



DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

02 SEP 1998

Ref: 98-CORR-123

MEMORANDUM FOR DIRECTOR, WASHINGTON HEADQUARTERS SERVICES

SUBJECT: DoD Regulation 5400.7-R, "DoD Freedom of Information Act Program"

Please issue the attached DoD Publication, DoD 5400.7-R, subject as above, by signing the foreword (Tab A).

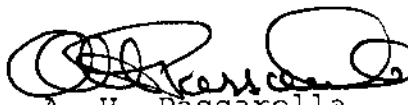
A list of coordinating officials and coordinating papers are attached at Tab B. All concurred, some with comment. Comments have been accepted or rejected with justifications.

At Tab C is the artwork for the cover.

Two diskettes of the Regulation are attached at Tab D.

Request a waiver to print the Regulation. My Directorate conducts training to the OSD and Joint Staff twice annually, and to the Combatant Commands every 18 months. We will also conduct training to the separate defense agencies and military departments on request. Normally this will occur also on an average of twice annually.

This Regulation is the FOIA policy for the DoD. The training presentation is taken from it, and the students use it during the course of the training. It would be extremely time consuming to download 200 copies of the Regulation from the Web, or to reproduce it in 200 copies for each training session. If approved, request a red cover.


A. H. Passarella
Director

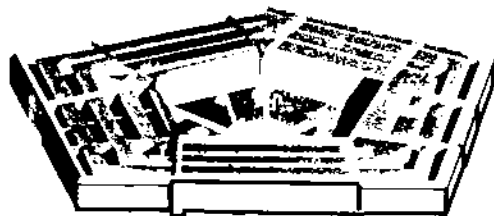
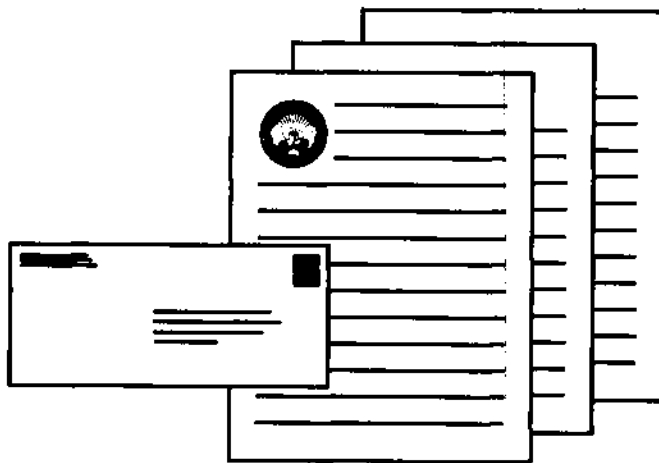
Attachments:
As stated



Department of Defense

DOD Freedom of Information Act Program

September 1998



Directorate for
Freedom of Information
and Security Review



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



ADMINISTRATION &
MANAGEMENT

September 4, 1998

FOREWORD

This Regulation is reissued under the authority of DoD Directive 5400.7, "DoD Freedom of Information Act Program," September 29, 1997. It provides guidance on the implementation of the Freedom of Information Act, as amended by the "Electronic Freedom of Information Act Amendments of 1996." The changes, since the last printing in May 1997, are indicated by italics.

This Regulation applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components"). This Regulation is effective immediately; it is mandatory for use by all the DoD Components.

Heads of DoD Components may elect to issue supplementary instructions deemed essential to the accommodation of perceived requirements peculiar to respective DoD Components. Any such instruction may not conflict with the provisions of this Regulation. Copies of DoD Components' supplementary instruction shall be forwarded to the below address for review within 120 days of the date of this Regulation.

DoD 5400.7-R, "Department of Defense Freedom of Information Act Program," May 1997 is hereby canceled.

Recommendations for amendments shall be forwarded through appropriate channels to the Director, Freedom of Information and Security Review, who is authorized to approve and issue amendments to this Regulation. Address recommendations to: Director, Freedom of Information and Security Review, Room 2C757, *1155 Defense Pentagon, Washington, DC 20301-1155.*

The DoD Components may obtain copies of this Regulation through their own publications channels. Approved for public release; distribution unlimited. Authorized registered users may obtain copies of this Regulation from the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Ft. Belvoir, VA 22060-6218. Other Federal Agencies and the public may obtain copies from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. *Copies may also be obtained from the World Wide Web at the following address: <http://www.defenselink.mil/pubs/foi/>*

D. O. Cooke
Director

REFERENCES

- (a) Section 552 of title 5, United States Code, "Freedom of Information Act"
- (b) DoD Directive 5400.7, "DoD Freedom of Information Act Program," September 29, 1997
- (c) "Personal Papers of Executive Branch Officials: A Management Guide," National Archives and Records Administration, Office of Records Administration, Washington, DC, 1992¹
- (d) Section 552a of title 5, United States Code, "The Privacy Act of 1974"
- (e) DoD Directive 5100.3, "Support of the Headquarters of Unified, Specified and Subordinate Commands," November 1, 1988
- (f) Section 551 of title 5, United States Code, "Administrative Procedures Act"
- (g) DoD 5200.1-R, "DoD Information Security Program Regulation," January 1997, authorized by DoD Directive 5200.1, December 13, 1996
- (h) Sections 181-188 of title 35, United States Code, "Patent Secrecy"
- (i) Section 2162 of title 42, United States Code, "Restricted Data and Formerly Restricted Data"
- (j) Section 798 of title 18, United States Code, "Communication Intelligence"
- (k) Section 130 of title 10, United States Code, "Authority to Withhold from Public Disclosure Certain Technical Data"
- (l) DoD Directive 5230.25, "Withholding of Unclassified Technical Data From Public Disclosure," November 6, 1984
- (m) Section 1102f of title 10, United States Code, "Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants"
- (n) Section 128 of title 10, United States Code, "Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information"
- (o) Section 403-3(c)(6) of title 50, United States Code, "Protection of Intelligence Sources and Methods"
- (p) Section 2305(g) of title 10, United States Code, "Protection of Contractor Submitted Proposals"
- (q) Section 423 of title 41, United States Code, "Procurement Integrity"
- (r) Sections 2320-2321 of title 10, United States Code, "Rights in Technical Data" and "Validation of Proprietary Data Restrictions"
- (s) Subpart 227.71-227.72 of chapter 2 of title 48, Code of Federal Regulations, "Rights in Technical Data" and "Rights in Computer Software and Computer Software Documentation," June 28, 1995
- (t) Section 106 of title 17, United States Code, "Copyright Act of 1976"
- (u) DoD Directive 5154.24, "Armed Forces Institute of Pathology," October 28, 1996
- (v) DoD 5400.11-R, "Department of Defense Privacy Program," August 1983, authorized by DoD Directive 5400.11, June 9, 1982
- (w) Section 3500 of title 18, United States Code, "The Jencks Act"
- (x) DoD Directive, 5230.24, "Distribution Statements on Technical Documents," March 18, 1987

¹ Available from the Records Administration Information Center, Agency Services Division (NIA), Washington, DC 20408.

- (y) DoD Directive 5400.4, "Provision of Information to Congress," January 30, 1978
- (z) DoD Directive 7650.1, "General Accounting Office (GAO) and Comptroller General Access to Records," *September 11, 1997*
- (aa) Section 402 of title 50, United States Code, note, "National Security Act of 1959"
- (ab) Sections 3301-3314 of title 44, United States Code, "Disposal of Records"
- (ac) Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information," June 23, 1987
- (ad) Treasury Financial Manual, current edition²
- (ae) Chapter 35 of title 44, United States Code, "Coordination of Federal Information Policy"
- (af) Title 31 United States Code, "Money and Finance"
- (ag) Section 2328 of title 10, United States Code, "Release of Technical Data under Freedom of Information Act: Recovery of Costs"
- (ah) Federal Register, Volume 52, pages 10012-10020, March 27, 1987
- (ai) DoD 7000.14-R, Volume 11A, "Department of Defense Financial Management Regulation (Reimbursable Operations, Policy and Procedures)," March 1997, authorized by DoD Instruction 7000.14, November 15, 1992
- (aj) Section 3717 of title 31, United States Code, "Interest and Penalty on Claims"
- (ak) Public Law 97-365, "Debt Collection Act of 1982," October 25, 1982
- (al) DoD Manual 8320.1-M, "Data Administration Procedures," March 1994, authorized by DoD Directive 8320.1, September 26, 1991
- (am) DoD Instruction 5400.10, "OSD Implementation of DoD Freedom of Information Act Program," *January 24, 1991*
- (an) DoD 8910.1-M, "DoD Procedures for Management of Information Requirements," *June 1998*, authorized by DoD Directive 8910.1, June 11, 1993
- (ao) Part 518 of title 32, Code of Federal Regulations, "The Army Freedom of Information Act Program," March 23, 1990

² Available from the U.S. Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328.

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C1. CHAPTER 1

GENERAL PROVISIONS

C1.1. REFERENCES

C1.1.1. References (see pages 2 and 3, above)

C1.2. PURPOSE AND APPLICABILITY

C1.2.1. Purpose. This Regulation provides policies and procedures for the DoD implementation of the Freedom of Information Act (5 U.S.C. 552, as amended) and DoD Directive 5400.7 (references (a) and (b)), and promotes uniformity in the DoD Freedom of Information Act (FOIA) Program.

C1.2.2. Applicability. This Regulation applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components"). This Regulation takes precedence over all DoD Component publications that supplement and implement the DoD FOIA Program. A list of DOD Components is at Appendix AP6.

C1.3. DOD PUBLIC INFORMATION

C1.3.1. Public Information.

C1.3.1.1. The public has a right to information concerning the activities of its Government. DoD policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall not be withheld in whole or in part unless the record is exempt from mandatory partial or total disclosure under the FOIA. As a matter of policy, DoD Components shall make discretionary disclosures of exempt records or information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court. In order that the public may have timely information concerning DoD activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request. Prompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Similarly, requests from other members of the public for information that would not be withheld under the FOIA should

continue to be honored through appropriate means without requiring the requester to invoke the FOIA.

C1.3.1.2. Within the OSD, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, as Chief Information Officer, in conjunction with the Assistant Secretary of Defense for Public Affairs, is responsible for ensuring preparation of reference material or a guide for requesting records or information from the Department of Defense, subject to the nine exemptions of the FOIA. This publication shall also include an index of all major information systems, and a description of major information and record locator systems, as defined by the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence. DoD FOIA Components shall coordinate with the appropriate office(s) to insure that this is also accomplished within their department or organization.

C1.3.1.3. DoD Components shall also prepare, in addition to normal FOIA regulations, a handbook for the use of the public in obtaining information from their organization. This handbook should be a short, simple explanation to the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. Each DoD Component should explain the types of records that can be obtained through FOIA requests, why some records cannot, by law, be made available, and how the DoD Component determines whether the record can be released. The handbook should also explain how to make a FOIA request, how long the requester can expect to wait for a reply, and explain the right of appeal. The handbook should supplement other information locator systems, such as the Government Information Locator Service (GILS), and explain how a requester can obtain more information about those systems. The handbook should be available on paper and through electronic means *and contain the following additional information, complete with electronic links to the below elements; the location of reading room(s) within the Component and the types and categories of information available, the location of Component's World Wide Web page, a reference to the Component's FOIA regulation and how to obtain a copy, a reference to the Component's FOIA annual report and how to obtain a copy and the location of the Component's GILS page.* Also, the DoD Components' Freedom of Information Act Annual Reports should refer to the handbook and how to obtain it.

C1.3.2. Control System. A request for records that invokes the FOIA shall enter a formal control system designed to ensure accountability and compliance with the FOIA. Any request for DoD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this Regulation, unless otherwise required by subsection C1.5.13 below.

C1.4. DEFINITIONS

C1.4.1. Definitions. As used in this Regulation, the following terms and meanings shall be applicable:

C1.4.2. FOIA Request. A written request for DoD records *that reasonably describes the record(s) sought*, made by any person, including a member of the public (U.S. or foreign citizen/entity), an organization, or a business, but not including a Federal Agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA, DoD Directive 5400.7

(reference (b)), this Regulation, or DoD Component supplementing regulations or instructions. *Requesters should also indicate a willingness to pay fees associated with the processing of their request or, in the alternative, why a waiver of fees may be appropriate.* Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically. *Requests received by facsimile or electronically must have a postal mailing address included since it may not be practical to provide a substantive response electronically. The request is considered properly received, or perfected, when the above conditions have been met and the request arrives at the FOIA office of the Component in possession of the records.*

C1.4.3. Agency Record.

C1.4.3.1. The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in Department of Defense possession and control at the time the FOIA request is made. Care should be taken not to exclude records from being considered agency records, unless they fall within one of the categories of the subparagraph C1.4.3.2, below.

C1.4.3.2. The following **are not** included within the definition of the word "record":

C1.4.3.2.1. Objects or articles, such as structures, furniture, vehicles and equipment, whatever their historical value, or value as evidence.

C1.4.3.2.2. Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

C1.4.3.2.3. Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers fall into three categories: those created before entering Government service; private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business; and work-related personal papers that are not used in the transaction of Government business (see reference (c)).

C1.4.3.3. A record must exist and be in the possession and control of the Department of Defense at the time of the request to be considered subject to this Regulation and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. See paragraph C1.5.7.2., below on creating a record in the electronic environment.

C1.4.3.4. Hard copy or electronic records, that are subject to FOIA requests under 5 U.S.C. 552 (a)(3) (reference (a)), and that are available to the public through an established distribution system, or through the Federal Register, the National Technical Information Service, or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, DoD Components shall provide the requester with guidance, inclusive of any written notice to the public, on how to obtain the information. However, if the

requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA. If there is any doubt as to whether the request must be processed, contact the Directorate for Freedom of Information and Security Review.

C1.4.4. DoD Component. An element of the Department of Defense, as defined in subsection C1.2.2, above, authorized to receive and act independently on FOIA requests. (See Appendix AP6.) A DoD Component has its own initial denial authority (IDA), appellate authority, and legal counsel.

C1.4.5. Initial Denial Authority (IDA). An official who has been granted authority by the head of a DoD component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure. IDA's may also deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need under paragraph C1.5.4.3, below, of this Regulation; 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.

C1.4.6. Appellate Authority. The Head of the DoD Component or the Component head's designee having jurisdiction for this purpose over the record, or any of the other adverse determinations outlined in subsections C1.4.5, above, and C1.4.7, below.

C1.4.7. Administrative Appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority of a DoD Component to reverse a decision: to withhold all or part of a requested record; to deny a fee category claim by a requester; to deny a request for waiver or reduction of fees; to deny a request to review an initial fee estimate; to deny a request for expedited processing due to demonstrated compelling need under paragraph C1.5.4.3, below, of this Regulation; to confirm that no records were located during the initial search. *Requesters also may appeal the failure to receive a response determination within the statutory time limits, and any determination that the requester believes is adverse in nature.*

C1.4.8. Public Interest. The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or official's own conduct.

C1.4.9. Electronic Record. Records (including e-mail) that are created, stored, and retrievable by electronic means.

C1.4.10. Federal Agency. As defined by 5 U.S.C. 552 (f)(1) (reference (a)), a Federal agency is any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

C1.5. POLICY

C1.5.1. Compliance with the FOIA. DoD personnel are expected to comply with the FOIA, this Regulation, and DoD FOIA policy in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create conditions that will promote public trust.

C1.5.2. Openness with the Public. The Department of Defense shall conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records not exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

C1.5.3. Avoidance of Procedural Obstacles. DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly. Components shall provide assistance to requesters to help them understand and comply with procedures established by this Regulation and any supplemental regulations published by the DoD Components.

C1.5.4. Prompt Action on Requests.

C1.5.4.1. Generally, when a member of the public complies with the procedures established in this Regulation and DoD Component regulations or instructions for obtaining DoD records, and after the request is received by the official designated to respond, DoD Components shall endeavor to provide a final response determination within the statutory 20 working days. If a significant number of requests, or the complexity of the requests prevent a final response determination within the statutory time period, DoD Components shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system (see subparagraph C1.5.4.2., below). A final response determination is notification to the requester that the records are released, or will be released on a certain date, or the records are denied under the appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons in subsection C5.2.2., below. Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA. *If a request fails to meet minimum requirements as set forth in subsection C1.4.2., above, Components shall inform the requester how to perfect or correct the request. The statutory 20 working day time limit applies upon receipt of a perfected or correct FOIA request which complies with the requirements outlined in subsection C1.4.2., above.*

C1.5.4.2. Multitrack Processing. When a Component has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing as described in paragraph C1.5.4.3., below. DoD Components may establish as many processing queues as they wish; however, as a minimum, three processing

tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request. One track shall be a processing queue for simple requests, one track for complex requests, and one track shall be a processing queue for expedited processing as described in paragraph C1.5.4.3, below. Determinations as to whether a request is simple or complex shall be made by each DoD Component. DoD Components shall provide a requester whose request does not qualify for the fastest queue (except for expedited processing as described in paragraph C1.5.4.3, below), an opportunity to limit in writing by hard copy, facsimile, or electronically, the scope of the request in order to qualify for the fastest queue. This multitrack processing system does not obviate components' responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

C1.5.4.3. Expedited Processing. A separate queue shall be established for requests meeting the test for expedited processing. **Expedited processing** shall be granted to a requester after the requester requests such and demonstrates a **compelling need** for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the DoD Component's office that will determine whether to grant expedited processing. Once the DoD Component has determined to grant expedited processing, the request shall be processed as soon as practicable. Actions by DoD Components to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review

C1.5.4.3.1. **Compelling need means** that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

C1.5.4.3.2. **Compelling need also means** that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media (see paragraph C6.1.5.7., below) would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

C1.5.4.3.2.1 **Urgently needed means** that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

C1.5.4.3.3. A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

C1.5.4.3.4. Other Reasons for Expedited Processing. **Other reasons** that merit expedited processing by DoD Components are an imminent loss of substantial due process rights and humanitarian need. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Humanitarian need means that disclosing the information will promote the welfare and interests of mankind. A demonstration of humanitarian need shall be also made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Both statements mentioned above must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for either of these reasons, the request may be processed in the expedited processing queue **behind** those requests qualifying for compelling need.

C1.5.4.3.5. These same procedures also apply to requests for expedited processing of administrative appeals.

C1.5.5. Use of Exemptions. It is DoD policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. It is DoD policy that DoD Components shall make discretionary releases whenever possible; however, a discretionary release is normally not appropriate for records **clearly** exempt under exemptions 1, 3, 4, 6, 7 (C) and 7(F) (see Chapter 3, below). Exemptions 2, 5, and 7(A)(B)(D) and (E) (see Chapter 3, below) are discretionary in nature, and DoD Components are encouraged to exercise discretionary releases whenever possible. Exemptions 4, 6 and 7(C) cannot be claimed when the requester is the submitter of the information.

C1.5.6. Public Domain. Nonexempt records released under the authority of this Regulation are considered to be in the public domain. Such records may also be made available in Components' reading rooms in paper form, as well as electronically, to facilitate public access. Discretionary releases to FOIA requesters constitute a waiver of the FOIA exemption that may otherwise apply. Disclosure to a properly constituted advisory committee, to Congress, or to other Federal Agencies does not waive the exemption. (See subsection C5.1.4., below.) Exempt records disclosed without authorization by the appropriate DoD official do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this Regulation apply if the same individual seeks the records in a private or personal capacity.

C1.5.7. Creating a Record

C1.5.7.1. A record must exist and be in the possession and control of the Department of Defense at the time of the search to be considered subject to this Regulation and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. A DoD Component, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee

which would be charged for providing the existing record. Fee assessments shall be in accordance with Chapter 6.

C1.5.7.2. About electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, Components should apply a standard of **reasonableness**. In other words, if the capability exists to respond to the request, and the effort would be a **business as usual** approach, then the request should be processed. However, the request need not be processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal **business as usual** approach. As used in this sense, a significant expenditure of resources in both time and manpower, that would cause a significant interference with the operation of the Components' automated information system **would not** be a business as usual approach.

C1.5.8. Description of Requested Record

C1.5.8.1. Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record, that enables the Government to locate the record with a reasonable amount of effort. In order to assist DoD Components in conducting more timely searches, requesters should endeavor to provide as much identifying information as possible. When a DoD Component receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined below in paragraph C1.5.8.2, below, of this Regulation. DoD Components are not obligated to act on the request until the requester responds to the specificity letter. When practicable, DoD Components shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act.

C1.5.8.2. The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort: (Descriptive information about a record may be divided into two broad categories.)

C1.5.8.2.1. Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

C1.5.8.2.2. Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

C1.5.8.3. Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non random search based on the DoD Component's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

C1.5.8.4. The following guidelines deal with requests for personal records: Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records in a Privacy Act system of records that can be retrieved by personal identifiers need be searched. However, if a DoD Component has reason to believe that records on the requester may exist in a record system other than a Privacy Act system, the DoD Component shall search that system under the provisions of the FOIA. In either case, DoD Components may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the Privacy Act (reference (d)). If the record is required to be released under the FOIA, reference (d) does not bar its disclosure. See subsection C1.5.13, below, for the relationship between the FOIA and the Privacy Act.

C1.5.8.5. The previous guidelines notwithstanding, the decision of the DoD Component concerning reasonableness of description must be based on knowledge of its files. If the description enables DoD Component personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle a DoD Component to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the DoD Component's staff to reasonably ascertain and locate which records are being requested.

C1.5.9. Referrals

C1.5.9.1. The DoD FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DoD Component receives a request for records originated by another DoD Component, it *should* contact the DoD Component to determine if it also received the request, and if not, obtain concurrence from the other DoD Component to refer the request. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DoD Components from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, DoD Components *should* coordinate with the originator of the information prior to making a release determination. A request received by a DoD Component having no records responsive to a request shall be referred routinely to another DoD Component, if the other DoD Component has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD Component, the DoD Component receiving the initial request shall consult with the other DoD Component to determine if that DoD Component's association with the material is exempt. If the association is exempt, the DoD Component receiving the initial request will protect the association and any exempt information without revealing the identity of the protected DoD Component. The protected DoD Component shall be responsible for submitting the justifications required in any litigation. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DoD Components making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address.

C1.5.9.2. A DoD Component shall refer for response directly to the requester, a FOIA request for a record that it holds to another DoD Component or agency outside the DoD, if the record originated in the other DoD Component or outside agency. Whenever a record or a portion of a record is referred to another DoD Component or to a Government Agency outside of the DoD for a release determination and direct response, the requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

C1.5.9.3. A DoD Component may refer a request for a record that it originated to another DoD Component or agency when the other DoD Component or agency has a valid interest in the record, or the record was created for the use of the other DoD Component or agency. In such situations, provide the record and a release recommendation on the record with the referral action. *Ensure you include a point of contact with the telephone number.* An example of such a situation is a request for audit reports prepared by the Defense Contract Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor shall be at the discretion of the contracting officer. A FOIA request shall be referred to the appropriate DoD Component and the requester shall be notified of the referral, unless exempt information would be revealed. Another example is a record originated by a DoD Component or agency that involves foreign relations, and could affect a DoD Component or organization in a host foreign country. Such a request and any responsive records may be referred to the affected DoD Component or organization for consultation prior to a final release determination within the Department of Defense. See also subsection C5.1.5., below, of this Regulation.

C1.5.9.4. Within the Department of Defense, a DoD Component shall ordinarily refer a FOIA request and a copy of the record it holds, but that was originated by another DoD Component or that contains substantial information obtained from another DoD Component, to that Component for direct response, after direct coordination and obtaining concurrence from the Component. The requester then shall be notified of such referral. DoD Components shall not, in any case, release or deny such records without prior consultation with the other DoD Component, except as provided in subsection 5-104, below.

C1.5.9.5. DoD Components that receive referred requests shall answer them in accordance with the time limits established by the FOIA, this Regulation, and their multitask processing queues, based upon the date of initial receipt of the request at the referring component or agency.

C1.5.9.6. Agencies outside the Department of Defense that are subject to the FOIA.

C1.5.9.6.1. A DoD Component may refer a FOIA request for any record that originated in an agency outside the Department of Defense or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DoD Component must respond to the request.

C1.5.9.6.2. A DoD Component shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the Department of Defense for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DoD Component may only respond directly to the requester after coordination with the outside agency.

C1.5.9.7. DoD Components that receive requests for records of the National Security Council (NSC), the White House, or the White House Military Office (WHMO) shall process the requests. DoD records in which the NSC or White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in DoD Components' files shall be forwarded to the Directorate for Freedom of Information and Security Review (DFOISR). The DFOISR shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination.

C1.5.9.8.. To the extent referrals are consistent with the policies expressed by this subsection, referrals between offices of the same DoD Component are authorized.

C1.5.9.9. On occasion, the Department of Defense receives FOIA requests for General Accounting Office (GAO) records containing DoD information. Even though the GAO is outside the Executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing DoD information received either from the public, or on referral from the GAO, shall be processed under the provisions of the FOIA.

C1.5.10. Authentication. Records provided under this Regulation shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DoD Components may charge for the service at a rate of \$5.20 for each authentication.

C1.5.11. Combatant Commands

C1.5.11.1. The Combatant Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department or the Chairman of the Joint Chiefs of Staff, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3 (reference (e)); it authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 (reference (b)) and this Regulation. The Combatant Commands shall forward directly to the Director, Freedom of Information and Security Review all correspondence associated with the appeal of an initial denial for records under the provisions of the FOIA. Procedures to effect this administrative requirement are outlined in Appendix AP1.

C1.5.11.2. Combatant Commands shall maintain an electronic reading room for FOIA-processed 5 U.S.C. 552(a)(2)(D) (reference (a)) records in accordance with Chapter 2, this Regulation. Records qualifying for this means of public access also shall be maintained in hard copy for public access at Combatant Commands' respective locations.

C1.5.12. 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.

C1.5.13. Relationship Between the FOIA and the Privacy Act (PA). Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records, *nor are all of them aware of appeal procedures*. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the *below* guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts. *See also paragraph C5.3., below, regarding appeal rights.*

C1.5.13.1. If the record is required to be released under the FOIA, the Privacy Act does not bar its disclosure. Unlike the FOIA, the Privacy Act applies only to U.S. citizens and aliens admitted for permanent residence.

C1.5.13.2. Requesters who seek records about themselves contained in a Privacy Act system of records and who cite or imply only the Privacy Act, will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) (reference (d)) *and if the records, or any portion thereof, are exempt under the FOIA*, the requester shall be so advised with the appropriate Privacy Act *and FOIA* exemption. *Appeals shall be processed under both Acts.*

C1.5.13.3. Requesters who seek records about themselves that are not contained in a Privacy Act system of records and who cite or imply the Privacy Act will have their requests processed under the provisions of the FOIA, since the Privacy Act does not apply to these records. *Appeals shall be processed under the FOIA.*

C1.5.13.4. Requesters who seek records about themselves that are contained in a Privacy Act system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) (reference (d)) *and if the records, or any portion thereof, are exempt under the FOIA*, the requester shall be so advised with the appropriate Privacy Act *and FOIA* exemption. *Appeals shall be processed under both Acts.*

C1.5.13.5. Requesters who seek access to agency records that are not part of a Privacy Act system of records, and who cite or imply the Privacy Act and FOIA, will have their requests processed under the FOIA since the Privacy Act does not apply to these records. *Appeals shall be processed under the FOIA.*

C1.5.13.6. Requesters who seek access to agency records and who cite or imply the FOIA will have their requests *and appeals* processed under the FOIA.

C1.5.13.7. Requesters shall be advised in *the* final response *letter* which Act(s) *was* (were) used, *inclusive of appeal rights as outlined above.*

C1.5.14. Non-Responsive Information in Responsive Records. DoD Components shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should DoD Components desire to withhold non-responsive information, the following steps shall be accomplished:

C1.5.14.1. Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

C1.5.14.2. If the responsive record is **unclassified**, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information which is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempt under (state appropriate exemption (s)). Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

C1.5.14.3. If the responsive record is **classified**, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, **release all unclassified** responsive and non-responsive information which is not exempt. If the non-responsive information is exempt, follow the procedures in subparagraph C1.5.14.2, above. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester that even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552 (b)(1) (reference (a)), and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

C1.5.15. Honoring Form or Format Requests. DoD Components shall provide the record in any form or format requested by the requester if the record is readily reproducible in that form or format. DoD Components shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, DoD Components shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the DoD Components' automated information system. Such determinations shall be made on a case by case basis. See also paragraph C1.5.7.2, above.

C2. CHAPTER 2

FOIA READING ROOMS

C2.1. REQUIREMENTS

C2.1.1. Reading Room

C2.1.1.1. Each DoD Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the records described in subsections C2.1.2 and C2.2.1, below. In addition to the records described in subsections C2.1.2 and C2.2.1, below, DoD Components may elect to place other records in their reading room, and also make them electronically available to the public. DoD Components may share reading room facilities if the public is not unduly inconvenienced, and also may establish decentralized reading rooms. When appropriate, the cost of copying may be imposed on the person requesting the material in accordance with the provisions of Chapter 6 of this Regulation.

C2.1.2. Record Availability. The FOIA requires that records described in 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) (reference (a)) **created on or after November 1, 1996**, shall be made available electronically by November 1, 1997, as well as in hard copy in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. Personal privacy information, that if disclosed to a third party requester, would result in an invasion of the first party's personal privacy, and contractor submitted information, that if disclosed to a competing contractor, would result in competitive harm to the submitting contractor shall be deleted from **all** 5 U.S.C. 552(a)(2) (reference (a)) records made available to the general public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record which is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, a DoD Component may publish in the Federal Register a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) records are:

C2.1.2.1. (a)(2)(A) records. Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551 (reference (f)), that may be cited, used, or relied upon as precedents in future adjudications.

C2.1.2.2. (a)(2)(B) records. Statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register.

C2.1.2.3. (a)(2)(C) records. Administrative staff manuals and instructions, or portions thereof, that establish DoD policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DoD Component. Examples of manuals and instructions not normally made available are:

C2.1.2.3.1. 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.

C2.1.2.3.2. Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and intelligence activities.

C2.1.2.4. (a)(2)(D) records. Those 5 U.S.C. 552 (a)(3) (reference (a)) records, which because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. These records are referred to as **FOIA-processed (a)(2) records**.

C2.1.2.4.1. DoD Components shall decide on a case by case basis whether records fall into this category, based on the following factors:

C2.1.2.4.1.1. Previous experience of the DoD Component with similar records.

C2.1.2.4.1.2. Particular circumstances of the records involved, including their nature and the type of information contained in them.

C2.1.2.4.1.3. The identity and number of requesters and whether there is widespread press, historic, or commercial interest in the records.

C2.1.2.4.2. This provision is intended for situations where public access in a timely manner is important, and it is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. DoD Components may remove the records from this access medium when the appropriate officials determine that access is no longer necessary.

C2.1.2.4.3. Should a requester submit a FOIA request for FOIA-processed (a)(2) records, and insist that the request be processed, DoD Components shall process the FOIA request. However, DoD Components have no obligation to process a FOIA request for 5 U.S.C. 552(a)(2)(A), (B), and (C) (reference (a)) records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

C2.2. INDEXES

C2.2.1. "(a) (2)" Materials

C2.2.1.1. Each DoD Component shall maintain in each facility prescribed in paragraph C2.1.1 above, an index of materials described in paragraph C2.1.2., above, that are issued, adopted, or promulgated, after July 4, 1967. No "(a) (2)" materials issued, promulgated, or adopted after July 4, 1967, that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and-timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this Regulation.

C2.2.1.2. Each DoD Component shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of "(a) (2)" materials or supplements thereto unless it publishes in the Federal Register an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in Chapter 6 of this Regulation.

C2.2.1.3. Each index of "(a) (2)" materials or supplement thereto shall be arranged topical or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

C2.2.1.4. A general index of FOIA-processed (a)(2) records referred to in paragraph C2.1.2.4., above, shall be made available to the public, both in hard copy and electronically by December 31, 1999.

C2.2.3. Other Materials

C2.2.3.1. Any available index of DoD Component material published in the Federal Register, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms, and electronically to the public.

C2.2.3.2. Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, "(a)(1)" materials shall, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of "(a)(1)" materials are: descriptions of an agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

C3. CHAPTER 3

EXEMPTIONS

C3.1. GENERAL PROVISIONS

C3.1.1. General. Records that meet the exemption criteria of the FOIA may be withheld from public disclosure and need not be published in the Federal Register, made available in a library reading room, or provided in response to a FOIA request.

C3.2. EXEMPTIONS

C3.2.1. FOIA Exemptions. The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law: A discretionary release of a record (see also subsection C1.5.5., above) to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest. *However, if the subject of the record is the requester for the record and the record is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11-R (reference (v)) and by a FOIA exemption.*

C3.2.1.1. Number 1. (5 U.S.C. 552 (b)(1) (reference (a))). Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1-R (reference (g)). Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in reference (g) apply. If the information qualifies as exemption 1 information, there is **no discretion** regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

C3.2.1.1.1. The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no record" response when a record does not exist, and a "refusal to confirm or deny" when a record does exist will itself disclose national security information.

C3.2.1.1.2. Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or

relationship that meets the standard for classification under an existing executive order for classification and DoD 5200.1-R (reference (g)), and is not otherwise revealed in the individual items of information.

C3.2.1.2. Number 2. (5 U.S.C. 552 (b)(2) (reference (a))). Those related solely to the internal personnel rules and practices of the Department of Defense or any of its Components. This exemption is **entirely discretionary**. This exemption has two profiles, **high (b)(2)** and **low (b)(2)**. Paragraph C3.2.1.2.2., below, contains a brief discussion on the low (b)(2) profile; however, that discussion is for information purposes only. When only a minimum Government interest would be affected (administrative burden), there is a great potential for discretionary disclosure of the information. Consequently, DoD Components **shall not invoke** the low (b)(2) profile.

C3.2.1.2.1. Records qualifying under high (b)(2) are those containing or constituting statutes, rules, regulations, orders, manuals, directives, instructions, and security classification guides, the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the Department of Defense. Examples include:

C3.2.1.2.1.1. Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, or examiners that must remain privileged in order for the DoD Component to fulfill a legal requirement.

C3.2.1.2.1.2. 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.

C3.2.1.2.1.3. Computer software, the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the **use** of the software must be closely examined to ensure a circumvention possibility exists.

C3.2.1.2.2. Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings. DoD Components shall not invoke the low (b)(2) profile.

C3.2.1.3. Number 3. (5 U.S.C. 552 (b)(3) (reference (a))). Those concerning matters that a statute specifically exempts from disclosure by terms that permit **no discretion** on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. The Directorate for Freedom of Information and Security Review maintains a list of (b)(3) statutes used within the Department of Defense, and provides

updated lists of these statutes to DoD Components on a periodic basis. A few examples of such statutes are:

C3.2.1.3.1. Patent Secrecy, 35 U.S.C. 181-188 (reference (h)). Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

C3.2.1.3.2. Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162 (reference (i)).

C3.2.1.3.3. Communication Intelligence, 18 U.S.C. 798 (reference (j)).

C3.2.1.3.4. Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25 (references (k) and (l)).

C3.2.1.3.5. Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. 1102 f (reference (m)).

C3.2.1.3.6. Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128 (reference (n)).

C3.2.1.3.7. Protection of Intelligence Sources and Methods, 50 U.S.C. 403-3(c)(6) (reference (o)).

C3.2.1.3.8. Protection of Contractor Submitted Proposals, 10 U.S.C. 2305(g) (reference (p)).

C3.2.1.3.9. Procurement Integrity, 41 U.S.C. 423 (reference (q)).

C3.2.1.4. Number 4. (5 U.S.C. 552 (b)(4) (reference (a))). Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm (see paragraph C3.2.1.4.8., below). If the information qualifies as exemption 4 information, there is **no discretion** in its release. Examples include:

C3.2.1.4.1. Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the DoD Component and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions,

discoveries, or other proprietary data. See also C5.2.8.2., below, this Regulation. Additionally, when the provisions of 10 U.S.C. 2305(g) (reference (p)), and 41 U.S.C. 423 (reference (q)) are met, certain proprietary and source selection information may be withheld under exemption 3.

C3.2.1.4.2. Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

C3.2.1.4.3. Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

C3.2.1.4.4. Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

C3.2.1.4.5. Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

C3.2.1.4.6. Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320-2321 (reference (r)) and DoD Federal Acquisition Regulation Supplement (DFARS), Chapter 2 of 48 C.F.R., Subpart 227.71-227.72 (reference (s)). Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 (reference (k)) and DoD Directive 5230.25 (reference (l)) (see subsection C3.2.1., Number 3 C3.2.1.3.5., above).

C3.2.1.4.7. Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106) (reference (t)), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

C3.2.1.4.8. Proprietary information submitted strictly on a **voluntary** basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities is **not voluntary**. (See also subsection C5.2.8.3., below.)

C3.2.1.5. Number 5. (5 U.S.C. 552 (b)(5) (reference (a))). Those containing information considered privileged in litigation, primarily under the deliberative process privilege. Except as provided in paragraphs Number 5 C3.2.1.5.2. through C3.2.1.5.5., below, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in deliberative records pertaining to the decision-making process of an agency, whether

within or among agencies (as defined in 5 U.S.C. 552(e) (reference (a))), or within or among DoD Components. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is **entirely discretionary**.

C3.2.1.5.1. Examples of the deliberative process include:

C3.2.1.5.1.1. The non factual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

C3.2.1.5.1.2. 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.

C3.2.1.5.1.3. Those non factual portions of evaluations by DoD Component personnel of contractors and their products.

C3.2.1.5.1.4. 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.

C3.2.1.5.1.5. Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

C3.2.1.5.1.6. Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

C3.2.1.5.1.7. Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

C3.2.1.5.2. If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the Agency, then it should not be withheld under the FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for use in the litigation. Consult with legal

counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

C3.2.1.5.3. Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

C3.2.1.5.4. A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

C3.2.1.5.5. An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

C3.2.1.6. Number 6. (5 U.S.C. 552 (b)(6) (reference (a))). Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption 6 information, there is **no discretion** in its release.

C3.2.1.6.1. Examples of other files containing personal information similar to that contained in personnel and medical files include:

C3.2.1.6.1.1. Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

C3.2.1.6.1.2. Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

C3.2.1.6.2. Home addresses, *including private e-mail addresses*, are normally not releasable without the consent of the individuals concerned. This includes lists of home addressees and military quarters' addressees without the occupant's name. *Additionally, the names and duty addresses (postal and/or e-mail) of DoD military and civilian personnel who*

are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy.

C3.2.1.6.2.1. **Privacy Interest.** A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

C3.2.1.6.2.2. Names and duty addresses (*postal and/or e-mail*) published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

C3.2.1.6.3. This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to the immediate next of kin as defined in DoD Directive 5154.24 (reference (u)).

C3.2.1.6.4. A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

C3.2.1.6.5. This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DoD Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption 6 must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies **before** referring a record that is exempt under the Glomar concept.

C3.2.1.6.5.1. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

C3.2.1.6.5.2. Refusal to confirm or deny should not be used when (a) the person whose personal privacy is in jeopardy has provided the requester a waiver of his or her

privacy rights; (b) the person initiated or directly participated in an investigation that lead to the creation of an agency record seeks access to that record; or (c) the person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family. See paragraph Number C3.2.1.6.2.3., above.

C3.2.1.7. Number 7. (5 U.S.C. 552 (b)(7) (reference (a))). Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of Executive Orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. **With the exception of parts (C) and (F)** (see subparagraph Number 7 C3.2.1.7.1.3., below) of this exemption, this exemption is **discretionary**. If information qualifies as exemption (7)(C) or (7)(F) (see subparagraph Number 7 C3.2.1.7.1.3., below) information, there is **no discretion** in its release.

C3.2.1.7.1. This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

C3.2.1.7.1.1. Could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A) (reference (a))).

C3.2.1.7.1.2. Would deprive a person of the right to a fair trial or to an impartial adjudication (5 U.S.C. 552(b)(7)(B) (reference (a))).

C3.2.1.7.1.3. Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C) (reference (a))).

C3.2.1.7.1.3.1. This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption (7)(C) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies **before** referring a record that is exempt under the Glomar concept.

C3.2.1.7.1.3.2. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

C3.2.1.7.1.3.3. Refusal to confirm or deny should not be used when 1 the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or 2 the person whose personal privacy is in jeopardy is deceased, and the Agency is aware of that fact.

C3.2.1.7.1.3.4. Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation (5 U.S.C. 552(b)(7)(D) (reference (a))).

C3.2.1.7.1.3.5. 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) (reference (a))).

C3.2.1.7.1.3.6. Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F) (reference (a))).

C3.2.1.7.2. Some examples of exemption 7 are:

C3.2.1.7.2.1. 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.

C3.2.1.7.2.2. 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.

C3.2.1.7.2.3. Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office within a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

C3.2.1.7.3. The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500, (reference (w))) is not diminished.

C3.2.1.7.4. Exclusions. Excluded from the above exemption are the below two situations applicable to the Department of Defense. (Components considering invoking an exclusion should first consult with the Department of Justice, Office of Information and Privacy.)

C3.2.1.7.4.1. Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Components may, during only such times as that circumstance continues, treat the records or information as

not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

C3.2.1.7.4.2. Whenever informant records maintained by a criminal law enforcement organization within a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Component may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7) (reference (a)), the response to the requester will state that no records were found.

C3.2.1.8. Number 8. (5 U.S.C. 552 (b)(8) (reference (a))). Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

C3.2.1.9. Number 9. (5 U.S.C. 552 (b)(9) (reference (a))). Those containing geological and geophysical information and data (including maps) concerning wells.

C4. CHAPTER 4

FOR OFFICIAL USE ONLY

C4.1. GENERAL PROVISIONS

C4.1.1. General. Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public *because disclosure would cause a foreseeable harm to an interest protected by one or more FOIA exemptions 2 through 9* (see Chapter 3) shall be considered as being for official use only (FOUO). No other material shall be considered FOUO and FOUO is not authorized as an anemic form of classification to protect national security interests. Additional information on FOUO and other controlled, unclassified information may be found in reference (g) *or by contacting the Directorate for Security, Office of the Assistant Secretary of Defense (Command, Control, Communications and Intelligence)*.

C4.1.2. Prior FOUO Application. The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether *disclosure would result in a foreseeable harm to an interest protected by one or more FOIA exemptions 2 through 9*. Even if any exemptions apply, the record *shall* be released as a discretionary matter when it is determined that *there is no foreseeable harm to an interest protected by the exemptions*.

C4.1.3. Historical Papers. Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special status apart from the exemptions under the FOIA (reference (a)).

C4.1.4. Time to Mark Records. The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

C4.1.5. Distribution Statement. Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24 (reference (x)) shall bear that statement and may be marked FOUO, as appropriate.

C4.2. MARKINGS

C4.2.1. Location of Markings

C4.2.1.1. An unclassified document containing FOUO information shall be marked "For Official Use Only" at the bottom on the outside of the front cover (if any), on each page

containing FOUO information, and on the outside of the back cover (if any). *Each paragraph containing FOUO information shall be marked as such.*

C4.2.1.2. Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page. Individual paragraphs shall be marked at the appropriate classification level, as well as unclassified or FOUO, as appropriate.

C4.2.1.3. Within a classified document, an individual page that contains FOUO information but no classified information shall be marked "For Official Use Only" at the top and bottom of the page, *as well as each paragraph that contains FOUO information.*

C4.2.1.4. Other records, such as photographs, films, tapes, or slides, shall be marked "For Official Use Only" or "FOUO" in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

C4.2.1.5. FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information
EXEMPT FROM MANDATORY DISCLOSURE
under the FOIA. Exemption(s) applies/apply.

C4.3. DISSEMINATION AND TRANSMISSION

C4.3.1. Release and Transmission Procedures. Until FOUO status is terminated, the release and transmission instructions that follow apply:

C4.3.1.1. FOUO information may be disseminated within DoD Components and between officials of DoD Components and DoD contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

C4.3.1.2. DoD holders of FOUO information are authorized to convey such information to officials in other Departments and Agencies of the Executive and Judicial Branches to fulfill a government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked "For Official Use Only," and the recipient shall be advised that the information may qualify for exemption from public disclosure, pursuant to the FOIA, and that special handling instructions do or do not apply.

C4.3.1.3. Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4 (reference (y)). Release to the GAO is governed by DoD Directive 7650.1 (reference (z)). Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed

or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

C4.3.2. Transporting FOUO Information. Records containing FOUO information shall be transported in a manner that prevents disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations, may be sent by fourth-class mail.

C4.3.3. Electronically and Facsimile Transmitted Messages. Each part of electronically and facsimile transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages and facsimiles shall be transmitted in accordance with communications security procedures whenever practicable.

C4.4. SAFEGUARDING FOUO INFORMATION

C4.4.1. During Duty Hours. During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to non-government personnel.

C4.4.2. During Nonduty Hours. At the close of business, FOUO records shall be stored so as to prevent unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or Government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of the National Security Act of 1959 (reference (aa)) shall meet the safeguards outlined for that group of records.

C4.5. TERMINATION, DISPOSAL AND UNAUTHORIZED DISCLOSURES

C4.5.1. Termination. The originator or other competent authority; e.g., initial denial and appellate authorities, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the "For Official Use Only" markings, but records in file or storage need not be retrieved solely for that purpose.

C4.5.2. Disposal

C4.5.2.1. Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to prevent reconstructing, and placing them in regular trash containers. When

local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but must give due consideration to the additional expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

C4.5.2.2. Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. 3301-3314 (reference (ab)), as implemented by DoD Component instructions concerning records disposal.

C4.5.3. Unauthorized Disclosure. The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act (reference (d)) may also result in civil and criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

C5. CHAPTER 5

RELEASE AND PROCESSING PROCEDURES

C5.1. GENERAL PROVISIONS

C5.1.1. Public Information

C5.1.1.1. Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for a DoD record made under the provisions of 5 U.S.C. 552 (a)(3) (reference (a)) of the FOIA may be denied only when:

C5.1.1.1.1. Disclosure would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is subject to one or more of the exemptions of the FOIA.

C5.1.1.1.2. 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.

C5.1.1.1.3. The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the DoD Component concerned. When personally identifiable information in a record is requested by the subject of the record or the subject's attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.

C5.1.1.2. Individuals seeking DoD information should address their FOIA requests to one of the addresses listed in Appendix AP2.

C5.1.2. Requests from Private Parties. The provisions of the FOIA are reserved for persons with private interests as opposed to U.S. Federal Agencies seeking official information. Requests from private persons will be made in writing, and should clearly show all other addressees within the Federal Government to which the request was also sent. This procedure will reduce processing time requirements, and ensure better inter- and intra-agency coordination. However, if the requester does not show all other addressees to which the request was also sent, DoD Components shall still process the request. DoD Components should encourage requesters to send requests by mail, facsimile, or by electronic means. Disclosure of records to individuals under the FOIA is considered public release of information, except as provided for in subsections C1.5.6. and C3.2.1., above.

C5.1.3. Requests from Government Officials. Requests from officials of State or local Governments for DoD Component records shall be considered the same as any other requester. Requests from members of Congress not seeking records on behalf of a Congressional Committee, Subcommittee, either House sitting as a whole, or made on behalf of their constituents shall be considered the same as any other requester (see also subsections C1.5.6., above and C5.1.4., below). Requests from officials of foreign governments shall be considered the same as any other requester. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

C5.1.4. Privileged Release *Outside of the FOIA* to U.S. Government Officials

C5.1.4.1. 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:

C5.1.4.1.1. In response to a request of a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoD Directive 5400.4 (reference (y));

C5.1.4.1.2. To other Federal Agencies, both executive and administrative, as determined by the head of a DoD Component or designee;

C5.1.4.1.3. In response to an order of a Federal court, DoD Components shall release information along with a description of the restrictions on its release to the public;

C5.1.4.2. DoD Components shall inform officials receiving records under the provisions of this paragraph that those records are exempt from public release under the FOIA. DoD Components also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1-R (reference (g)), and information contained in Privacy Act systems of records is subject to DoD 5400.11-R (reference (v)).

C5.1.5. Consultation with Affected DoD Component

C5.1.5.1. When a DoD Component receives a FOIA request for a record in which an affected DoD organization (including a Combatant Command) has a clear and substantial interest in the subject matter, consultation with that affected DoD organization is required. As an example, where a DoD Component receives a request for records related to DoD operations in a foreign country, the cognizant Combatant Command for the area involved in the request shall be consulted before a release is made. Consultations may be telephonic, electronic, or in hard copy.

C5.1.5.2. The affected DoD Component shall review the circumstances of the request for host- nation relations, and provide, where appropriate, FOIA processing assistance to the responding DoD Component regarding release of information. Responding DoD Components shall provide copies of responsive records to the affected DoD Component when requested by the

affected DoD Component. The affected DoD Component shall receive a courtesy copy of all releases in such circumstances.

C5.1.5.3. Nothing in the above paragraphs shall impede the processing of the FOIA request initially received by a DoD Component.

C5.2. INITIAL DETERMINATIONS

C5.2.1. Initial Denial Authority

C5.2.1.1. Components shall limit the number of IDAs appointed. In designating its IDAs, a DoD Component shall balance the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding to each request within the time limitations of the FOIA.

C5.2.1.2. The initial determination whether to make a record available upon request may be made by any suitable official designated by the DoD Component in published regulations. The presence of the marking "For Official Use Only" does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under the FOIA is applicable.

C5.2.1.3. The officials designated by DoD Components to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media.

C5.2.2. Reasons for Not Releasing a Record. The following are reasons for not complying with a request for a record under 5 U.S.C. 552(a)(3) (reference (a)):

C5.2.2.1. No Records. *A reasonable search of files failed to identify responsive records.*

C5.2.2.2. Referrals. *The request is transferred to another DoD Component, or to another Federal Agency.*

C5.2.2.3. Request Withdrawn. *The request is withdrawn by the requester.*

C5.2.2.4. 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.*

C5.2.2.5. 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.*

C5.2.2.6. Not a Proper FOIA Request for Some Other Reason. The requester has failed unreasonably to comply with procedural requirements, *other than fee-related*, imposed by this Regulation or DoD Component supplementing regulations.

C5.2.2.7. Not an Agency Record. The information requested is not a record within the meaning of the FOIA and this Regulation.

C5.2.2.8. Duplicate Request. *The request is a duplicate request (e.g., a requester asks for the same information more than once). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.*

C5.2.2.9. Other (Specify). *Any other reason a requester does not comply with published rules other than those outlined above.*

C5.2.2.10. Partial or Total Denial. The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

C5.2.3. Denial Tests. To deny a requested record that is in the possession and control of a DoD Component, it must be determined that disclosure of the record would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is exempt under one or more of the exemptions of the FOIA. An outline of the FOIA's exemptions is contained in Chapter 3 of this Regulation.

C5.2.4. Reasonably Segregable Portions. Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. Unless indicating the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas indicating removal of information. In no case shall the deleted areas be left "white" without the use of brackets to show the bounds of deleted information. In the case of electronic deletion, or deletion in audiovisual or microfiche records, if technically feasible, the amount of redacted information shall be indicated at the place in the record such deletion was made, unless including the indication would harm an interest protected by the exemption under which the deletion is made. This may be done by use of brackets, shaded areas, or some other identifiable technique that will clearly show the limits of the deleted information. When a record is denied in whole, the response advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release.

C5.2.5. Response to Requester.

C5.2.5.1. Whenever possible, initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 20 working days after receipt of the request by the official designated to respond. When a DoD Component has a significant number of pending requests which prevent a response determination within the 20 working day period, the requester shall be so notified in an interim response, and advised whether

their request qualifies for the fast track or slow track within the DoD Components' multitrack processing system. Requesters who do not meet the criteria for fast track processing shall be given the opportunity to limit the scope of their request in order to qualify for fast track processing. See also subsection C5.1.4. above, for greater detail on multitrack processing and compelling need meriting expedited processing.

C5.2.5.2. When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

C5.2.5.3. When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based, inclusive of a brief statement describing what the exemption(s) cover. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable Executive Order criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the DoD Component.

C5.2.5.4. The final response to the requester should contain information concerning the fee status of the request, consistent with the provisions of Chapter 6, this Regulation. *When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the response letter. Components also shall provide the requester with a complete cost breakdown (e.g., 15 pages of office reproduction at \$0.15 per page; 5 minutes of computer search time at \$43.50 per minute, 2 hours of professional level search at \$25 per hour, etc.) in the response letter.*

C5.2.5.5. The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this Regulation; e.g., 5 U.S.C. 552 (b)(1) (reference (a)). Merely referring to a classification; to a "For Official Use Only" marking on the requested record; or to this Regulation or a DoD Component's regulation does not constitute a proper citation or explanation of the basis for invoking an exemption.

C5.2.5.6. When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

C5.2.5.7. When denying a request for records, in whole or in part, a DoD Component shall make a reasonable effort to estimate the volume of the records denied and provide this estimate to the requester, unless providing such an estimate would harm an interest protected by an exemption of the FOIA. This estimate should be in number of pages or in some other reasonable form of estimation, unless the volume is otherwise indicated through deletions on records disclosed in part.

C5.2.5.8. When denying a request for records in accordance with a statute qualifying as a FOIA exemption 3 statute, DoD Components shall, in addition to stating the particular statute relied upon to deny the information, also state whether a court has upheld the decision to withhold the information under the particular statute, and a concise description of the scope of the information being withheld.

C5.2.6. Extension of Time

C5.2.6.1. In unusual circumstances, when additional time is needed to respond to the initial request, the DoD Component shall acknowledge the request in writing within the 20 day period, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days, except as provided below:

C5.2.6.2. With respect to a request for which a written notice has extended the time limits by 10 additional working days, and the Component determines that it cannot make a response determination within that additional 10 working day period, the requester shall be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request. Refusal by the requester to reasonably modify the request or arrange for an alternative time frame shall be considered a factor in determining whether exceptional circumstances exist with respect to DoD Components' request backlogs. Exceptional circumstances do not include a delay that results from predictable component backlogs, unless the DoD Component demonstrates reasonable progress in reducing its backlog.

C5.2.6.3. Unusual circumstances that may justify delay are:

C5.2.6.3.1. The need to search for and collect the requested records from other facilities that are separate from the office determined responsible for a release or denial decision on the requested information.

C5.2.6.3.2. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are requested in a single request.

C5.2.6.3.3. The need for consultation, which shall be conducted with all practicable speed, with other agencies having a substantial interest in the determination of the request, or among two or more DoD Components having a substantial subject-matter interest in the request.

C5.2.6.3.4. DoD Components may aggregate certain requests by the same requester, or by a group of requesters acting in concert, if the DoD Component reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances set forth above, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated. If the requests are aggregated under these conditions, the requester or requesters shall be so notified.

C5.2.6.3.5. In cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester with a request that he agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. DoD Components are reminded that the requester still retains the right to treat this delay as a defacto denial with full administrative remedies.

C5.2.6.3.6. As an alternative to the taking of formal extensions of time as described in subsection C5.2.6. above, the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

C5.2.7. Misdirected Requests. Misdirected requests shall be forwarded promptly to the DoD Component or other Federal Agency with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the DoD Component that manages the records requested.

C5.2.8. Records of Non-U.S. Government Source

C5.2.8.1. When a request is received for a record that falls under exemption 4 (see subsection Number 4 of Chapter 3, above), that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information [also known as "the submitter" for matters pertaining to proprietary data under 5 U.S.C. 552 (reference (a)) Exemption (b)(4)] [Chapter 3, section 2, subsection C3.2.1., Number 4, this Regulation and E. O. 12600 (reference (ac)),] shall be notified promptly of that request and afforded reasonable time (e.g., 30 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4) of reference (a). If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised, the DoD Component may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

C5.2.8.2. If the submitted information is a proposal in response to a solicitation for a competitive proposal, and the proposal is in the possession and control of DoD, and meets the requirements of 10 U.S.C. 2305(g) (reference (p)), 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 (p) and exemption (b)(3) of reference (a). This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between a DoD Component and the offeror that submitted the proposal. In such situations, normal submitter notice shall be conducted in accordance with paragraph C5.2.8.1., above, except for sealed bids that are opened and read to the public. The term proposal means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive proposal, but does not include an offeror's name or total price or unit prices when set forth in a record other than the proposal itself. Submitter notice, and analysis as appropriate, are required for exemption (b)(4) matters that are not specifically incorporated in reference (p).

C5.2.8.3. If the record or information was submitted on a strictly voluntary basis, absent any exercised authority that prescribes criteria for submission, and after consultation with the submitter, it is absolutely clear that the record or information would customarily not be released to the public, the submitter need not be notified. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Records or information submitted under these authorities **are not** voluntary in nature. When it is not clear whether the information was submitted on a voluntary basis, absent any exercised authority, and whether it would customarily be released to the public by the submitter, notify the submitter and ask that it describe its treatment of the information, and render an objective evaluation. If the decision is made to release the information over the objection of the submitter, notify the submitter and afford the necessary time to allow the submitter to seek a restraining order, or take court action to prevent release of the record or information.

C5.2.8.4. The coordination provisions of this paragraph also apply to any non-U.S. Government record in the possession and control of the DoD from multi-national organizations, such as the North Atlantic Treaty Organization (NATO), United Nations Commands, the North American Aerospace Defense Command (NORAD), the Inter-American Defense Board, or foreign governments. Coordination with foreign governments under the provisions of this paragraph may be made through Department of State, or the specific foreign embassy.

C5.2.9. 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 C5.2.2.* shall be maintained for a period of six years to meet the statute of limitations requirement.

C5.2.10. Special Mail Services. Components are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. *The requester shall be notified that they are responsible for the full costs of special services.*

C5.2.11. Receipt Accounts. The Treasurer of the United States has established two accounts for FOIA receipts, and all money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer. These accounts, which are described in paragraphs C5.2.11.1. and

C5.2.11.2., below, shall be used for depositing all FOIA receipts, except receipts for *Working Capital* and non appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. *Working Capital* and non appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

C5.2.11.1. Receipt Account 3210 Sale of Publications and Reproductions, Freedom of Information Act (reference (ad)). This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles.

C5.2.11.2. Receipt Account 3210 Fees and Other Charges for Services, Freedom of Information Act (reference (ad)). This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

C5.3. APPEALS

C5.3.1. General. If the official designated by the DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, for no record determinations when the requester considers such responses adverse in nature, *not providing a response determination to a FOIA request within the statutory time limits, or any determination found to be adverse in nature by the requester. When denials have been made under the provisions of the Privacy Act and the FOIA, and the denied information is contained in a Privacy Act system of records, appeals shall be processed under both the Privacy Act and the FOIA. If the denied information is not maintained in a Privacy Act system of records, the appeal shall be processed under the FOIA.* Appeals of Office of the Secretary of Defense and Chairman of the Joint Chiefs of Staff determinations may be sent to the address in Appendix AP2, paragraph AP2.2.1. If a request is merely misaddressed, and the receiving DoD Component simply advises the requester of such and refers the request to the appropriate DoD Component, this shall not be considered a no record determination.

C5.3.2. Time of Receipt. A FOIA appeal has been received by a DoD Component when it reaches the office of an appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

C5.3.3. Time Limits

C5.3.3.1. The requester shall be advised to file an appeal so that it is *postmarked* no later than 60 calendar days after the date of the initial denial letter. *If no appeal is received, or if the appeal is postmarked after the conclusion of this 60-day period, the appeal may be*

considered closed. However, exceptions to the above may be considered on a case by case basis. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until *the date of the final response*. Records that are denied shall be retained for a period of six years to meet the statute of limitations requirement.

C5.3.3.2. Final determinations on appeals normally shall be made within 20 working days after receipt. When a DoD Component has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitask processing system, based at a minimum, on the three processing tracks established for initial requests. See subsection C1.5.4. above, this Regulation. All of the provisions of C1.5.4. apply also to appeals of initial determinations, to include establishing additional processing queues as needed.

C5.3.4. Delay in Responding to an Appeal

C5.3.4.1. If additional time is needed due to the unusual circumstances described in subsection C5.2.6., above, the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request.

C5.3.4.2. If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in subsection C5.2.6., above, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The DoD Component shall continue to process the case expeditiously.

C5.3.5. Response to the Requester

C5.3.5.1. When an appellate authority makes a final determination to release all or a portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

C5.3.5.2. Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response, at a minimum, shall include the following:

C5.3.5.2.1. The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of the FOIA, and with respect to other appeal matters as set forth in subsection C5.3.1., above.

C5.3.5.2.2. When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a

declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

C5.3.5.2.3. The final denial shall include the name and title or position of the official responsible for the denial.

C5.3.5.2.4. In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable.

C5.3.5.2.5. When the denial is based upon an exemption 3 statute (see subsection Number 3 of Chapter 3), the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld.

C5.3.5.2.6. The response shall advise the requester of the right to judicial review.

C5.3.6. Consultation

C5.3.6.1. Final refusal involving issues not previously resolved or that the DoD Component knows to be inconsistent with rulings of other DoD Components ordinarily should not be made before consultation with the DoD Office of the General Counsel.

C5.3.6.2. Tentative decisions to deny records that raise new or significant legal issues of potential significance to other Agencies of the Government shall be provided to the DoD Office of the General Counsel.

C5.4. JUDICIAL ACTIONS

C5.4.1. General

C5.4.1.1. This section 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.

C5.4.1.2. A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the DoD Component has failed to respond within the time limits prescribed by the FOIA and in this Regulation.

C5.4.2. Jurisdiction. The requester may bring suit in the U.S. District Court in the district in which the requester resides or is the requesters place of business, in the district in which the record is located, or in the District of Columbia.

C5.4.3. 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.

C5.4.4. Actions by the Court

C5.4.4.1. When a DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Component additional time to complete its review of the records.

C5.4.4.2. If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

C5.4.4.3. When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions 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.

C5.4.4.2. The court may punish the responsible official for contempt when a DoD Component fails to comply with the court order to produce records that it determines have been withheld improperly.

C5.4.5. Non-United States Government Source Information. A requester may bring suit in a U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the DoD Component shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court action of the source, whichever is sooner.

C5.4.6. FOIA Litigation. Personnel responsible for processing FOIA requests at the DoD Component level shall be aware of litigation under the FOIA. Such information will provide management insights into the use of the nine exemptions by Component personnel. Whenever a complaint under the FOIA is filed in a U.S. District Court, the DoD Component named in the complaint shall forward a copy of the complaint by any means to the Director, Freedom of Information and Security Review with an information copy to the DoD Office of the General Counsel, ATTN: Office of Legal Counsel.

C6. CHAPTER 6

FEE SCHEDULE

C6.1. GENERAL PROVISIONS

C6.1.1. Authorities. The Freedom of Information Act (reference (a)), as amended; the Paperwork Reduction Act (44 U.S.C. Chapter 35) (reference (ae)), as amended; the Privacy Act of 1974 (reference (d)), as amended; the Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act, as amended (see 31 U.S.C.) (reference (af)); and 10 U.S.C. 2328 (reference (ag)).

C6.1.2. Application

C6.1.2.1. The fees described in this Chapter apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines (reference (ah)). They reflect direct costs for search, review (in the case of commercial requesters); and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as *DoD 7000.14-R* (reference (ai)), which does not supersede the collection of fees under the FOIA. Nothing in this Chapter shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552 (a)(4)(a)(vi)) (reference (a)) means any statute that enables a Government Agency such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as the GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

C6.1.2.2. The term "direct costs" means those expenditures a Component actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. These factors have been included in the fee rates prescribed at Section C6.2. of this Chapter. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

C6.1.2.3. The term "search" includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions

thereof are responsive to the request. Components should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Component and the requester. For example, Components should not engage in line-by-line searches when duplicating an entire document known to contain responsive information would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time. See paragraph C6.1.2.5., below, for the definition of review, and paragraphs C6.1.3.5., and C6.2.2.2., below, for information pertaining to computer searches.

C6.1.2.4. The term "duplication" refers to the process of making a copy of a document in response to a FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably usable, the requester shall be notified that the copy provided is the best available and that the Agency's master copy shall be made available for review upon appointment. For duplication of computer tapes and audiovisual, the actual cost, including the operator's time, shall be charged. In practice, if a Component estimates that assessable duplication charges are likely to exceed \$25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

C6.1.2.5. The term "review" refers to the process of examining documents located in response to a FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the initial review. Components may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

C6.1.3. Fee Restrictions

C6.1.3.1. No fees may be charged by any DoD Component if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, Components shall provide the first two hours of search time, and the first one hundred pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and ten minutes of search time, and resulted in one hundred and five pages of documents, a Component would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than, the cost to the Component for billing the requester and processing the fee collected, no charges would result.

C6.1.3.2. Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if a Component, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DoD Component, or another Federal Agency to action their portion of the request, the referring Component shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

C6.1.3.3. The elements to be considered in determining the "cost of collecting a fee" are the administrative costs to the Component of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in Components' determinations.

C6.1.3.4. For the purposes of these restrictions, the word "pages" refers to paper copies of a standard size, which will normally be "8 1/2 x 11" or "11 x 14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout however, might meet the terms of the restriction.

C6.1.3.5. In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$24.00 (two hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search. See Section C6.2., this Chapter, for further details regarding fees for computer searches.

C6.1.4. Fee Waivers

C6.1.4.1. Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in subsection C6.1.5. below, 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.

C6.1.4.2. When assessable costs for a FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

C6.1.4.3. Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis, consistent with the following factors:

C6.1.4.3.1. 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."

C6.1.4.3.1.1. The subject of the request. Components should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Department of Defense. Requests for records in the possession of the Department of Defense which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value, will likely not contribute to public understanding of the operations or activities of the Department of Defense. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the Department of Defense; however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of the Department of Defense, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of the Department of Defense.

C6.1.4.3.1.2. 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 operations or activities of the Department of Defense, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the Department of Defense must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of the Department of Defense.

C6.1.4.3.1.3. 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.

C6.1.4.3.1.4. The significance of the contribution to public understanding.

In applying this factor, Components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing 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. Components shall not make value judgments as to whether the information is important enough to be made public.

C6.1.4.3.2. Disclosure of the information "is not primarily in the commercial interest of the requester."

C6.1.4.3.2.1. The existence and magnitude of a commercial interest. If the request is determined to be of a commercial interest, Components should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to 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, Components may draw inference from the requester's identity and circumstances of the request. In such situations, the provisions of subsection C6.1.5. below, apply. Components are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must clearly override any personal or non-profit interest.

C6.1.4.3.2.2. The primary interest in disclosure. Once a requester's commercial interest has been determined, Components should then determine if the disclosure would be primarily in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

C6.1.4.4. Components are reminded that the factors and examples used in this subsection are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to

whether to charge or waive the fee cannot be clearly resolved, Components should rule in favor of the requester.

C6.1.4.5. In addition, the following additional circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

C6.1.4.5.1. A record is voluntarily created to prevent an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

C6.1.4.5.2. A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. \$15.00 - \$30.00).

C6.1.5. Fee Assessment

C6.1.5.1. Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

C6.1.5.2. In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Components shall adhere to the following procedures:

C6.1.5.2.1. 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:

C6.1.5.2.1.1 Notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (i.e., 30 calendar days), the Component shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

C6.1.5.2.1.2. Advise the requester that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Component.

C6.1.5.2.2. Requesters should submit a fee declaration appropriate for the below categories.

C6.1.5.2.2.1. Commercial. Requesters should indicate a willingness to pay all search, review and duplication costs.

C6.1.5.2.2.2. Educational or Noncommercial Scientific Institution or News Media. Requesters should indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

C6.1.5.2.2.3. All Others. Requesters should indicate a willingness to pay assessable search and duplication costs if more than two hours of search effort or 100 pages of records are desired.

C6.1.5.2.3. If the above conditions are not met, then the request need not be processed and the requester shall be so informed.

C6.1.5.2.4. In the situations described by subparagraphs C6.1.5.2.1. and C6.1.5.2.2., above, Components must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Components' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement.

C6.1.5.2.5. No DoD Component may require advance payment of any fee; i.e., payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Component.

C6.1.5.2.6. Where a Component estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the Component shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

C6.1.5.2.7. Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the Component may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Component begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717 (reference (aj)), and confirmed with respective Finance and Accounting Offices.

C6.1.5.2.8. After all work is completed on a request, and the documents are ready for release, Components may request payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed previously to pay a fee in a timely fashion (i.e., within 30 calendar days from the date of the billing). In the case of the latter, the provisions of subparagraph C6.1.5.2.7., above, apply.

C6.1.5.2.9. When Components act under subparagraphs C6.1.5.2.1. through C6.1.5.2.7, above, 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).

C6.1.5.2.10. Components may charge for time spent searching for records, even if that search fails to locate records responsive to the request. Components may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure. In practice, if the Component estimates that search charges are likely to exceed \$25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

C6.1.5.3. Commercial Requesters. Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought. (See subsection C1.5.8. above.)

C6.1.5.3.1. The term "commercial use" request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, Components must determine the use to which a requester will put the documents requested. Moreover, where a Component has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Components should seek additional clarification before assigning the request to a specific category.

C6.1.5.3.2. When Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents. Moreover, 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 criteria, 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.

C6.1.5.4. Educational Institution Requesters. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the records sought (see subsection C1.5.8. above). The term "educational institution" refers to a pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. Fees shall be waived or reduced in the public interest if the criteria of subsection C6.1.4., above, have been met.

C6.1.5.5. Non-Commercial Scientific Institution Requesters. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought (see subsection C1.5.8., above). The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as defined in subparagraph C6.1.5.3., above, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. Fees shall be waived or reduced in the public interest if the criteria of subsection C6.1.4., above, have been met.

C6.1.5.6. Components shall provide documents to requesters in paragraphs C6.1.5.4. and C6.1.5.5., above, for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in these categories, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.

C6.1.5.7. Representatives of the news media. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought (see subsection C1.5.8., above). Fees shall be waived or reduced if the criteria of subsection C6.1.4., above, have been met.

C6.1.5.7.1. 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 that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Components may also look to the past publication record of a requester in making this determination.

C6.1.5.7.2. To be eligible for inclusion in this category, a requester must meet the criteria in subparagraph C6.1.5.7.1., above, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

C6.1.5.7.3. "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.*

C6.1.5.8. All Other Requesters. Components shall charge requesters who do not fit into any of the categories described in subsections C6.1.5.3., C6.1.5.4., C6.1.5.5., or C6.1.5.7., fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought (see subsection C1.5.8., above). Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974 (reference (d)), which permit fees only for duplication. Components are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest as defined under subsection C6.1.4.1., above. (See also subparagraph C6.1.5.3.2.)

C6.1.6. Aggregating Requests. Except for requests that are for a commercial use, a Component may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document 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 Agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30 day period had been made to avoid fees. For requests made over a longer period however, such a presumption becomes harder to sustain and Components should have a solid basis for determining that aggregation is warranted in such cases. Components are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may Components aggregate multiple requests on unrelated subjects from one requester.

C6.1.7 Effect of the Debt Collection Act of 1982 (P.L. 97-365) (reference (ak)). The Debt Collection Act of 1982 (P.L. 97-365) (reference (ak)) provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Components may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in 31 U.S.C. 3717 (reference (aj)). 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 reference (ak).

C6.1.8. Computation of Fees. The fee schedule in this Chapter shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. costs shall be computed on time actually spent. Neither time-

based nor dollar-based minimum charges for search, review and duplication are authorized. *The appropriate fee category of the requester shall be applied before computing fees.*

C6.1.9. Refunds. In the event that a Component discovers that it has overcharged a requester or a requester has overpaid, the Component shall promptly refund the charge to the requester by reimbursement methods that are agreeable to the requester and the Component.

C6.2. COLLECTION OF FEES AND FEE RATES

C6.2.1. Collection of Fees. Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs. Collection of fees may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the DoD Component, or the Component has determined that the fee will be in excess of \$250 (see subsection C6.1.5., above).

C6.2.2. Search Time.

C6.2.2.1. Manual Search

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical	E9/GS8 and below	12
Professional	O1-O6/GS9-GS15	25
Executive	O7/GS16/ES1 and above	45

C6.2.2.2. Computer Search. Fee assessments for computer search consists of two parts; individual time (hereafter referred to as human time), and machine time.

C6.2.2.2.1. Human time. Human time is all the time spent by humans performing the necessary tasks to prepare the job for a machine to execute the run command. If execution of a run requires monitoring by a human, that human time may be also assessed as computer search. The terms "programmer/operator" shall not be limited to the traditional programmers or operators. Rather, the terms shall be interpreted in their broadest sense to incorporate any human involved in performing the computer job (e.g. technician, administrative support, operator, programmer, database administrator, or action officer).

C6.2.2.2.2. Machine time. Machine time involves only direct costs of the Central Processing Unit (CPU), input/output devices, and memory capacity used in the actual computer configuration. Only this CPU rate shall be charged. No other machine related costs shall be charged. In situations where the capability does not exist to calculate CPU time, no machine costs can be passed on to the requester. When CPU calculations are not available, only human time costs shall be assessed to requesters. Should DoD Components lease computers, the services charged by the lessor shall not be passed to the requester under the FOIA.

C6.2.3. Duplication

<u>Type</u>	<u>Cost per Page (cents)</u>
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)

C6.2.4. Review Time (in the case of commercial requesters)

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical	E9/GS8 and below	12
Professional	O1-O6/GS9-GS15	25
Executive	O7/GS16/ES1 and above	45

C6.2.5. Audiovisual Documentary Materials. Search costs are computed as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

C6.2.6. Other Records. Direct search and duplication cost for any record not described in this section shall be computed in the manner described for audiovisual documentary material.

C6.2.7. Costs for Special Services. Complying with requests for special services is at the discretion of the Components. Neither the FOIA, nor its fee structure cover these kinds of services. Therefore, Components may recover the costs of special services requested by the requester after agreement has been obtained in writing from the requester to pay for one or more of the following services:

C6.2.7.1. Certifying that records are true copies.

C6.2.7.2. Sending records by special methods such as express mail, etc.

C6.3. COLLECTION OF FEES AND FEE RATES FOR TECHNICAL DATA

C6.3.1. Fees for Technical Data

C6.3.1.1. Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays all reasonable costs attributed to search, duplication and review of the records to be released. Technical data, as used in this section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information. DoD Components shall retain the amounts received by such a release,

and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. All reasonable costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full costs shall include all direct and indirect costs to conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable under section C6.2. of this chapter for other types of information released under the FOIA.

C6.3.1.2. Waiver. Components shall waive the payment of costs required in paragraph C6.3.1.1., above, which are greater than the costs that would be required for release of this same information under section C6.2. of this chapter if:

C6.3.1.2.1. The request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, Components may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

C6.3.1.2.2. The release of technical data is requested in order to comply with the terms of an international agreement; or,

C6.3.1.2.3. The Component determines in accordance with paragraph C6.1.4.1., above, that such a waiver is in the interest of the United States.

C6.3.1.3. Fee Rates

C6.3.1.3.1. Search Time

C6.3.1.3.1.1. Manual Search

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical (Minimum Charge)	E9/GS8 and below	13.25 8.30

Professional and Executive (To be established at actual hourly rate prior to search. A minimum charge will be established at 1/2 hourly rates).

C6.3.1.3.1.2. Computer search is based on the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage (based upon the scale in subparagraph C6.3.1.3.1.1., above) for the computer operator and/or programmer determining how to conduct, and subsequently executing the search will be

recorded as part of the computer search. See paragraph C6.2.2.2., above, for further details regarding computer search.

C6.3.1.3.2. Duplication

<u>Type</u>	<u>Cost</u>
Aerial photograph, maps, specifications, permits, charts, blueprints, and other technical engineering documents	\$2.50
Engineering data (microfilm)	
(a) Aperture cards	
1 Silver duplicate negative, per card	.75
When key punched and verified, per card	.85
2 Diazo duplicate negative, per card	.65
When key punched and verified, per card	.75
(b) 35mm roll film, per frame	.50
(c) 16mm roll film, per frame	.45
(d) Paper prints (engineering drawings), each	1.50
(e) Paper reprints of microfilm indices, each	.10

C6.3.1.3.3. Review Time

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical	E9/GS8 and below	13.25
(Minimum Charge)		8.30

Professional and Executive (To be established at actual hourly rate prior to review. A minimum charge will be established at 1/2 hourly rates).

C6.3.1.4. Other Technical Data Records. Charges for any additional services not specifically provided in subsection C6.3.1.3., above, consistent with Volume 11A of DoD 7000.14-R (reference (ai)), shall be made by Components at the following rates:

(1) Minimum charge for office copy (up to six images)	\$3.50
(2) Each additional image10
(3) Each typewritten page	3.50
(4) Certification and validation with seal, each	5.20
(5) Hand-drawn plots and sketches, each hour or fraction thereof	12.00

C7. CHAPTER 7

REPORTS

C7.1. REPORTS CONTROL

C7.1.1. General.

C7.1.1.1. *The Annual Freedom of Information Act Report is mandated by the statute and reported on a fiscal year basis. Due to the magnitude of the requested statistics and the need to ensure accuracy of reporting, DoD Components shall track this data as requests are processed. This will also facilitate a quick and accurate compilation of statistics. DoD Components shall forward their report to the Directorate for Freedom of Information and Security Review no later than November 30 following the fiscal year's close. It may be submitted electronically and via hard copy accompanied by a computer diskette. In turn, DoD will produce a consolidated report for submission to the Attorney General, and ensure that a copy of the DoD consolidated report is placed on the Internet for public access.*

C7.1.1.2. Existing DoD standards and registered data elements are to be utilized to the greatest extent possible in accordance with the provisions of DoD Manual 8320.1-M, "Data Administration Procedures" (reference (al)).

C7.1.1.3. The reporting requirement outlined in this Chapter is assigned Report Control Symbol *DD-DA&M(A)1365, Freedom of Information Act Report to Congress.*

C7.1.2. Annual Report. The current edition of DD Form 2564 *shall* be used to submit component input. *DD Form 2564 is available on the Internet under DefenseLink, Publications.* Instructions for completion follow:

C7.1.2.1. ITEM 1 Initial Request Determinations. *Please note that initial Privacy Act requests which are also processed as initial FOIA requests are reported here. They will also be reported as "Privacy Act requests" on the Annual Privacy Act Report. See paragraph C1.5.13., Relationship Between the FOIA and the Privacy Act (PA).*

C7.1.2.1.1. Total Requests Processed. Enter the total number of initial FOIA requests responded to (completed) during the fiscal year. Since more than one action frequently is taken on a completed case, Total Actions (see C7.1.2.1.6., below) the sum of Items C7.1.2.1.2. (below) through C7.1.2.1.5. (below), may exceed Total Requests Processed (See Appendix AP5 for form layout).

C7.1.2.1.2. Granted in Full. Enter the total number of initial FOIA requests responded to that were granted in full during the fiscal year. (This may include requests granted by your office, yet still requiring action by another office.)

C7.1.2.1.3. Denied in Part. Enter the total number of initial FOIA requests responded to and denied in part based on one or more of the FOIA exemptions. (*Do not report "Other Reason Responses" as a partial denial here, unless a FOIA exemption is used also.*)

C7.1.2.1.4. Denied in Full. Enter the total number of initial FOIA requests responded to and denied in full based on one or more of the FOIA exemptions. (*Do not report "Other Reason Responses" as denials here, unless a FOIA exemption is used also.*)

C7.1.2.1.5. "Other Reason" Responses. Enter the total number of initial FOIA requests in which you were unable to provide all or part of the requested information based on an "Other Reason" response. C7.1.2.2.2. below, explains the *nine* possible "Other Reasons."

C7.1.2.1.6. Total Actions. Enter the total number of FOIA actions taken during the fiscal year. This number will be the sum of C7.1.2.1.2. through C7.1.2.1.5., above. Total Actions must be equal to or greater than the number of Total Requests Processed (C7.1.2.1.1., above).

C7.1.2.2. ITEM 2 Initial Request Exemptions and Other Reasons

C7.1.2.2.1. Exemptions Invoked on Initial REQUEST Determinations. Enter the number of times an exemption was claimed for each request that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of C7.1.2.1.3. and C7.1.2.1.4., above. *The (b)(7) exemption is reported by subcategories (A) through (F): (A) INTERFERE WITH ENFORCEMENT; (B) FAIR TRIAL RIGHT; (C) INVASION OF PRIVACY; (D) PROTECT CONFIDENTIAL SOURCE; (E) DISCLOSE TECHNIQUES; and (F) ENDANGER LIFE OR SAFETY.*

C7.1.2.2.2. "Other Reasons" Cited on Initial Determinations. Identify the "Other Reason" response cited when responding to a FOIA request and enter the number of times each was claimed.

C7.1.2.2.2.1. No Records. Enter the number of times a *reasonable* search of files failed to identify records responsive to subject request.

C7.1.2.2.2.2. Referrals. Enter the number of times a request was referred to another DoD Component or Federal Agency for action.

C7.1.2.2.2.3. Request Withdrawn. Enter the number of times a request and/or appeal was withdrawn by a requester. [For appeals, report number in Item 4b on the report form (see Appendix AP5).]

C7.1.2.2.2.4. Fee-Related Reason. *Requester is unwilling to pay the fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with a fee estimate.*

C7.1.2.2.2.5. Records not Reasonably Described. *Enter the number of times a FOIA request could not be acted upon since the record had not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.*

C7.1.2.2.2.6. Not a Proper FOIA Request for Some Other Reason. *Enter the number of times the requester has failed unreasonably to comply with procedural requirements, other than fee-related (described in C7.1.2.2.2.4., above), imposed by this Regulation or a DoD Component's supplementing regulation.*

C7.1.2.2.2.7. Not an Agency Record. *Enter the number of times a requester was provided a response indicating the requested information was not a record within the meaning of the FOIA and this Regulation.*

C7.1.2.2.2.8. Duplicate Request. *Record number of duplicate requests closed for that reason (e.g., request for the same information by the same requester). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.*

C7.1.2.2.2.9. Other (Specify). *Any other reason a requester does not comply with published rules, other than those reasons outlined in C7.1.2.2.2.1. through C7.1.2.2.2.8, above.*

C7.1.2.2.2.10. Total. *Enter the sum of C7.1.2.2.2.1. through C7.1.2.2.2.9. above, in the block provided on the form. This number will be equal to or greater than the number in C7.1.2.1.5. (above) since more than one reason may be claimed for each "Other Reason" response.*

C7.1.2.2.3 (b)(3) Statutes Invoked on Initial Determinations. *Identify the number of times you have used a specific statute to support each (b)(3) exemption. List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure you cite the specific sections of the acts invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 2a on the report form.*

C7.1.2.3. ITEM 3 Appeal Determinations. *Please note that Privacy Act appeals which are also processed as FOIA appeals are reported here. They will also be reported as "Privacy Act appeals" on the Annual Privacy Act Report. See paragraph C1.5.13., Relationship Between the FOIA and the Privacy Act (PA).*

C7.1.2.3.1. Total Appeal Responses. Enter the total number of FOIA appeals responded to (completed) during the fiscal year.

C7.1.2.3.2. Granted in Full. Enter the total number of FOIA appeals responded to and granted in full during the year.

C7.1.2.3.3. Denied in Part. Enter the total number of FOIA appeals responded to and denied in part based on one or more of the FOIA exemptions. *(Do not report "Other Reason Responses" as a partial denial here, unless a FOIA exemption is used also.)*

C7.1.2.3.4. Denied in Full. Enter the total number of FOIA appeals responded to and denied in full based on one or more of the FOIA exemptions. *(Do not report "Other Reason Responses" as denials here, unless a FOIA exemption is used also.)*

C7.1.2.3.5. "Other Reason" Responses. Enter the total number of FOIA appeals in which you were unable to provide the requested information based on an "Other Reason" response *(as outlined in "Other Reasons" in C7.1.2.2.2., above)*.

C7.1.2.3.6. Total Actions. Enter the total number of FOIA appeal actions taken during the fiscal year. This number will be the sum of C7.1.2.3.2. through C7.1.2.3.5., above, and should be equal to or greater than the number of Total Appeal Responses, C7.1.2.3.1., above.

C7.1.2.4. ITEM 4 Appeal Exemptions and Other Reasons

C7.1.2.4.1. Exemptions Invoked on Appeal Determinations. Enter the number of times an exemption was claimed for each appeal that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of C7.1.2.3.3. and C7.1.2.3.4. *Note that the (b)(7) exemption is reported by subcategory (A) through (F): (A) INTERFERE WITH ENFORCEMENT; (B) FAIR TRIAL RIGHT; (C) INVASION OF PRIVACY; (D) PROTECT CONFIDENTIAL SOURCE; (E) DISCLOSE TECHNIQUES; and (F) ENDANGER LIFE OR SAFETY.*

C7.1.2.4.2. "Other Reasons" Cited on Appeal Determinations. Identify the "Other Reason" response cited when responding to a FOIA appeal and enter the number of times each was claimed. See C7.1.2.2.2. above for description of "Other Reasons." This number may be equal to or possibly greater than the number in C7.1.2.3.5., above, since more than one reason may be claimed for each "Other Reason" response.

C7.1.2.4.3. (b)(3) Statutes Invoked on Appeal Determinations. *Identify the number of times a specific statute has been used to support each (b)(3) exemption identified in item 4a on the report form (Appendix AP5). List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure citation to the specific sections of*

the statute invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 4a on the report form.

C7.1.2.5. ITEM 5 Number and Median Age of Initial Cases Pending:

C7.1.2.5.1. *Total Initial Cases Pending:*

C7.1.2.5.1.1. *Beginning and Ending Report Period:* *Midnight, 2400 hours, September 30 of the Preceding Year -OR- 0001 hours, October 1 is the beginning of the report period. Midnight, 2400 hours, is the close of the reporting period.*

C7.1.2.5.2. *Median Age of Initial Requests Pending:* *Report the median age in days (including holidays and weekends) of initial requests pending.*

C7.1.2.5.3. Examples of Median Calculation.

C7.1.2.5.3.1. *If given five cases aged 10, 25, 35, 65, and 100 days from date of receipt as of the previous September 30th, the total requests pending is five (5). The median age (days) of open requests is the middle, not average value, in this set of numbers (10, 25, 35, 65, and 100), 35 (the middle value in the set).*

C7.1.2.5.3.2. *If given six pending cases, aged 10, 20, 30, 50, 120, and 200 days from date of receipt, as of the previous September 30th, the total requests pending is six (6). The median age (days) of open requests 40 days (the mean [average] of the two middle numbers in the set, in this case the average of middle values 30 and 50).*

C7.1.2.5.4. *Accuracy of Calculations.* *Components must ensure the accuracy of calculations. As backup, the raw data used to perform calculations should be recorded and preserved. This will enable recalculation of median [and mean values] as necessary. Components may require subordinate elements to forward raw data, as deemed necessary and appropriate.*

C7.1.2.5.5. *Average.* *If a Component believes that "average" (mean) processing time is a better measure of performance, then report "averages" (means) as well as median values (e.g., with data reflected and plainly labeled on plain bond as an attachment to the report). However, "average" (mean) values will not be included in the consolidated DoD report unless all Components report it.*

C7.1.2.6. ITEM 6 Number of Initial Requests Received During the Fiscal Year. *Enter the total number of initial FOIA requests received during the reporting period (fiscal year being reported).*

C7.1.2.7. ITEM 7 Types of Requests Processed and Median Age. *Information is reported for three types of initial requests completed during the reporting period: Simple;*

Complex; and Expedited Processing. The following items of information are reported for these requests:

C7.1.2.7.1. Total Number of Initial Requests. Enter the total number of initial requests processed [completed] during the reporting period (fiscal year) by type (Simple, Complex and Expedited Processing) in the appropriate row on the form.

C7.1.2.7.2. Median Age (Days). Enter the median number of days [calendar days including holidays and weekends] required to process each type of case (Simple, Complex and Expedited Processing) during the period in the appropriate row on the form.

C7.1.2.7.3. Example. Given seven Initial Requests, Multitrack -- Simple completed during the fiscal year, aged 10, 25, 35, 65, 79, 90 and 400 days when completed. The total number of requests completed was seven (7). The median age (days) of completed requests is 65, the middle value in the set.

C7.1.2.8. ITEM 8 Fees Collected from the Public. Enter the total amount of fees collected from the public during the fiscal year. This includes search, review and reproduction costs only.

C7.1.2.9. ITEM 9 FOIA Program Costs.

C7.1.2.9.1. Number of Full Time Staff: Enter the number of personnel your agency had dedicated to working FOIA full time during the fiscal year. This will be expressed in work-years [many years]. For example: "5.1, 3.2, 1.0, 6.5, et al." A sample calculation follows:

<u>Employee</u>	<u>Number Months Worked</u>	<u>Work-Years</u>	<u>Note</u>
SMITH, Jane	6	.5	Hired full time at middle of fiscal year.
PUBLIC, John Q.	4	.34	Dedicated to full time FOIA processing last quarter of fiscal year.
BROWN, Tom	12	1.0	Worked FOIA full time all fiscal year.
TOTAL:	22	1.84 work-years	

C7.1.2.9.2. Number of Part Time Staff: Enter the number of personnel your agency had dedicated to working FOIA part time during the fiscal year. This will be expressed in work-years [manyears]. For example: "5.1, 3.2, 1.0, 6.5, et al." A sample calculation follows:

<u>Employee</u>	<u>Number Hours Worked</u>	<u>Work-Years</u>	<u>Note</u>
PUBLIC, John Q.	200	.1	Amount of time devoted to part time FOIA processing before becoming full time FOIA processor in previous example.
WHITE, Sally	400	.2	Processed FOIA's part time while working as paralegal in General Counsel's Office.
PETERS, Ron	1,000	.5	Part time employee dedicated to FOIA processing.
TOTAL:	1,600/2,000 hours (hours worked in a year) equals 0.8 work-years.		

C7.1.2.9.3. Estimated Litigation Cost: Report your best estimate of litigation costs for the FY. Include all direct and indirect expenses associated with FOIA litigation in U.S. District Courts, U.S. Circuit Courts of Appeals, and the U.S. Supreme Court.

C7.1.2.9.4. Total Program Cost: Report the total cost of FOIA program operation within your agency. Include your litigation costs in this total. While you do not have to report detailed cost information as in the past, you should be able to explain the technique by which you derived your agency's total cost figures if the need arises.

C7.1.2.9.4.1. Before the close of each fiscal year, the Directorate for Freedom of Information and Security Review (DFOISR) will dispatch the latest OSD Composite Rate Chart for military personnel to DoD Components. This information may be used in computing military personnel costs.

C7.1.2.9.4.2. DoD Components should compute their civilian personnel costs using rates from local Office of Personnel Management (OPM) Salary Tables and shall add 16% for benefits.

C7.1.2.9.4.3. Data captured on DD Form 2086, Record of Freedom of Information (FOI) Processing Cost and DD Form 2086-1, Record of Freedom of Information (FOI) Processing Cost for Technical Data, shall be summarized and used in computing total costs.

C7.1.2.9.4.4. An overhead rate of 25% shall be added to all calculated costs for supervision, space, and administrative support.

C7.1.2.10. ITEM 10 AUTHENTICATION: The official that approves the agency's report submission to DoD will sign and date; enter typed name and duty title; and provide the both the agency's name and phone number for questions about the report.

C7.1.3. Electronic Publication. The consolidated DoD Annual FOIA Program Report will be made available to the public in either paper or electronic format.

C8. CHAPTER 8

EDUCATION AND TRAINING

C8.1. RESPONSIBILITY AND PURPOSE

C8.1.1. Responsibility. The Head of each DoD Component is responsible for the establishment of educational and training programs on the provisions and requirements of this Regulation. The educational programs should be targeted toward all members of the DoD Component, developing a general understanding and appreciation of the DoD FOIA Program; whereas, the training programs should be focused toward those personnel who are involved in the day-to-day processing of FOIA requests, and should provide a thorough understanding of the procedures outlined in this Regulation.

C8.1.2. Purpose. The purpose of the educational and training programs is to promote a positive attitude among DoD personnel and raise the level of understanding and appreciation of the DoD FOIA Program, thereby improving the interaction with members of the public and improving the public trust in the DoD.

C8.1.3. Scope and Principles. Each Component shall design its FOIA educational and training programs to fit the particular requirements of personnel dependent upon their degree of involvement in the implementation of this Regulation. The program should be designed to accomplish the following objectives:

C8.1.3.1. Familiarize personnel with the requirements of the FOIA and its implementation by this Regulation.

C8.1.3.2. Instruct personnel, who act in FOIA matters, concerning the provisions of this Regulation, advising them of the legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information.

C8.1.3.3. Provide for the procedural and legal guidance and instruction, as may be required, in the discharge of the responsibilities of initial denial and appellate authorities.

C8.1.3.4. Advise personnel of the penalties for noncompliance with the FOIA.

C8.1.4. Implementation. To ensure uniformity of interpretation, all major educational and training programs concerning the implementation of this Regulation should be coordinated with the Director, Freedom of Information and Security Review.

C8.1.5. Uniformity of Legal Interpretation. In accordance with DoD Directive 5400.7 (reference (b)), the DoD Office of the General Counsel shall ensure uniformity in the legal position and interpretation of the DoD FOIA Program.

AP1. APPENDIX 1

COMBATANT COMMANDS - PROCESSING PROCEDURES FOR FOIA APPEALS

AP1.1. General

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

AP1.1.2. The policy change in AP1.1.1., above, authorizes and requires the Combatant Commands to process FOIA requests in accordance with reference (b) and DoD Instruction 5400.10 (reference (am)) and to forward directly to the Director, Freedom of Information and Security Review, all correspondence associated with the appeal of an initial denial for information under the provisions of the FOIA.

AP1.2. Responsibilities of Commands. Combatant Commanders in Chief shall:

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

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

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

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

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

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

AP1.2.7. Provide to the Director, Freedom of Information and Security Review when the request for a record is denied in whole or in part, a copy of the response to the requester or the

requester's representative, and any internal memoranda that provide background information or rationale for the denial.

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

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

AP1.3. Fees for FOIA Requests. The fees charged for requested records shall be in accordance with Chapter 6, above.

AP1.4. Communications. Excellent communication capabilities currently exist between the Director, Freedom of Information and Security Review and the *Freedom of Information Act Offices of the Combatant Commands*. This communication capability shall be used for FOIA cases that are time sensitive.

AP1.5. Information Requirements

AP1.5.1. The Combatant Commands shall submit to the Director, Freedom of Information and Security Review, an annual report. The instructions for the report are outlined in Chapter 7, above.

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

AP2. APPENDIX 2

ADDRESSING FOIA REQUESTS

AP2.1. General

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

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

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

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

Executive Secretariat

Under Secretary of Defense (Policy)

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

Under Secretary of Defense (Acquisition & Technology)

- Deputy Under Secretary of Defense (Logistics)
- Deputy Under Secretary of Defense (Advanced Technology)
- Deputy Under Secretary of Defense (Acquisition Reform)
- Deputy Under Secretary of Defense (Environmental Security)
- Deputy Under Secretary of Defense (International & Commercial Programs)
- Deputy Under Secretary of Defense (Industrial Affairs & Installations)
- Assistant to the Secretary of Defense (Nuclear, Chemical & Biological Defense Programs)
- Director, Defense Research & Engineering
- Director, Small & Disadvantaged Business Utilization

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

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

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

AP2.2.4. Department of the Air Force. Air Force records may be requested from the Commander of any Air Force installation, major command, or field operating agency (ATTN: FOIA Office). For Air Force records of Headquarters, United States Air Force, or if there is

uncertainty as to which Air Force activity may have the records, send requests to Department of the Air Force, 11CS/SCSR(FOIA), 1000 Air Force Pentagon, Washington, DC 20330-1000.

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

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

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

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

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

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

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

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

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

AP2.2.14. Defense Finance and Accounting Service (DFAS). DFAS records may be requested from any of its regional offices or from its Headquarters. Requesters should send FOIA requests to Defense Finance and Accounting Service, Directorate for External Services, Crystal

Mall 3, Room 416, Arlington, VA 22240-5291, for records of its Headquarters, or if there is uncertainty as to which DFAS region may have the records sought.

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

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

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

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

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

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

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

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

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

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

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

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

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

AP2.4. National Guard Bureau. FOIA requests for National Guard Bureau records may be sent to the Chief, National Guard Bureau, ATTN: NGB-ADM, Room 2C363, 2500 Army Pentagon, Washington, DC 20310-2500.

AP2.5. Miscellaneous. If there is uncertainty as to which DoD Component may have the DoD record sought, the requester may address a Freedom of Information request to the Directorate for Freedom of Information and Security Review, Room 2C757, *1155 Defense Pentagon, Washington, DC 20301-1155*.

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST <i>Please read instructions on back before completing form.</i>						REPORT CONTROL SYMBOL DA&M(A)1365	
1. REQUEST NUMBER 98-F-8888		2. TYPE OF REQUEST (X one) <div style="display: flex; justify-content: space-between;"> <div style="text-align: center;"> <input checked="" type="checkbox"/> a. INITIAL </div> <div style="text-align: center;"> <input type="checkbox"/> b. APPEAL </div> </div>		3. DATE COMPLETED (YYYYMMDD) 19980701			
4. CLERICAL HOURS (E-9/GS-8 and below)		TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)			
a. SEARCH		1.00	X \$12.00 =	12.00			
b. REVIEW/EXCISING		2.00		24.00			
c. CORRESPONDENCE AND FORMS PREPARATION		1.00		12.00			
d. OTHER ACTIVITY		2.00		24.00			
5. PROFESSIONAL HOURS (O-1 - O-6/GS-9 - GS-15)		TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)			
a. SEARCH		2.00	X \$25.00 =	50.00			
b. REVIEW/EXCISING		1.00		25.00			
c. COORDINATION/APPROVAL/DENIAL		1.00		25.00			
d. OTHER ACTIVITY		0.00		0.00			
6. EXECUTIVE HOURS (O-7 - GS-16/ES 1 and above)		TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)			
a. SEARCH		0.00	X \$45.00 =	0.00			
b. REVIEW/EXCISING		0.00		0.00			
c. COORDINATION/APPROVAL/DENIAL		0.50		22.50			
7. COMPUTER SEARCH		TOTAL HOURS (1)	HOURLY RATE (2)	COST (3)			
a. MACHINE HOURS		0.00	X 0.00 =	0.00			
b. PROGRAMMER/OPERATOR TIME		0.00		0.00			
(1) Clerical		1.00		12.00			
(2) Professional		1.00		25.00			
8. OFFICE COPY REPRODUCTION		NUMBER (1)	RATE (2)	COST (3)			
a. PAGES REPRODUCED		450	X .15 =	67.50			
9. MICROFICHE REPRODUCTION		NUMBER (1)	RATE (2)	COST (3)			
a. MICROFICHE REPRODUCED		0	X .25 =	0.00			
10. PRINTED RECORDS		TOTAL PAGES (1)	RATE (2)	COST (3)			
a. FORMS		0	X .02 =	0.00			
b. PUBLICATIONS		156		3.12			
c. REPORTS		45		0.90			
11. COMPUTER COPY		NUMBER (1)	ACTUAL COST (2)	COST (3)			
a. TAPE		0	X 0.00 =	0.00			
b. PRINTOUT		0		0.00			
12. AUDIOVISUAL MATERIALS		NUMBER (1)	ACTUAL COST (2)	COST (3)			
a. MATERIALS REPRODUCED		0	X 0.00 =	0.00			
13. FOR FOI OFFICE USE ONLY							
a. SEARCH FEES PAID		\$99.00	f. TOTAL COLLECTABLE COSTS		\$219.52		
b. REVIEW FEES PAID		\$49.00	g. TOTAL PROCESSING COSTS		\$303.02		
c. COPY FEES PAID		\$71.52	h. TOTAL CHARGED		\$219.52		
d. TOTAL PAID		\$219.52	i. FEES WAIVED/REDUCED (X one)		<div style="display: flex; justify-content: space-around;"> Yes <input checked="" type="checkbox"/> No </div>		
e. DATE PAID (YYYYMMDD)		19980801	<i>See Chapter 6, Fee Schedule, DoD 5400.7-R, to determine appropriate assessment of fees.</i>				

INSTRUCTIONS FOR COMPLETING DD FORM 2086

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

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

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

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

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

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

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

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

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

Forms (Include any type of printed forms)

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

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

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

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

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

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

13. FOR FOI OFFICE USE ONLY -

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

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

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

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

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

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

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

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

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

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST FOR TECHNICAL DATA <i>Please read instructions on back before completing form.</i>							REPORT CONTROL SYMBOL DA&M(A)1365		
1. REQUEST NUMBER 98-F-9999		2. TYPE OF REQUEST (X one) <input checked="" type="checkbox"/> a. INITIAL <input type="checkbox"/> b. APPEAL		3. DATE COMPLETED (YYYYMMDD) 19980701					
4. CLERICAL HOURS (E-9/GS-8 and below)				TOTAL HOURS (1)	HOURLY RATE (2)		COST (3)		
a. SEARCH				2.00	X \$13.25	=	• 26.50		
b. REVIEW/EXCISING				1.00			• 13.25		
c. CORRESPONDENCE AND FORMS PREPARATION				0.00			• 0.00		
d. OTHER ACTIVITY				0.00			• 0.00		
e. MINIMUM CHARGE				3.00			• 24.90		
5. PROFESSIONAL HOURS (O-1 - O-6/GS-9 - GS/GM-15)				TOTAL HOURS (1)	HOURLY RATE (2)		COST (3)		
a. SEARCH				1.00	X ACTUAL HOURLY RATE	=	• 25.00		
b. REVIEW/EXCISING				1.50			• 37.50		
c. COORDINATION/APPROVAL/DENIAL				0.25			• 6.25		
d. OTHER ACTIVITY				0.00			• 0.00		
e. MINIMUM CHARGE				2.75			• 34.38		
6. EXECUTIVE HOURS (O-7/GM-16/ES 1 and above)				TOTAL HOURS (1)	HOURLY RATE (2)		COST (3)		
a. SEARCH				0.00	X ACTUAL HOURLY RATE	=	• 0.00		
b. REVIEW/EXCISING				0.00			• 0.00		
c. COORDINATION/APPROVAL/DENIAL				0.25			• 25.00		
d. MINIMUM CHARGE				0.25			• 12.50		
7. COMPUTER SEARCH				TOTAL HOURS (1)	HOURLY RATE (2)		COST (3)		
a. MACHINE HOURS				0.00	X 0.00	=	• 0.00		
b. PROGRAMMER/OPERATOR TIME									
- Clerical				1.00			• 13.25		
- Professional				1.00			• 25.00		
8. REPRODUCTION				NUMBER (1)	RATE (2)		COST (3)		
a. AERIAL PHOTOGRAPHS, SPECIFICATIONS, PERMITS, CHARTS, BLUEPRINTS, AND OTHER TECHNICAL DOCUMENTS				1	\$ 2.50		• 2.50		
b. ENGINEERING DATA (Microfilm)									
- Aperture cards						X	=		
-- Silver duplicate negative, per card				0	.75			• 0.00	
-- When keypunched and verified, per card				0	.85			• 0.00	
-- Diazo duplicate negative, per card				1	.65			• 0.65	
-- When keypunched and verified, per card				0	.75			• 0.00	
- 35 mm roll film, per frame				0	.50			• 0.00	
- 16 mm roll film, per frame				0	.45			• 0.00	
- Paper prints (engineering drawings), each				0	1.50			• 0.00	
- Paper reprints of microfilm indices, each				0	.10	• 0.00			
c. AUDIOVISUAL MATERIALS (Insert actual cost in block (2))				25	1.24		• 31.00		
d. OTHER TECHNICAL DATA RECORDS									
Charges for any additional services not specifically provided above shall be made by components at the following rates:									
- Minimum charge for office copy (up to six images)				1	\$ 3.50	X	=	• 3.50	
- Each additional image				30	.10			• 3.00	
- Each typewritten page				0	3.50			• 0.00	
- Certification and validation with seal, each				0	5.20			• 0.00	
- Hand-drawn plots and sketches, each hour or fraction thereof				0.00	12.00			• 0.00	
* Chargeable to all requesters.									
9. FOR FOI OFFICE USE ONLY									
a. SEARCH FEES PAID		89.75		f. TOTAL COLLECTABLE		181.15			
b. REVIEW FEES PAID		50.75		g. TOTAL PROCESSING		212.40			
c. COPY FEES PAID		40.65		h. TOTAL CHARGED		181.15			
d. TOTAL PAID		181.15		i. FEES WAIVED/REDUCED (X one)		YES	X	NO	
e. DATE PAID (YYYYMMDD)		19980801							

INSTRUCTIONS FOR COMPLETING DD FORM 2086-1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

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

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

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

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

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

9. FOR FOI OFFICE USE ONLY -

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

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

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

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

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

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

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

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

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

ANNUAL REPORT FREEDOM OF INFORMATION ACT										REPORT CONTROL SYMBOL DD-DA&M(A)1365
1. INITIAL REQUEST DETERMINATIONS										
a. TOTAL REQUESTS		b. GRANTED IN FULL		c. DENIED IN PART		d. DENIED IN FULL		e. "OTHER REASONS"		f. TOTAL ACTIONS
30		24		3		1		6		34
2a. EXEMPTIONS INVOKED ON INITIAL REQUEST DETERMINATIONS										
(b) (1)		(b) (2)		(b) (3)		(b) (4)		(b) (5)		(b) (6)
3		0		2		1		0		0
(b) (7)(A)	(b) (7)(B)	(b) (7)(C)		(b) (7)(D)		(b) (7)(E)		(b) (7)(F)		(b) (8)
0	0	0		1		1		1		0
2b. "OTHER REASONS" CITED ON INITIAL DETERMINATIONS										
1	2	3	4	5	6	7	8	9	TOTAL	
1	4	1	1	0	0	0	0	0	7	
2c. STATUTES CITED ON INITIAL REQUEST (b)(3) EXEMPTIONS										
(1)(b)(3) STATUTE CLAIMED				NUMBER OF INSTANCES	COURT UPHELD? (Yes or No)	CONCISE DESCRIPTION OF MATERIAL WITHHELD				
10 USC §130 10 USC §424				1 1	Y N	Unclassified technical data regarding design of reentry vehicles (RV) Organizational data for protected organizations				
S A M P L E										
3. APPEAL DETERMINATIONS										
a. TOTAL REQUESTS		b. GRANTED IN FULL		c. DENIED IN PART		d. DENIED IN FULL		e. "OTHER REASONS"		f. TOTAL ACTIONS
4		0		3		1		0		4

AP6. APPENDIX 6

DOD FREEDOM OF INFORMATION ACT PROGRAM COMPONENTS

Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff/Combatant Commands,
Defense Agencies, and the DoD Field Activities

Department of the Army

Department of the Navy

Department of the Air Force

Defense Information Systems Agency

Defense Contract Audit Agency

Defense Intelligence Agency

Defense *Security* Service

Defense Logistics Agency

National Imagery and Mapping Agency

Defense Special Weapons Agency

National Security Agency

Office of the Inspector General, Department of Defense

Defense Finance and Accounting Service

National Reconnaissance Office



DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

02 SEP 1998

Ref: 98-CORR-123

MEMORANDUM FOR THE DIRECTOR OF ADMINISTRATION AND
MANAGEMENT

SUBJECT: Certification Statement that 32 CFR Part 286 is not
Subject to Executive Order 12866, Public Law 104-4,
Public Law 96-354, and Public Law 96-511

Executive Order 12866, "Regulatory Planning and Review"

It has been determined that 32 CFR Part 286 is not a significant regulatory action. The rule 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 of the Unfunded Mandates Reform Act (Public Law 104-4)

It has been determined that this regulatory action does not contain a Federal mandate that may result in the 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 this rule 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. This rule implements the Freedom of Information Act (5 U.S.C. § 552), a statute concerning the release of Federal Government records, and does not economically impact Federal Government relations with the private sector.



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

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



A. H. Passarella
Director

Concurrence:

OGC

S. Key 18 Aug 98

COMMENTS OF PUBLIC CITIZEN, INC. AND
THE FREEDOM OF INFORMATION CLEARINGHOUSE ON
THE DEPARTMENT OF DEFENSE'S
FREEDOM OF INFORMATION ACT PROGRAM REGULATION

Public Citizen and the Freedom of Information Clearinghouse submit these comments regarding the Department of Defense's (DoD's) proposed revisions to its Freedom of Information Act regulations, 63 Fed. Reg. 31161 (June 8, 1998). We submit these comments in order to object to the provision set forth at proposed 32 C.F.R. § 286.7(b)(4)(a)(2)(D)(i), which allows DoD Components to decide "on a case by case basis" whether records that have already become subject to several requests should be placed in Component reading rooms. The provision gives too much discretion to the Component to decide which repeatedly requested records are subject to the new reading room requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended by the Electronic Freedom of Information Act (EFOIA) Amendments of 1996, Public Law 104-231.

Both Public Citizen and the Freedom of Information Clearinghouse have had extensive experience, both as requesters and as counsel for requesters, with agencies' implementation of FOIA. Public Citizen, founded by Ralph Nader in 1972, is a non-profit consumer advocacy organization with over 120,000 active supporters nationwide. From its founding, Public Citizen has regularly used the FOIA to request records related to its advocacy efforts and has represented FOIA requesters in approximately 300 lawsuits challenging government secrecy. The Freedom of Information Clearinghouse is a project of Ralph Nader's Center for Study of Responsive Law, directed by a Public Citizen lawyer. The Clearinghouse has provided technical and legal assistance since

1972 to individuals, public interest groups, and the media who seek access to information held by government agencies. We submit these comments to ensure that the DoD's regulations correspond to Congress's mandate to open up government action to public scrutiny.

In enacting the EFOIA Amendments, Congress recognized that certain records are subject to multiple FOIA requests and that these records should be treated as (a)(2) materials and made available for public inspection and copying in agency reading rooms in order to speed up access for requesters and to divert potential requests for previously-released records from FOIA-processing altogether. 5 U.S.C. §552(a)(2)(D). These (a)(2) records are defined as:

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) [pursuant to a FOIA request] and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

Under this provision, agencies are "required to make available for public inspection and copying, in the same manner as other materials made available under Section 552(a)(2), copies of records released in response to FOIA requests that the agency determines have been or will likely be the subject of additional requests." H. Rep. No. 795, 104th Cong., 2d Sess. 21 (1996). Congress believed that providing reading room access to these requested records "would help to reduce the number of multiple FOIA requests for the same records requiring separate agency responses" and allow agencies to "better use their FOIA resources to fulfill new requests." Id.

To implement this new statutory mandate, DoD's proposed regulations provide:

DoD Components shall decide on a case by case basis whether records fall into this category [of repeatedly-requested records], based on the following factors:

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

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

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

Proposed 32 C.F.R. § 286.7(b)(4)(a)(2)(D)(i). For records that have not yet been subject to multiple requests, the factors listed in the proposed regulations for an agency to consider are sensible. However, these factors should not be used as a basis for refusing to place records that have already been the subject of several FOIA requests in Component reading rooms. Once a Component receives multiple FOIA requests for the same records, the presumption should be that the records are placed in the reading room, so that the public no longer has to file a formal FOIA request for the information. The proposed regulation gives a Component too much discretion on how to treat records that have already been subject to multiple FOIA records.

Accordingly, we urge DoD to amend the proposal to clarify that a case by case analysis should be conducted only when determining whether records "are likely to become" subject to subsequent requests. The final rule should provide as follows (suggested additions are underlined):

(4)(a)(2)(D) records. Those 5 U.S.C. 552(a)(3) records, which because of the nature of their subject matter, have become or

are likely to become the subject of subsequent records for substantially the same records. These records are referred to as FOIA-processed (a)(2) records.

(i) For records that have not yet been subject of subsequent requests, DoD Components shall decide on a case by case basis whether records are likely to fall into this category, based on the following factors:

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

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

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

Respectfully submitted,



Lucinda Sikes
Michael Tankersley
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

August 7, 1998

This comment is rejected for two reasons:

1. *The portion of the Regulation they cited was not amended during this Federal Register run. This portion was amended in Apr-May 1997. Public Citizen forwarded comments on that version, which did not include this comment. Thus, their comment ^{period} on that portion of the Regulation has expired.*

2. *They base their argument solely on a request being the subject of subsequent requests. This is only part of the issue, the other part being "the nature of their subject matter." The DoD Regulation recognizes both the nature of the subject matter, and whether subsequent requests will be made for the same records. Public Citizen only speaks of requests being the subject of future requests.*

*TALBOT
DFAIR*



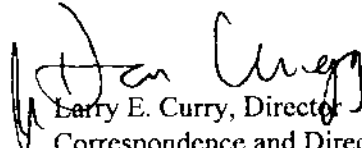
DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

2 JUN 1998

MEMORANDUM FOR DIRECTOR OF ORGANIZATIONAL AND MANAGEMENT
PLANNING, ODA&M
DEFENSE PRIVACY OFFICE, ODA&M
INFORMATION OPERATIONS AND REPORTS, WHS
BUDGET AND FINANCE, WHS
PERSONNEL AND SECURITY, WHS
REAL ESTATE AND FACILITIES, WHS

SUBJECT: Formal Coordination of Change to DoD 5500.7-R, "Joint Ethics Regulation"

1. The subject DoD Issuance is forwarded for review and coordination.
2. Concurrence. Concur by completing and returning the memorandum below.
3. Comments or nonconcurrence. Comments or nonconcurrence with justification must be submitted on a letterhead memorandum to the Director, Correspondence and Directives, WHS. Your memorandum will be used as an attachment to the coordination memorandum that is signed by the Director of Administration and Management (DA&M).
4. Coordinations must be signed by the Director or Principal Deputy Director of the WHS Component. The coordinations must be received by **June 18, 1998** for inclusion in the consolidated WHS/DA&M coordination memorandum signed by the DA&M that is provided to the originator of the subject issuance within the suspense date designated on the SD Form 106.


Larry E. Curry, Director
Correspondence and Directives

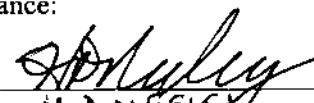
Attachments

a/s

MEMORANDUM FOR DIRECTOR, CORRESPONDENCE AND DIRECTIVES, WHS

SUBJECT: Formal Coordination of Change to DoD 5500.7-R, "Joint Ethics Regulation"

This office concurs with the subject issuance:

 (Signature)
H. P. NEELEY (Typed/printed Name)
CH, D&RD (Title & Office Symbol)
16 JUN 98 (Date)



COORDINATION

LIST OF COORDINATING OFFICIALS

GC, DoD	Stewart F. Aly, Acting Dep. GC (LC)
IG, DoD	Donald Mancuso, Dep. IG
DA&M	Larry E. Curry, Acting DA&M
Army	David Borland, Vice Dir. Of Info. Systems for Command, Control, Comm. & Computers
Navy	Leigh A. Bradley, Acting GC
Air Force	William A. Davidson, Admin. Asst to the Secty.
NSA	RADM Winsor Whiton, USN, Dep. Dir. For Plans, Policy and Programs

- DOD DIRECTIVES SYSTEM COORDINATION RECORD

(Please read instructions on back before completing form.)

15. COORDINATORS**UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND TECHNOLOGY**

- PRINCIPAL DEPUTY UNDER SECRETARY FOR ACQUISITION AND TECHNOLOGY
- DMR DEFENSE RESEARCH AND ENGINEERING
- ASD FOR ECONOMIC SECURITY
- ATSD FOR ATOMIC ENERGY
- DMR ADVANCED RESEARCH PROJECTS AGENCY
- DMR BALLISTIC MISSILE DEFENSE ORGANIZATION
- DMR DEFENSE LOGISTICS AGENCY
- DMR DEFENSE NUCLEAR AGENCY
- DMR ON-SITE INSPECTION AGENCY

UNDER SECRETARY OF DEFENSE FOR POLICY

- PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE FOR POLICY
- ASD FOR INTERNATIONAL SECURITY AFFAIRS
- ASD FOR INTERNATIONAL SECURITY POLICY
- ASD FOR SPECIAL OPERATIONS AND LOW-INTENSITY CONFLICT
- ASD FOR STRATEGY AND REQUIREMENTS
- DMR OF NET ASSESSMENT
- DMR DEFENSE SECURITY ASSISTANCE AGENCY

UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS

- ASD FOR FORCE MANAGEMENT
- ASD FOR HEALTH AFFAIRS
- ASD FOR RESERVE AFFAIRS
- DMR DEFENSE COMMISSARY AGENCY

ASD FOR COMMAND, CONTROL, COMMUNICATIONS, AND INTELLIGENCE

- DMR DEFENSE INFORMATION SYSTEMS AGENCY
- DMR DEFENSE INTELLIGENCE AGENCY
- DMR DEFENSE INVESTIGATIVE SERVICE
- DMR DEFENSE MAPPING AGENCY

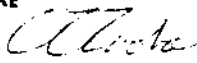
ASD FOR LEGISLATIVE AFFAIRS**COMPTROLLER, DoD**

- PRINCIPAL DEPUTY COMPTROLLER
- DMR PROGRAM ANALYSIS AND EVALUATION
- DMR DEFENSE CONTRACT AUDIT AGENCY
- DMR DEFENSE FINANCE AND ACCOUNTING SERVICE

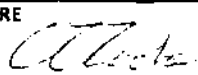
GENERAL COUNSEL, DoD

- DMR DEFENSE LEGAL SERVICES AGENCY

INSPECTOR GENERAL, DoD**DIR OPERATIONAL TEST AND EVALUATION, OSD****ATSD FOR INTELLIGENCE OVERSIGHT****ATSD FOR PUBLIC AFFAIRS****DIR OF ADMINISTRATION AND MANAGEMENT, OSD (4 cys)****SECRETARY OF THE ARMY****SECRETARY OF THE NAVY****SECRETARY OF THE AIR FORCE****CHAIRMAN OF THE JOINT CHIEFS OF STAFF****DIR CENTRAL IMAGERY OFFICE****DIR NATL SECURITY AGENCY / CHIEF, CENTRAL SECURITY SERVICE**

1. COORDINATION SUSPENSE DATE (YYMMDD) 01 APR 1998		2. DOD ISSUANCE NUMBER DoD 5400.7-R	
3. TYPE OF DOD ISSUANCE (X one)	4. TYPE OF ACTION (X one)	5. SECURITY CLASSIFICATION (X one)	
<input type="checkbox"/> DoD DIRECTIVE	<input type="checkbox"/> NEW	<input type="checkbox"/> TOP SECRET	
<input checked="" type="checkbox"/> DoD INSTRUCTION	<input checked="" type="checkbox"/> REISSUANCE	<input type="checkbox"/> SECRET	
<input checked="" type="checkbox"/> DoD PUBLICATION	<input type="checkbox"/> CHANGE	<input type="checkbox"/> CONFIDENTIAL	
<input type="checkbox"/> ADMINISTRATIVE INSTRUCTION (AI)	<input type="checkbox"/> CANCELLATION	<input checked="" type="checkbox"/> UNCLASSIFIED	
6. SUBJECT (Title) DoD Freedom of Information Act Program			
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10. FORMS PRESCRIBED (X one) (If Yes, list form number(s) and title(s) in item 7.)		11. REPORTS REQUIRED (X all that apply) (Define in item 7)	
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13. ACTION OFFICER			
a. NAME (Last, First, Middle Initial) Talbott, Charlie Y.		b. OFFICE DESIGNATION DFOISR	
c. ROOM NUMBER 2C757		d. TELEPHONE NUMBER (Include Area Code) (703) 697-1160	
14. AUTHORIZING OFFICIAL (OSD Principal Staff Assistant or Principal Deputy) David O. Cooke			
a. SIGNATURE 			
b. NAME AND TITLE David O. Cooke, Director, A&M		c. DATE SIGNED 18 Feb 98	

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#11. DD Form 2564, "Annual Report: FOIA"				COMPTROLLER, DoD • PRINCIPAL DEPUTY COMPTROLLER • DIR PROGRAM ANALYSIS AND EVALUATION • DIR DEFENSE CONTRACT AUDIT AGENCY • DIR DEFENSE FINANCE AND ACCOUNTING SERVICE	
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a. SIGNATURE <i>David O. Cooke</i>					
b. NAME AND TITLE David O. Cooke, Director, A&M			c. DATE SIGNED 18 Feb 98		

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GENERAL COUNSEL, DoD <ul style="list-style-type: none"> • DMR DEFENSE LEGAL SERVICES AGENCY 											
INSPECTOR GENERAL, DoD											
DMR OPERATIONAL TEST AND EVALUATION, OSD											
ATSD FOR INTELLIGENCE OVERSIGHT											
ATSD FOR PUBLIC AFFAIRS											
DIR OF ADMINISTRATION AND MANAGEMENT, OSD (4 cys)											
SECRETARY OF THE ARMY											
SECRETARY OF THE NAVY											
SECRETARY OF THE AIR FORCE											
CHAIRMAN OF THE JOINT CHIEFS OF STAFF											
DIR CENTRAL IMAGERY OFFICE											
DIR NATL SECURITY AGENCY / CHIEF, CENTRAL SECURITY SERVICE											

Specific Army Comments

to

DoD Regulation 5400.7

C1. CHAPTER 1 GENERAL PROVISIONS:

Para C1.4.2, Line 1-7. FOIA Request - The new sentence "Requesters should also address fees in their requests" should be changed. Requesters must promise to pay the appropriate fees, as noted in section C5.1.1.1.3 and other sections of the regulation. It might be inferred from this sentence under the definition section, that fees only need to be addressed and that promise to pay is not required. The sentence could be changed to - Requesters must also promise to pay the appropriate fee in their request.

Reject. The intent is to be permissive. Cite para data not apply.

Para C1.5.7.1., Line 7. Should read ...charged to the requester unless the fee for creating the record exceeds the fee....

Reject. This is a different way of paying the same thing.

Para C1.5.9.4, Line 1-3. Change to...a DoD Component shall refer a FOIA request and a copy of the record it holds that was originated by another DoD Component, or contains substantial...

Accept Ok

Para C1.5.9.4, Line 1-5. Portion of paragraph is not clear; should read...a DoD Component shall refer a FOIA request and a copy of the records it holds, that was originated by another DoD Component to that Component for direct response...

Accept Ok Same as above

Para C1.5.13.7. Requesters shall be advised in the final response letter which Act was used.

Reject.

Current amended language is more comprehensive.

C3. CHAPTER 3 EXEMPTIONS:

Para C3.2.1.4, Line 5. Change to...Records within exemption 4 must contain...

Reject.

No need for this change because the entire para speaks of "exemption 4."

C5. CHAPTER 5 RELEASE AND PROCESSING PROCEDURES:

Para C5.2.2.8. Duplicate Request - That provision allows components to not comply with a duplicate request "received via different means... at the same or different times". That provision should be expanded to all components to not comply with duplicate requests to not comply with duplicate requests via the same or different means. Duplicate request via the same means (e.g. two letters) can cause the same problems as duplicate requests via different means.

*Reject.
This makes
no sense.
Our current
wording covers
the same
information asked
for more than
once.*

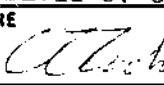
C6. CHAPTER 6 FEE SCHEDULE:

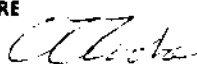
Para C6.1.2.3.1. That paragraph requires components to conduct "partial searches". It is not clear from that paragraph whether the requester would still be required to promise to pay the appropriate fee in the request letter before a partial search is conducted. If "the requester's hourly and/or fee threshold" is the statutory minimum, e.g. two hours and 100 pages for "other" requesters, "partial searches" would be required for almost all requests (even when the requester did not promise to pay in advance). That provision should be clarified.

*MOOT
"partial
search" para
has been
removed.*

Para C6.3.1.3. Fee Rates - Recommend periodic changes be published to keep pace with salary increases and cost of consumables.

*Reject.
Current fee
rates as in
litigation.
Can not change
now.*

- DOD DIRECTIVES SYSTEM COORDINATION RECORD (Please read instructions on back before completing form.)				15. COORDINATORS	
1. COORDINATION SUSPENSE DATE (YYMMDD) 01 APR 1998		2. DODISSUANCE NUMBER DoD 5400.7-R		UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND TECHNOLOGY • PRINCIPAL DEPUTY UNDER SECRETARY FOR ACQUISITION AND TECHNOLOGY • DIR DEFENSE RESEARCH AND ENGINEERING • ASD FOR ECONOMIC SECURITY • ATSD FOR ATOMIC ENERGY • DIR ADVANCED RESEARCH PROJECTS AGENCY • DIR BALLISTIC MISSILE DEFENSE ORGANIZATION • DIR DEFENSE LOGISTICS AGENCY • DIR DEFENSE NUCLEAR AGENCY • DIR ON-SITE INSPECTION AGENCY	
3. TYPE OF DOD ISSUANCE (X one)	4. TYPE OF ACTION (X one)	5. SECURITY CLASSIFICATION (X one)			
<input type="checkbox"/> DoD DIRECTIVE	<input type="checkbox"/> NEW	<input type="checkbox"/> TOP SECRET			
<input checked="" type="checkbox"/> DoD PUBLICATION	<input checked="" type="checkbox"/> REISSUANCE	<input type="checkbox"/> SECRET			
<input type="checkbox"/> ADMINISTRATIVE INSTRUCTION (AI)	<input type="checkbox"/> CHANGE	<input type="checkbox"/> CONFIDENTIAL		UNDER SECRETARY OF DEFENSE FOR POLICY • PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE FOR POLICY • ASD FOR INTERNATIONAL SECURITY AFFAIRS • ASD FOR INTERNATIONAL SECURITY POLICY • ASD FOR SPECIAL OPERATIONS AND LOW-INTENSITY CONFLICT • ASD FOR STRATEGY AND REQUIREMENTS • DIR OF NET ASSESSMENT • DIR DEFENSE SECURITY ASSISTANCE AGENCY	
	<input type="checkbox"/> CANCELLATION	<input checked="" type="checkbox"/> UNCLASSIFIED			
6. SUBJECT (Title) DoD Freedom of Information Act Program					
7. PURPOSE AND REMARKS (If additional space is needed, a separate page should be attached.) DoD 5400.7-R has been amended and will be reissued. Reissuance contains amendments made since the last issuance, which are necessary to implement the Freedom of Information Act, 5 USC 552. Amendments are in italics.					
#10. DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost" DD Form 2086-1, "Record of Freedom of Information (FOI) Processing Cost for Technical Data"			UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS • ASD FOR FORCE MANAGEMENT • ASD FOR HEALTH AFFAIRS • ASD FOR RESERVE AFFAIRS • DIR DEFENSE COMMISSARY AGENCY		
#11. DD Form 2564, "Annual Report: FOIA"					
8. FEDERAL REGISTER DOCUMENT REQUIRED (X one)		9. IMPLEMENTING DOCUMENTS REQUIRED (X one)			
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO				
10. FORMS PRESCRIBED (X one) (If Yes, list form number(s) and title(s) in item 7.)		11. REPORTS REQUIRED (X all that apply) (Define in item 7)		ASD FOR COMMAND, CONTROL, COMMUNICATIONS, AND INTELLIGENCE • DIR DEFENSE INFORMATION SYSTEMS AGENCY • DIR DEFENSE INTELLIGENCE AGENCY • DIR DEFENSE INVESTIGATIVE SERVICE • DIR DEFENSE MAPPING AGENCY	
<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		<input type="checkbox"/> OMB <input checked="" type="checkbox"/> RCS <input type="checkbox"/> IRCN			
12. DOD PUBLICATION ONLY (X all that apply)					
a. THE MILITARY DEPARTMENTS AND THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF. Provide the names and telephone numbers of the functional managers who may be contacted to make arrangements for the printing and distribution of the DoD Publication for their organizations. Include this information with the coordination.					
b. OSD. Provide the names and complete mailing addresses of the OSD offices that require the DoD Publication, including the number of copies for each addressee. Include this information with the coordination.				ASD FOR LEGISLATIVE AFFAIRS COMPTROLLER, DoD • PRINCIPAL DEPUTY COMPTROLLER • DIR PROGRAM ANALYSIS AND EVALUATION • DIR DEFENSE CONTRACT AUDIT AGENCY • DIR DEFENSE FINANCE AND ACCOUNTING SERVICE	
c. DEFENSE AGENCIES. OSD Components should contact the Defense Agencies under their cognizance to obtain the names and telephone numbers of functional managers in the Defense Agencies who may be contacted to make arrangements for the printing and distribution of the DoD Publication for their Agencies. Include this information with the coordination.					
13. ACTION OFFICER					
a. NAME (Last, First, Middle Initial) Talbot, Charlie Y.		b. OFFICE DESIGNATION DFOISR			
c. ROOM NUMBER 20757		d. TELEPHONE NUMBER (Include Area Code) (703) 697-1160		GENERAL COUNSEL, DoD • DIR DEFENSE LEGAL SERVICES AGENCY	
14. AUTHORIZING OFFICIAL (OSD Principal Staff Assistant or Principal Deputy) David O. Cooke					
a. SIGNATURE 					
b. NAME AND TITLE David O. Cooke, Director, A&M		c. DATE SIGNED 18 Feb 98			
				INSPECTOR GENERAL, DoD DIR OPERATIONAL TEST AND EVALUATION, OSD ATSD FOR INTELLIGENCE OVERSIGHT ATSD FOR PUBLIC AFFAIRS	
				DIR OF ADMINISTRATION AND MANAGEMENT, OSD (4 cys) SECRETARY OF THE ARMY SECRETARY OF THE NAVY General Counsel (Acting) SECRETARY OF THE AIR FORCE	
				CHAIRMAN OF THE JOINT CHIEFS OF STAFF DIR CENTRAL IMAGERY OFFICE DIR NATL SECURITY AGENCY / CHIEF, CENTRAL SECURITY SERVICE	

- DOD DIRECTIVES SYSTEM COORDINATION RECORD (Please read instructions on back before completing form.)				15. COORDINATORS		
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3. TYPE OF DOD ISSUANCE (X one)	4. TYPE OF ACTION (X one)	5. SECURITY CLASSIFICATION (X one)	UNDER SECRETARY OF DEFENSE FOR POLICY • PRINCIPAL DEPUTY UNDER SECRETARY OF DEFENSE FOR POLICY • ASD FOR INTERNATIONAL SECURITY AFFAIRS • ASD FOR INTERNATIONAL SECURITY POLICY • ASD FOR SPECIAL OPERATIONS AND LOW-INTENSITY CONFLICT • ASD FOR STRATEGY AND REQUIREMENTS • DIR OF NET ASSESSMENT • DIR DEFENSE SECURITY ASSISTANCE AGENCY			
<input type="checkbox"/> DoD DIRECTIVE	<input type="checkbox"/> NEW	<input type="checkbox"/> TOP SECRET				
<input checked="" type="checkbox"/> DoD INSTRUCTION	<input checked="" type="checkbox"/> REISSUANCE	<input type="checkbox"/> SECRET				
<input checked="" type="checkbox"/> DoD PUBLICATION	<input type="checkbox"/> CHANGE	<input type="checkbox"/> CONFIDENTIAL	UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS • ASD FOR FORCE MANAGEMENT • ASD FOR HEALTH AFFAIRS • ASD FOR RESERVE AFFAIRS • DIR DEFENSE COMMISSARY AGENCY			
<input type="checkbox"/> ADMINISTRATIVE INSTRUCTION (AI)	<input type="checkbox"/> CANCELLATION	<input checked="" type="checkbox"/> UNCLASSIFIED				
6. SUBJECT (Title) DoD Freedom of Information Act Program				ASD FOR COMMAND, CONTROL, COMMUNICATIONS, AND INTELLIGENCE • DIR DEFENSE INFORMATION SYSTEMS AGENCY • DIR DEFENSE INTELLIGENCE AGENCY • DIR DEFENSE INVESTIGATIVE SERVICE • DIR DEFENSE MAPPING AGENCY		
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8. FEDERAL REGISTER DOCUMENT REQUIRED (X one) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		9. IMPLEMENTING DOCUMENTS REQUIRED (X one) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		GENERAL COUNSEL, DoD • DIR DEFENSE LEGAL SERVICES AGENCY		
10. FORMS PRESCRIBED (X one) (If Yes, list form number(s) and title(s) in item 7.) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		11. REPORTS REQUIRED (X all that apply) (Define in item 7) <input type="checkbox"/> OMB <input checked="" type="checkbox"/> RCS <input type="checkbox"/> IRCN				
12. DOD PUBLICATION ONLY (X all that apply)				INSPECTOR GENERAL, DoD DIR OPERATIONAL TEST AND EVALUATION, OSD ATSD FOR INTELLIGENCE OVERSIGHT ATSD FOR PUBLIC AFFAIRS DIR OF ADMINISTRATION AND MANAGEMENT, OSD (4 cys) SECRETARY OF THE ARMY SECRETARY OF THE NAVY SECRETARY OF THE AIR FORCE MAY 4 1998 CHAIRMAN OF THE JOINT CHIEFS OF STAFF DIR CENTRAL IMAGERY OFFICE DIR NATL SECURITY AGENCY / CHIEF, CENTRAL SECURITY SERVICE		
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c. ROOM NUMBER 2C757		d. TELEPHONE NUMBER (Include Area Code) (703) 697-1160				
14. AUTHORIZING OFFICIAL (OSD Principal Staff Assistant or Principal Deputy) David O. Cooke						
a. SIGNATURE 						
b. NAME AND TITLE David O. Cooke, Director, A&M						
c. DATE SIGNED 18 Feb 98						



NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000

16 March 1998
Serial: DDP-007-98

MEMORANDUM FOR DIRECTORATE FREEDOM OF INFORMATION AND SECURITY
REVIEW (OATSD) (PA) (FOI/SR)

SUBJECT: DoD Freedom of Information Act Program

This responds to your SD FORM 106, Subj: DoD Freedom of Information Act Program, dated 18 February 1998. NSA/CSS has no comments on the changes to DoD 5400.7-R. Please be advised, however, that with an amendment to 50 U.S.C. 403, the cites included as reference o. and at C3.2.1.3.7 are no longer correct. The correct citation is 50 U.S.C. 403-3(c)(6).

accept


WINSOR WHITON

RADM, USN
Deputy Director
for Plans, Policy and Programs




DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

MEMORANDUM FOR DIRECTOR OF FREEDOM OF INFORMATION AND SECURITY
REVIEW

SUBJECT: Proposed DoD 5400.7-R, "DoD Freedom of Information Act Program"

We have reviewed the subject Regulation and concur, subject to the comments submitted by the Directors of Information Operations and Reports and the Defense Privacy Office, which are attached at TAB B.

Editorial and format improvements, as discussed with Mr. Cragg, have been incorporated at TAB A.


Larry E. Curry, Director
Correspondence and Directives

Attachments
a/s





DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
DIRECTORATE FOR INFORMATION OPERATIONS AND REPORTS
1215 JEFFERSON DAVIS HIGHWAY, SUITE 1204
ARLINGTON, VA 22202-4302

MAR 11 1998

MEMORANDUM FOR DIRECTOR, CORRESPONDENCE AND DIRECTIVES, WHS

SUBJECT: Formal Coordination of DoD Instruction 5400.7-R, *DoD Freedom of Information Act Program*

This office has reviewed the subject DoD publication and the following comments should be forwarded to the originator:

1. Please change paragraph C7.1.3. (page 66) to read as follows:

C7.1.1.3. The reporting requirement outlined in this Chapter is assigned Report Control Symbol (RCS) DD-DA&M(A)1365, *Freedom of Information Act Report to Congress*.

2. If DD Form 2564 is intended to be used as it is currently designed, please change paragraph C7.1.2., Annual Report Content to read as follows:

DD Form 2564, dated MAR 1998, shall be used to submit component input. DD Form 2564 is available on the Internet under DefenseLink, Publications. Instructions for completion follow:

3. Please change subparagraphs 2.8. and 2.9., of Appendix 1, from *Director, Administration & Management* to *Director, Administration and Management and Washington Headquarters Services*.

4. Please change the second sentence of subparagraph 5.2., of Appendix 1., paragraph 5., INFORMATION REQUIREMENTS to read as follows:

This reporting requirement has been assigned RCS DD-DA&M(A)1365 in accordance with DoD 8910.1-M (reference (an)).

5. Appendix 5, DD Form 2564, *Annual Report Freedom of Information Act*, will be finalized by WHS/DIOR upon completion of DD Form 67, *Form Processing Action Request*, block 15, *External Coordination and Concurrence*. Upon receipt of DD Form 67, block 15 coordination, camera copies will be provided to you in time for use in this publication.

Accept

Actually Accept

Cannot use a date because I don't know when the Reg will be published

OK Accept


Accept

Accept

Tab B

6. All forms require sample entries. The sample entries provide visual information for completing the form; whereas, blank forms serve no useful purpose because typewriter alignment is lost when the form is reduced in size to accommodate the page size of the publication. Accept

If additional information is needed, please contact the DIOR Information Control Division staff at (703) 604-4573.



Robert S. Drake
Director

cc:

OASD(PA)

Attention: Ms. Patricia Bursell

WHS/DFOISR

Attention: Mr. Charlie Y. Talbott

Attention: LTC Don Campbell



DEPARTMENT OF DEFENSE
DEFENSE PRIVACY OFFICE
1941 JEFFERSON DAVIS HIGHWAY, SUITE 920
ARLINGTON, VA 22202-4502

March 4, 1998

MEMORANDUM FOR CORRESPONDENCE AND DIRECTIVES, WHS

SUBJECT: Formal Coordination of DoD 5400.7-R, "DoD Freedom of Information Act Program"

This responds to your request for comments regarding the draft revision of DoD 5400.7-R.

The following comments and recommendations are offered:

- o Page 31, para C3.2.1.6.2, last sentence.

Delete: sentence, and

Substitute:

"In addition, the names and duty (postal and/or e-mail) addresses of DoD military and civilian personnel who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories can constitute a clearly unwarranted invasion of personal privacy."

Accept

Comment: Simplicity

- o Page 31, para C3.2.1.6.2.2.

Add: "(postal and/or e-mail)"

Between: "duty" and "addresses"

Reason: Consistency with para C3.2.1.6.2.

- o Pages 31-32

Comment: Unless it is the intent of the proponent to change the paragraphing of the current regulation, and it does not appear that this is intended, para C3.2.1.6.2.3 should be C3.2.1.6.3. And if so, the follow-on subparas must be changed as well.

Accept

Accept

Vahan Moushegian, Jr.
Acting Director





DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

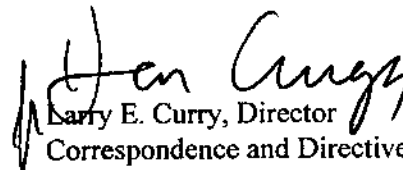


23 FEB 1998

MEMORANDUM FOR DIRECTOR OF ORGANIZATIONAL AND MANAGEMENT
PLANNING, ODA&M
DEFENSE PRIVACY OFFICE, ODA&M
INFORMATION OPERATIONS AND REPORTS, WHS
BUDGET AND FINANCE, WHS
PERSONNEL AND SECURITY, WHS
REAL ESTATE AND FACILITIES, WHS

SUBJECT: Formal Coordination of DoD 5400.7-R, "DoD Freedom of Information Act Program"

1. The subject DoD Issuance is forwarded for review and coordination.
2. Concurrence. Concur by completing and returning the memorandum below.
3. Comments or nonconcurrence. Comments or nonconcurrence with justification must be submitted on a letterhead memorandum to the Director, Correspondence and Directives, WHS. Your memorandum will be used as an attachment to the coordination memorandum that is signed by the Director of Administration and Management (DA&M).
4. Coordinations must be signed by the Director or Principal Deputy Director of the WHS Component. The coordinations must be received by **March 9, 1998** for inclusion in the consolidated WHS/DA&M coordination memorandum signed by the DA&M that is provided to the originator of the subject issuance within the suspense date designated on the SD Form 106.

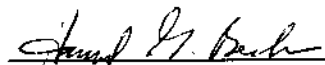

Larry E. Curry, Director
Correspondence and Directives

Attachments
a/s

MEMORANDUM FOR DIRECTOR, CORRESPONDENCE AND DIRECTIVES, WHS

SUBJECT: Formal Coordination of DoD 5400.7-R, "DoD Freedom of Information Act Program"

This office concurs with the subject issuance:

	(Signature)
Howard G. Becker	(Typed/printed Name)
Director, O&MP	(Title & Office Symbol)
3/5/98	(Date)





DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155


23 FEB 1998



MEMORANDUM FOR DIRECTOR OF ORGANIZATIONAL AND MANAGEMENT
PLANNING, ODA&M
DEFENSE PRIVACY OFFICE, ODA&M
INFORMATION OPERATIONS AND REPORTS, WHS
BUDGET AND FINANCE, WHS
PERSONNEL AND SECURITY, WHS
REAL ESTATE AND FACILITIES, WHS

SUBJECT: Formal Coordination of DoD 5400.7-R, "DoD Freedom of Information Act Program"

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Larry E. Curry, Director
Correspondence and Directives


Attachments

a/s

MEMORANDUM FOR DIRECTOR, CORRESPONDENCE AND DIRECTIVES, WHS

SUBJECT: Formal Coordination of DoD 5400.7-R, "DoD Freedom of Information Act Program"

This office concurs with the subject issuance:


H. D. NEELEY (Signature)
CH, D&M (Typed/printed Name)
3/6/98 (Title & Office Symbol)
3/6/98 (Date)





ADMINISTRATION &
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



The Honorable Robert P. Murphy
Comptroller General of
the United States
Washington, DC 20548

Dear Mr. Murphy:

In accordance with section 801 of Public Law 104-121, "Congressional Review of Agency Rulemaking," March 29, 1996, the Department of Defense is transmitting herewith for your review a final rule, "DoD Freedom of Information Act Program," and a concise general statement relating to the rule.

Any inquiries or comments concerning this rule should be addressed to Mr. Charlie Talbott, telephone 703-697-1160.

Sincerely,

D. O. Cooke
Director

Attachments:
As stated

Department of Defense Regulation 5400.7-R, "DoD Freedom of Information Act Program"

Statement of the Final Rule

This final revision to the Freedom of Information Act Regulation for the Department of Defense conforms to the requirements of the Electronic Freedom of Information Act Amendments of 1996 (5 U.S.C. § 552, as amended by Public Law 104-231). This reissuance contains amendments made since the last issuance. This final rule incorporates agency comments received. One public comment was received but was not incorporated because it was a misinterpretation of the Freedom of Information Act.



ADMINISTRATION &
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



The Honorable Newt Gingrich
Speaker of the House of Representatives
H-326, The Capitol
Washington, DC 20515

Dear Mr. Speaker:

In accordance with section 801 of Public Law 104-121, "Congressional Review of Agency Rulemaking," March 29, 1996, the Department of Defense is transmitting herewith for your review a final rule, "DoD Freedom of Information Act Program," and a concise general statement relating to the rule.

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Sincerely,

D. O. Cooke
Director

Attachments:
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ADMINISTRATION &
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



The Honorable Albert Gore, Jr.
President of the Senate
S-212, The Capitol
Washington, DC 20501

Dear Mr. President:

In accordance with section 801 of Public Law 104-121, "Congressional Review of Agency Rulemaking," March 29, 1996, the Department of Defense is transmitting herewith for your review a final rule, "DoD Freedom of Information Act Program," and a concise general statement relating to the rule.

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Sincerely,

D. O. Cooke
Director

Attachments:
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EXECUTIVE ORDER 12866 SUBMISSION

Important

Please read the instructions on the reverse side before completing this form.

For additional forms or assistance in completing this form, contact the OIRA Docket Library,
(202) 395-6880, or your OIRA Desk Officer.

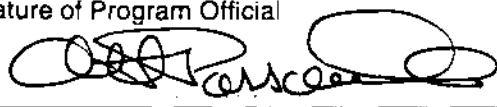
Send three copies of this form and supporting material (four copies if Economically Significant or an
Unfunded Mandate) to:

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Docket Library, Room 10102
725 17th Street N.W.
Washington, DC 20503

1. Agency/Subagency originating request Department of Defense Office of the Secretary	2. Regulation Identifier Number (RIN) 0790-AG58
3. Title DoD Freedom of Information Act Program (DoD 5400.7-R)	
4. Stage of Development <input type="checkbox"/> Prerule <input type="checkbox"/> Proposed Rule <input type="checkbox"/> Interim Final Rule <input checked="" type="checkbox"/> Final Rule <input type="checkbox"/> Final Rule - No material change <input type="checkbox"/> Notice <input type="checkbox"/> Other Description of Other _____	5. Legal Deadline for this submission a) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No b) Date ____/____/____ DD MM YYYY c) <input checked="" type="checkbox"/> Statutory <input type="checkbox"/> Judicial
7. Agency Contact (person who can best answer questions regarding the content of this submission) Mr. Charlie Y. Talbott Phone (703) 697-1180	6. Designations a) Economically Significant (E.O. 12866) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No b) Unfunded Mandate (2 U.S.C. 1532) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If either of the above is "Yes," submit four (4) complete packages to OIRA

Certification for Executive Order 12866 Submissions

The authorized regulatory contact and the program official certify that the agency has complied with the requirements of
E.O. 12866 and any applicable policy directives.

Signature of Program Official 	Date 2 Sep 98
Signature of Authorized Regulatory Contact	Date



DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

02 SEP 1998

Ref: 98-CORR-123

MEMORANDUM FOR CHIEF, DIRECTIVES & RECORDS BRANCH
ATTN: OSD FEDERAL REGISTER LIAISON OFFICER

SUBJECT: Reissuance of DoD Regulation 5400.7-R Subject to
Section 801 of Public Law 104-121

Please have the Director, Administration and Management (DA&M) sign the attached three letters that I have approved, to the Speaker of the House of Representatives, the Comptroller General of the United States, and the President of the Senate as required by section 801 of Public Law 104-121. Also, please have DA&M sign the Executive Order 12866 Submission.

This package has been coordinated with OGC and ASD(LA), both of which concurred.

A. H. Passarella
Director

Attachment:
As stated

Concurrence:

ASD(LA)

D. L. Rogers 21 Aug. 98

OGC

S. Aly 19 Aug 98



FOREWORD

This Regulation is reissued under the authority of DoD Directive 5400.7, "DoD Freedom of Information Act Program," September 29, 1997. It provides guidance on the implementation of the Freedom of Information Act, as amended by the "Electronic Freedom of Information Act Amendments of 1996." The changes, since the last printing in May 1997, are indicated by italics.

This Regulation applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components"). This Regulation is effective immediately; it is mandatory for use by all the DoD Components.

Heads of DoD Components may elect to issue supplementary instructions deemed essential to the accommodation of perceived requirements peculiar to respective DoD Components. Any such instruction may not conflict with the provisions of this Regulation. Copies of DoD Components' supplementary instruction shall be forwarded to the below address for review within 120 days of the date of this Regulation.

DoD 5400.7-R, "Department of Defense Freedom of Information Act Program," May 1997 is hereby canceled.

Recommendations for amendments shall be forwarded through appropriate channels to the Director, Freedom of Information and Security Review, who is authorized to approve and issue amendments to this Regulation. Address recommendations to: Director, Freedom of Information and Security Review, Room 2C757, *1155 Defense Pentagon, Washington, DC 20301-1155*.

The DoD Components may obtain copies of this Regulation through their own publications channels. Approved for public release; distribution unlimited. Authorized registered users may obtain copies of this Regulation from the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Ft. Belvoir, VA 22060-6218. Other Federal Agencies and the public may obtain copies from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

D. O. Cooke
Director
Administration and Management

REFERENCES

- (a) Section 552 of title 5, United States Code, "Freedom of Information Act"
- (b) DoD Directive 5400.7, "DoD Freedom of Information Act Program," September 29, 1997
- (c) "Personal Papers of Executive Branch Officials: A Management Guide," National Archives and Records Administration, Office of Records Administration, Washington, DC, 1992¹
- (d) Section 552a of title 5, United States Code, "The Privacy Act of 1974"
- (e) DoD Directive 5100.3, "Support of the Headquarters of Unified, Specified and Subordinate Commands," November 1, 1988
- (f) Section 551 of title 5, United States Code, "Administrative Procedures Act"
- (g) DoD 5200.1-R, "DoD Information Security Program Regulation," January 1997, authorized by DoD Directive 5200.1, December 13, 1996
- (h) Sections 181-188 of title 35, United States Code, "Patent Secrecy"
- (i) Section 2162 of title 42, United States Code, "Restricted Data and Formerly Restricted Data"
- (j) Section 798 of title 18, United States Code, "Communication Intelligence"
- (k) Section 130 of title 10, United States Code, "Authority to Withhold from Public Disclosure Certain Technical Data"
- (l) DoD Directive 5230.25, "Withholding of Unclassified Technical Data From Public Disclosure," November 6, 1984
- (m) Section 1102f of title 10, United States Code, "Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants"
- (n) Section 128 of title 10, United States Code, "Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information"
- (o) Section 403-3(c)(5) of title 50, United States Code, "Protection of Intelligence Sources and Methods"
- (p) Section 2305(g) of title 10, United States Code, "Protection of Contractor Submitted Proposals"
- (q) Section 423 of title 41, United States Code, "Procurement Integrity"
- (r) Sections 2320-2321 of title 10, United States Code, "Rights in Technical Data" and "Validation of Proprietary Data Restrictions"
- (s) Subpart 227.71-227.72 of chapter 2 of title 48, Code of Federal Regulations, "Rights in Technical Data" and "Rights in Computer Software and Computer Software Documentation," June 28, 1995
- (t) Section 106 of title 17, United States Code, "Copyright Act of 1976"
- (u) DoD Directive 5154.24, "Armed Forces Institute of Pathology," October 28, 1996
- (v) DoD 5400.11-R, "Department of Defense Privacy Program," August 1983, authorized by DoD Directive 5400.11, June 9, 1982
- (w) Section 3500 of title 18, United States Code, "The Jencks Act"
- (x) DoD Directive, 5230.24, "Distribution Statements on Technical Documents," March 18, 1987

¹ Available from the Records Administration Information Center, Agency Services Division (NIA), Washington, DC 20408.

- (y) DoD Directive 5400.4, "Provision of Information to Congress," January 30, 1978
- (z) DoD Directive 7650.1, "General Accounting Office Access to Records," August 26, 1982
- (aa) Section 402 of title 50, United States Code, note, "National Security Act of 1959"
- (ab) Sections 3301-3314 of title 44, United States Code, "Disposal of Records"
- (ac) Executive Order 12600, "Predisclosure Notification Procedures for Confidential Commercial Information," June 23, 1987
- (ad) Treasury Financial Manual, current edition²
- (ae) Chapter 35 of title 44, United States Code, "Coordination of Federal Information Policy"
- (af) Title 31 United States Code, "Money and Finance"
- (ag) Section 2328 of title 10, United States Code, "Release of Technical Data under Freedom of Information Act: Recovery of Costs"
- (ah) Federal Register, Volume 52, pages 10012-10020, March 27, 1987
- (ai) DoD 7000.14-R, Volume 11A, "Department of Defense Financial Management Regulation (Reimbursable Operations, Policy and Procedures)," March 1997, authorized by DoD Instruction 7000.14, November 15, 1992
- (aj) Section 3717 of title 31, United States Code, "Interest and Penalty on Claims"
- (ak) Public Law 97-365, "Debt Collection Act of 1982," October 25, 1982
- (al) DoD Manual 8320.1-M, "Data Administration Procedures," March 1994, authorized by DoD Directive 8320.1, September 26, 1991
- (am) DoD Instruction 5400.10, "OSD Implementation of DoD Freedom of Information Act Program," August 20, 1981
- (an) DoD 8910.1-M, "DoD Procedures for Management of Information Requirements," November 28, 1986, authorized by DoD Directive 8910.1, June 11, 1993
- (ao) Part 518 of title 32, Code of Federal Regulations, "The Army Freedom of Information Act Program," March 23, 1990

² Available from the U.S. Government Printing Office, Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328.

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C1. CHAPTER 1

GENERAL PROVISIONS

C1.1. REFERENCES

C1.1.1. References (see pages 2 and 3, above)

C1.2. PURPOSE AND APPLICABILITY

C1.2.1. Purpose. This Regulation provides policies and procedures for the DoD implementation of the Freedom of Information Act (5 U.S.C. 552, as amended) and DoD Directive 5400.7 (references (a) and (b)), and promotes uniformity in the DoD Freedom of Information Act (FOIA) Program.

C1.2.2. Applicability. This Regulation applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components"). This Regulation takes precedence over all DoD Component publications that supplement and implement the DoD FOIA Program. A list of DOD Components is at Appendix AP6.

C1.3. DOD PUBLIC INFORMATION

C1.3.1. Public Information.

C1.3.1.1. The public has a right to information concerning the activities of its Government. DoD policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall not be withheld in whole or in part unless the record is exempt from mandatory partial or total disclosure under the FOIA. As a matter of policy, DoD Components shall make discretionary disclosures of exempt records or information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court. In order that the public may have timely information concerning DoD activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request. Prompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Similarly, requests from other

members of the public for information that would not be withheld under the FOIA should continue to be honored through appropriate means without requiring the requester to invoke the FOIA.

C1.3.1.2. Within the OSD, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, as Chief Information Officer, in conjunction with the Assistant Secretary of Defense for Public Affairs is responsible for ensuring preparation of reference material or a guide for requesting records or information from the Department of Defense, subject to the nine exemptions of the FOIA. This publication shall also include an index of all major information systems, and a description of major information and record locator systems, as defined by the Office of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence. DoD FOIA Components shall coordinate with the appropriate office(s) to insure that this is also accomplished within their department or organization.

C1.3.1.3. DoD Components shall also prepare, in addition to normal FOIA regulations, a handbook for the use of the public in obtaining information from their organization. This handbook should be a short, simple explanation to the public of what the FOIA is designed to do, and how a member of the public can use it to access government records. Each DoD Component should explain the types of records that can be obtained through FOIA requests, why some records cannot, by law, be made available, and how the DoD Component determines whether the record can be released. The handbook should also explain how to make a FOIA request, how long the requester can expect to wait for a reply, and explain the right of appeal. The handbook should supplement other information locator systems, such as the Government Information Locator Service (GILS), and explain how a requester can obtain more information about those systems. The handbook should be available on paper and through electronic means, and identify how a requester can access DoD Components' Freedom of Information Act Annual Reports. Similarly, the DoD Components' Freedom of Information Act Annual Reports should refer to the handbook and how to obtain it.

C1.3.2. Control System. A request for records that invokes the FOIA shall enter a formal control system designed to ensure accountability and compliance with the FOIA. Any request for DoD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this Regulation, unless otherwise required by subsection C1.5.13 below.

C1.4. DEFINITIONS

C1.4.1. Definitions. As used in this Regulation, the following terms and meanings shall be applicable:

C1.4.2. FOIA Request. A written request for DoD records *that adequately describes the record(s) sought*, made by any person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal Agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA, DoD Directive 5400.7 (reference (b)), this Regulation, or DoD Component supplementing regulations or instructions. *Requesters should also address fees in their request*. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically. *Requests received electronically*

*should have a postal mailing address included since it may not be practical to provide a substantive response electronically. The request is considered **perfected** when the above conditions have been met and the request arrives at the FOIA office of the Component in possession of the records.*

C1.4.3. Agency Record.

C1.4.3.1. The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in Department of Defense possession and control at the time the FOIA request is made. Care should be taken not to exclude records from being considered agency records, unless they fall within one of the categories of the subparagraph C1.4.3.2, below.

C1.4.3.2. The following **are not** included within the definition of the word "record":

C1.4.3.2.1. Objects or articles, such as structures, furniture, vehicles and equipment, whatever their historical value, or value as evidence.

C1.4.3.2.2. Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

C1.4.3.2.3. Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use. Personal papers fall into three categories: those created before entering Government service; private materials brought into, created, or received in the office that were not created or received in the course of transacting Government business; and work-related personal papers that are not used in the transaction of Government business (see reference (c)).

C1.4.3.3. A record must exist and be in the possession and control of the Department of Defense at the time of the request to be considered subject to this Regulation and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. See paragraph C1.5.7.2., below on creating a record in the electronic environment.

C1.4.3.4. Hard copy or electronic records, that are subject to FOIA requests under 5 U.S.C. 552 (a)(3) (reference (a)), and that are available to the public through an established distribution system, or through the Federal Register, the National Technical Information Service, or the Internet, normally need not be processed under the provisions of the FOIA. If a request is received for such information, DoD Components shall provide the requester with guidance, inclusive of any written notice to the public, on how to obtain the information. However, if the requester insists that the request be processed under the FOIA, then the request shall be processed under the FOIA. If there is any doubt as to whether the request must be processed, contact the Directorate for Freedom of Information and Security Review.

C1.4.4. DoD Component. An element of the Department of Defense, as defined in subsection C1.2.2, above, authorized to receive and act independently on FOIA requests. (See Appendix AP6.) A DoD Component has its own initial denial authority (IDA), appellate authority, and legal counsel.

C1.4.5. Initial Denial Authority (IDA). An official who has been granted authority by the head of a DoD component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure. IDA's may also deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need under paragraph C1.5.4.3, below, of this Regulation; 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.

C1.4.6. Appellate Authority. The Head of the DoD Component or the Component head's designee having jurisdiction for this purpose over the record, or any of the other adverse determinations outlined in subsections C1.4.5, above, and C1.4.7, below.

C1.4.7. Administrative Appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority of a DoD Component to reverse a decision to: withhold all or part of a requested record; deny a fee category claim by a requester; deny a request for expedited processing due to demonstrated compelling need under paragraph C1.5.4.3, below, of this Regulation; deny a request for waiver or reduction of fees; deny a request to review an initial fee estimate; and confirm that no records were located during the initial search.

C1.4.8. Public Interest. The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or official's own conduct.

C1.4.9. Electronic Record. Records (including e-mail) that are created, stored, and retrievable by electronic means.

C1.4.10. Federal Agency. As defined by 5 U.S.C. 552 (f)(1) (reference (a)), a Federal agency is any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

C1.5. POLICY

C1.5.1. Compliance with the FOIA. DoD personnel are expected to comply with the FOIA, this Regulation, and DoD FOIA policy in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create conditions that will promote public trust.

C1.5.2. Openness with the Public. The Department of Defense shall conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records not exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

C1.5.3. Avoidance of Procedural Obstacles. DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly. Components shall provide assistance to requesters to help them understand and comply with procedures established by this Regulation and any supplemental regulations published by the DoD Components.

C1.5.4. Prompt Action on Requests.

C1.5.4.1. Generally, when a member of the public complies with the procedures established in this Regulation and DoD Component regulations or instructions for obtaining DoD records, and after the request is received by the official designated to respond, DoD Components shall endeavor to provide a final response determination within the statutory 20 working days. If a significant number of requests, or the complexity of the requests prevent a final response determination within the statutory time period, DoD Components shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system (see subparagraph C1.5.4.2., below). A final response determination is notification to the requester that the records are released, or will be released on a certain date, or the records are denied under the appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons in subsection C5.2.2., below. Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA. *If a request fails to meet minimum requirements as set forth in subsection C1.4.2., above, Components shall apprise the requester how to perfect the request. The statutory 20 working day time limit applies upon receipt of a **perfected** FOIA request as outlined in subsection C1.4.2., above.*

C1.5.4.2. Multitrack Processing. When a Component has a significant number of pending requests that prevents a response determination being made within 20 working days, the requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the requests, and whether the request qualifies for expedited processing as described in paragraph C1.5.4.3., below. DoD Components may establish as many processing queues as they wish; however, as a minimum, three processing tracks shall be established, all based on a first-in, first-out concept, and rank ordered by the date of receipt of the request. One track shall be a processing queue for simple requests, one track for complex requests, and one track shall be a processing queue for expedited processing as described in paragraph C1.5.4.3, below. Determinations as to whether a request is simple or complex shall be made by each DoD Component. DoD Components shall provide a requester whose request does not qualify for the fastest queue (except for expedited processing as described in paragraph C1.5.4.3, below), an opportunity to limit in writing by hard copy, facsimile, or electronically, the scope of the request in order to qualify for the fastest queue. This multitrack processing system

does not obviate components' responsibility to exercise due diligence in processing requests in the most expeditious manner possible.

C1.5.4.3. Expedited Processing. A separate queue shall be established for requests meeting the test for expedited processing. **Expedited processing** shall be granted to a requester after the requester requests such and demonstrates a **compelling need** for the information. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within 10 calendar days after receipt of the request in the DoD Component's office that will determine whether to grant expedited processing. Once the DoD Component has determined to grant expedited processing, the request shall be processed as soon as practicable. Actions by DoD Components to initially deny or affirm the initial denial on appeal of a request for expedited processing, and failure to respond in a timely manner shall be subject to judicial review

C1.5.4.3.1. **Compelling need means** that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

C1.5.4.3.2. **Compelling need also means** that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media (see paragraph C6.1.5.7., below) would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.

C1.5.4.3.2.1 **Urgently needed means** that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of general public interest. However, information of historical interest only, or information sought for litigation or commercial activities would not qualify, nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.

C1.5.4.3.3. A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge. This statement must accompany the request in order to be considered and responded to within the 10 calendar days required for decisions on expedited access.

C1.5.4.3.4. Other Reasons for Expedited Processing. **Other reasons** that merit expedited processing by DoD Components are an imminent loss of substantial due process rights and humanitarian need. A demonstration of imminent loss of substantial due process rights shall be made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Humanitarian need means that disclosing the information will promote the welfare and interests of mankind. A demonstration of humanitarian need shall be also made by a statement certified by the requester to be true and correct to the best of his or her knowledge. Both statements mentioned above must accompany the request in order to be considered and

responded to within the 10 calendar days required for decisions on expedited access. Once the decision has been made to expedite the request for either of these reasons, the request may be processed in the expedited processing queue **behind** those requests qualifying for compelling need.

C1.5.4.3.5. These same procedures also apply to requests for expedited processing of administrative appeals.

C1.5.5. Use of Exemptions. It is DoD policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. It is DoD policy that DoD Components shall make discretionary releases whenever possible; however, a discretionary release is normally not appropriate for records **clearly** exempt under exemptions 1, 3, 4, 6, 7 (C) and 7(F) (see Chapter 3, below). Exemptions 2, 5, and 7(A)(B)(D) and (E) (see Chapter 3, below) are discretionary in nature, and DoD Components are encouraged to exercise discretionary releases whenever possible. Exemptions 4, 6 and 7(C) cannot be claimed when the requester is the submitter of the information.

C1.5.6. Public Domain. Nonexempt records released under the authority of this Regulation are considered to be in the public domain. Such records may also be made available in Components' reading rooms in paper form, as well as electronically, to facilitate public access. Discretionary releases to FOIA requesters constitute a waiver of the FOIA exemption that may otherwise apply. Disclosure to a properly constituted advisory committee, to Congress, or to other Federal Agencies does not waive the exemption. (See subsection C5.1.4., below.) Exempt records disclosed without authorization by the appropriate DoD official do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this Regulation apply if the same individual seeks the records in a private or personal capacity.

C1.5.7. Creating a Record

C1.5.7.1. A record must exist and be in the possession and control of the Department of Defense at the time of the search to be considered subject to this Regulation and the FOIA. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request. A DoD Component, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. Fee assessments shall be in accordance with Chapter 6.

C1.5.7.2. About electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to FOIA requests for electronic data where creation of a record, programming, or particular format are questionable, Components should apply a standard of **reasonableness**. In other words, if the capability exists to respond to the request, and the effort would be a **business as usual** approach, then the request should be processed. However, the request need not be

processed where the capability to respond does not exist without a significant expenditure of resources, thus not being a normal **business as usual** approach. As used in this sense, a significant expenditure of resources in both time and manpower, that would cause a significant interference with the operation of the Components' automated information system **would not** be a business as usual approach.

C1.5.8. Description of Requested Record

C1.5.8.1. Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record, that enables the Government to locate the record with a reasonable amount of effort. In order to assist DoD Components in conducting more timely searches, requesters should endeavor to provide as much identifying information as possible. When a DoD Component receives a request that does not reasonably describe the requested record, it shall notify the requester of the defect in writing. The requester should be asked to provide the type of information outlined below in paragraph C1.5.8.2, below, of this Regulation. DoD Components are not obligated to act on the request until the requester responds to the specificity letter. When practicable, DoD Components shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act.

C1.5.8.2. The following guidelines are provided to deal with generalized requests and are based on the principle of reasonable effort: (Descriptive information about a record may be divided into two broad categories.)

C1.5.8.2.1. Category I is file-related and includes information such as type of record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

C1.5.8.2.2. Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

C1.5.8.3. Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, non random search based on the DoD Component's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

C1.5.8.4. The following guidelines deal with requests for personal records: Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records in a Privacy Act system of records that can be retrieved by personal identifiers need be searched. However, if a DoD Component has reason to believe that records on the requester may exist in a record system other than a Privacy Act system, the DoD Component shall search that system under the provisions of the FOIA. In either case, DoD Components may request a reasonable description of the records desired before searching for such records under the provisions of the FOIA and the Privacy Act (reference (d)). If the record

is required to be released under the FOIA, reference (d) does not bar its disclosure. See subsection C1.5.13, below, for the relationship between the FOIA and the Privacy Act.

C1.5.8.5. The previous guidelines notwithstanding, the decision of the DoD Component concerning reasonableness of description must be based on knowledge of its files. If the description enables DoD Component personnel to locate the record with reasonable effort, the description is adequate. The fact that a FOIA request is broad or burdensome in its magnitude does not, in and of itself, entitle a DoD Component to deny the request on the ground that it does not reasonably describe the records sought. The key factor is the ability of the DoD Component's staff to reasonably ascertain and locate which records are being requested.

C1.5.9. Referrals

C1.5.9.1. The DoD FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DoD Component receives a request for records originated by another DoD Component, it *should* contact the DoD Component to determine if it also received the request, and if not, obtain concurrence from the other DoD Component to refer the request. In either situation, the requester shall be advised of the action taken, unless exempt information would be revealed. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DoD Components from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, DoD Components *should* coordinate with the originator of the information prior to making a release determination. A request received by a DoD Component having no records responsive to a request shall be referred routinely to another DoD Component, if the other DoD Component has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD Component, the DoD Component receiving the initial request shall consult with the other DoD Component to determine if that DoD Component's association with the material is exempt. If the association is exempt, the DoD Component receiving the initial request will protect the association and any exempt information without revealing the identity of the protected DoD Component. The protected DoD Component shall be responsible for submitting the justifications required in any litigation. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DoD Components making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address.

C1.5.9.2. A DoD Component shall refer for response directly to the requester, a FOIA request for a record that it holds to another DoD Component or agency outside the DoD, if the record originated in the other DoD Component or outside agency. Whenever a record or a portion of a record is referred to another DoD Component or to a Government Agency outside of the DoD for a release determination and direct response, the requester shall be informed of the referral, unless it has been determined that notification would reveal exempt information. Referred records shall only be identified to the extent consistent with security requirements.

C1.5.9.3. A DoD Component may refer a request for a record that it originated to another DoD Component or agency when the other DoD Component or agency has a valid

interest in the record, or the record was created for the use of the other DoD Component or agency. In such situations, provide the record and a release recommendation on the record with the referral action. An example of such a situation is a request for audit reports prepared by the Defense Contract Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor shall be at the discretion of the contracting officer. A FOIA request shall be referred to the appropriate DoD Component and the requester shall be notified of the referral, unless exempt information would be revealed. Another example is a record originated by a DoD Component or agency that involves foreign relations, and could affect a DoD Component or organization in a host foreign country. Such a request and any responsive records may be referred to the affected DoD Component or organization for consultation prior to a final release determination within the Department of Defense. See also subsection C5.1.5., below, of this Regulation.

C1.5.9.4. Within the Department of Defense, a DoD Component shall ordinarily refer a FOIA request and a copy of the record it holds, but that was originated by another DoD Component or that contains substantial information obtained from another DoD Component, to that Component for direct response, after direct coordination and obtaining concurrence from the Component. The requester then shall be notified of such referral. DoD Components shall not, in any case, release or deny such records without prior consultation with the other DoD Component, except as provided in subsection 5-104, below.

C1.5.9.5. DoD Components that receive referred requests shall answer them in accordance with the time limits established by the FOIA, this Regulation, and their multitask processing queues, based upon the date of initial receipt of the request at the referring component or agency.

C1.5.9.6. Agencies outside the Department of Defense that are subject to the FOIA.

C1.5.9.6.1. A DoD Component may refer a FOIA request for any record that originated in an agency outside the Department of Defense or that is based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the DoD Component must respond to the request.

C1.5.9.6.2. A DoD Component shall refer to the agency that provided the record any FOIA request for investigative, intelligence, or any other type of records that are on loan to the Department of Defense for a specific purpose, if the records are restricted from further release and so marked. However, if for investigative or intelligence purposes, the outside agency desires anonymity, a DoD Component may only respond directly to the requester after coordination with the outside agency.

C1.5.9.7. DoD Components that receive requests for records of the National Security Council (NSC), the White House, or the White House Military Office (WHMO) shall process the requests. DoD records in which the NSC or White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in DoD Components' files shall be forwarded to the Directorate for Freedom of Information and Security Review (DFOISR). The

DFOISR shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination.

C1.5.9.8.. To the extent referrals are consistent with the policies expressed by this subsection, referrals between offices of the same DoD Component are authorized.

C1.5.9.9. On occasion, the Department of Defense receives FOIA requests for General Accounting Office (GAO) records containing DoD information. Even though the GAO is outside the Executive Branch, and not subject to the FOIA, all FOIA requests for GAO documents containing DoD information received either from the public, or on referral from the GAO, shall be processed under the provisions of the FOIA.

C1.5.10. Authentication. Records provided under this Regulation shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under the FOIA and is not included in the FOIA fee schedule. DoD Components may charge for the service at a rate of \$5.20 for each authentication.

C1.5.11. Combatant Commands

C1.5.11.1. The Combatant Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department or the Chairman of the Joint Chiefs of Staff, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3 (reference (e)); it authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 (reference (b)) and this Regulation. The Combatant Commands shall forward directly to the Director, Freedom of Information and Security Review all correspondence associated with the appeal of an initial denial for records under the provisions of the FOIA. Procedures to effect this administrative requirement are outlined in Appendix AP1.

C1.5.11.2. Combatant Commands shall maintain an electronic reading room for FOIA-processed 5 U.S.C. 552(a)(2)(D) (reference (a)) records in accordance with Chapter 2, this Regulation. Records qualifying for this means of public access also shall be maintained in hard copy for public access at Combatant Commands' respective locations.

C1.5.12. 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.

C1.5.13. Relationship Between the FOIA and the Privacy Act (PA). Not all requesters are knowledgeable of the appropriate statutory authority to cite when requesting records. In some instances, they may cite neither Act, but will imply one or both Acts. For these reasons, the following guidelines are provided to ensure that requesters receive the greatest amount of access rights under both Acts:

C1.5.13.1. If the record is required to be released under the FOIA, the Privacy Act does not bar its disclosure. Unlike the FOIA, the Privacy Act applies only to U.S. citizens and aliens admitted for permanent residence.

C1.5.13.2. Requesters who seek records about themselves contained in a Privacy Act system of records and who cite or imply only the Privacy Act, will have their requests processed under the provisions of both the Privacy Act and the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) (reference (d)), the requester shall be so advised with the appropriate Privacy Act exemption, and then further advised that the information was therefore reviewed for release under the FOIA.

C1.5.13.3. Requesters who seek records about themselves that are not contained in a Privacy Act system of records and who cite or imply the Privacy Act will have their requests processed under the provisions of the FOIA, since the Privacy Act does not apply to these records..

C1.5.13.4.. Requesters who seek records about themselves that are contained in a Privacy Act system of records and who cite or imply the FOIA or both Acts will have their requests processed under the provisions of both the Privacy Act an the FOIA. If the Privacy Act system of records is exempt from the provisions of 5 U.S.C. 552a(d)(1) (reference (d)) the requester shall be so advised with the appropriate Privacy Act exemption, and then further advised that the information was therefore reviewed for release under the FOIA.

C1.5.13.5. Requesters who seek access to agency records that are not part of a Privacy Act system of records, and who cite or imply the Privacy Act and FOIA, will have their requests processed under the FOIA since the Privacy Act does not apply to these records.

C1.5.13.6. Requesters who seek access to agency records and who cite or imply the FOIA will have their requests processed under the FOIA.

C1.5.13.7. Requesters shall be advised in final responses which Act was used.

C1.5.14. Non-Responsive Information in Responsive Records. DoD Components shall interpret FOIA requests liberally when determining which records are responsive to the requests, and may release non-responsive information. However, should DoD Components desire to withhold non-responsive information, the following steps shall be accomplished:

C1.5.14.1. Consult with the requester, and ask if the requester views the information as responsive, and if not, seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. Reflect this concurrence in the response letter.

C1.5.14.2. If the responsive record is **unclassified**, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, release all non-responsive and responsive information which is not exempt. For non-responsive information that is exempt, notify the requester that even if the information were determined responsive, it would likely be exempt under (state appropriate exemption (s)). Advise the requester of the right to request this

information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

C1.5.14.3. If the responsive record is **classified**, and the requester does not agree to deletion of non-responsive information without a FOIA exemption, **release all unclassified** responsive and non-responsive information which is not exempt. If the non-responsive information is exempt, follow the procedures in subparagraph C1.5.14.2, above. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester that even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552 (b)(1) (reference (a)), and other exemptions if appropriate. Advise the requester of the right to request this information under a separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

C1.5.15. Honoring Form or Format Requests. DoD Components shall provide the record in any form or format requested by the requester if the record is readily reproducible in that form or format. DoD Components shall make reasonable efforts to maintain their records in forms or formats that are reproducible. In responding to requests for records, DoD Components shall make reasonable efforts to search for records in electronic form or format, except when such efforts would significantly interfere with the operation of the DoD Components' automated information system. Such determinations shall be made on a case by case basis. See also paragraph C1.5.7.2, above.

C2. CHAPTER 2

FOIA READING ROOMS

C2.1. REQUIREMENTS

C2.1.1. Reading Room

C2.1.1.1. Each DoD Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the records described in subsections C2.1.2 and C2.2.1, below. In addition to the records described in subsections C2.1.2 and C2.2.1, below, DoD Components may elect to place other records in their reading room, and also make them electronically available to the public. DoD Components may share reading room facilities if the public is not unduly inconvenienced, and also may establish decentralized reading rooms. When appropriate, the cost of copying may be imposed on the person requesting the material in accordance with the provisions of Chapter 6 of this Regulation.

C2.1.2. Record Availability. The FOIA requires that records described in 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) (reference (a)) **created on or after November 1, 1996**, shall be made available electronically by November 1, 1997, as well as in hard copy in the FOIA reading room for inspection and copying, unless such records are published and copies are offered for sale. Personal privacy information, that if disclosed to a third party requester, would result in an invasion of the first party's personal privacy, and contractor submitted information, that if disclosed to a competing contractor, would result in competitive harm to the submitting contractor shall be deleted from **all** 5 U.S.C. 552(a)(2) (reference (a)) records made available to the general public. In every case, justification for the deletion must be fully explained in writing, and the extent of such deletion shall be indicated on the record which is made publicly available, unless such indication would harm an interest protected by an exemption under which the deletion was made. If technically feasible, the extent of the deletion in electronic records or any other form of record shall be indicated at the place in the record where the deletion was made. However, a DoD Component may publish in the Federal Register a description of the basis upon which it will delete identifying details of particular types of records to avoid clearly unwarranted invasions of privacy, or competitive harm to business submitters. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) records are:

C2.1.2.1. (a)(2)(A) records. Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551 (reference (f)), that may be cited, used, or relied upon as precedents in future adjudications.

C2.1.2.2. (a)(2)(B) records. Statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register.

C2.1.2.3. (a)(2)(C) records. Administrative staff manuals and instructions, or portions thereof, that establish DoD policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DoD Component. Examples of manuals and instructions not normally made available are:

C2.1.2.3.1. 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.

C2.1.2.3.2. Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and intelligence activities.

C2.1.2.4. (a)(2)(D) records. Those 5 U.S.C. 552 (a)(3) (reference (a)) records, which because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. These records are referred to as **FOIA-processed (a)(2) records**.

C2.1.2.4.1. DoD Components shall decide on a case by case basis whether records fall into this category, based on the following factors:

C2.1.2.4.1.1. Previous experience of the DoD Component with similar records.

C2.1.2.4.1.2. Particular circumstances of the records involved, including their nature and the type of information contained in them.

C2.1.2.4.1.3. The identity and number of requesters and whether there is widespread press, historic, or commercial interest in the records.

C2.1.2.4.2. This provision is intended for situations where public access in a timely manner is important, and it is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. DoD Components may remove the records from this access medium when the appropriate officials determine that access is no longer necessary.

C2.1.2.4.3. Should a requester submit a FOIA request for FOIA-processed (a)(2) records, and insist that the request be processed, DoD Components shall process the FOIA request. However, DoD Components have no obligation to process a FOIA request for 5 U.S.C. 552(a)(2)(A), (B), and (C) (reference (a)) records because these records are required to be made public and not FOIA-processed under paragraph (a)(3) of the FOIA.

~~(4) DoD Components have no obligation to provide electronic or hard copy reading room access to any (a)(2) record (inclusive of FOIA-processed (a)(2) records) originating outside of their respective organizations.~~

C2.2. INDEXES

C2.2.1. "(a) (2)" Materials

C2.2.1.1. Each DoD Component shall maintain in each facility prescribed in paragraph C2.1.1 above, an index of materials described in paragraph C2.1.2., above, that are issued, adopted, or promulgated, after July 4, 1967. No "(a) (2)" materials issued, promulgated, or adopted after July 4, 1967, that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and-timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be made available upon request if not exempted under this Regulation.

C2.2.1.2. Each DoD Component shall promptly publish quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of "(a) (2)" materials or supplements thereto unless it publishes in the Federal Register an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in Chapter 6 of this Regulation.

C2.2.1.3. Each index of "(a) (2)" materials or supplement thereto shall be arranged topical or by descriptive words rather than by case name or numbering system so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

C2.2.1.4. A general index of FOIA-processed (a)(2) records referred to in paragraph C2.1.2.4., above, shall be made available to the public, both in hard copy and electronically by December 31, 1999.

C2.2.3. Other Materials

C2.2.3.1. Any available index of DoD Component material published in the Federal Register, such as material required to be published by Section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms, and electronically to the public.

C2.2.3.2. Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, "(a)(1)" materials shall, when feasible, be made available to the public in FOIA reading rooms for inspection and copying, and by electronic means. Examples of "(a)(1)" materials are: descriptions of an agency's central and field organization, and to the extent they affect the public, rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revision, or report of the aforementioned.

C3. CHAPTER 3

EXEMPTIONS

C3.1. GENERAL PROVISIONS

C3.1.1. General. Records that meet the exemption criteria of the FOIA may be withheld from public disclosure and need not be published in the Federal Register, made available in a library reading room, or provided in response to a FOIA request.

C3.2. EXEMPTIONS

C3.2.1. FOIA Exemptions. The following types of records may be withheld in whole or in part from public disclosure under the FOIA, unless otherwise prescribed by law: (A discretionary release of a record (see also subsection C1.5.5., above) to one requester shall prevent the withholding of the same record under a FOIA exemption if the record is subsequently requested by someone else. However, a FOIA exemption may be invoked to withhold information that is similar or related that has been the subject of a discretionary release. In applying exemptions, the identity of the requester and the purpose for which the record is sought are irrelevant with the exception that an exemption may not be invoked where the particular interest to be protected is the requester's interest.)

C3.2.1.1. Number 1. (5 U.S.C. 552 (b)(1) (reference (a))). Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations, such as DoD 5200.1-R (reference (g)). Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in reference (g) apply. If the information qualifies as exemption 1 information, there is **no discretion** regarding its release. In addition, this exemption shall be invoked when the following situations are apparent:

C3.2.1.1.1. The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no record" response when a record does not exist, and a "refusal to confirm or deny" when a record does exist will itself disclose national security information.

C3.2.1.1.2. Compilations of items of information that are individually unclassified may be classified if the compiled information reveals additional association or relationship that meets the standard for classification under an existing executive order for

classification and DoD 5200.1-R (reference (g)), and is not otherwise revealed in the individual items of information.

C3.2.1.2. Number 2. (5 U.S.C. 552 (b)(2) (reference (a))). Those related solely to the internal personnel rules and practices of the Department of Defense or any of its Components. This exemption is **entirely discretionary**. This exemption has two profiles, **high (b)(2) and low (b)(2)**. Paragraph b., below, contains a brief discussion on the low (b)(2) profile; however, that discussion is for information purposes only. When only a minimum Government interest would be affected (administrative burden), there is a great potential for discretionary disclosure of the information. Consequently, DoD Components **shall not invoke** the low (b)(2) profile.

C3.2.1.2.1. Records qualifying under high (b)(2) are those containing or constituting statutes, rules, regulations, orders, manuals, directives, instructions, and security classification guides, the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the Department of Defense. Examples include:

C3.2.1.2.1.1. Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, or examiners that must remain privileged in order for the DoD Component to fulfill a legal requirement.

C3.2.1.2.1.2. 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.

C3.2.1.2.1.3. Computer software, the release of which would allow circumvention of a statute or DoD rules, regulations, orders, manuals, directives, or instructions. In this situation, the **use** of the software must be closely examined to ensure a circumvention possibility exists.

C3.2.1.2.2. Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature for which there is no legitimate public interest or benefit to be gained by release, and it would constitute an administrative burden to process the request in order to disclose the records. Examples include rules of personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and administrative data such as file numbers, mail routing stamps, initials, data processing notations, brief references to previous communications, and other like administrative markings. DoD Components shall not invoke the low (b)(2) profile.

C3.2.1.3. Number 3. (5 U.S.C. 552 (b)(3) (reference (a))). Those concerning matters that a statute specifically exempts from disclosure by terms that permit **no discretion** on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. The Directorate for Freedom of Information and Security Review maintains a list of (b)(3) statutes used within the Department of Defense, and provides updated lists of these statutes to DoD Components on a periodic basis. **A few** examples of such statutes are:

C3.2.1.3.1. Patent Secrecy, 35 U.S.C. 181-188 (reference (h)). Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

C3.2.1.3.2. Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162 (reference (i)).

C3.2.1.3.3. Communication Intelligence, 18 U.S.C. 798 (reference (j)).

C3.2.1.3.4. Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and DoD Directive 5230.25 (references (k) and (l)).

C3.2.1.3.5. Confidentiality of Medical Quality Assurance Records: Qualified Immunity for Participants, 10 U.S.C. 1102 f (reference (m)).

C3.2.1.3.6. Physical Protection of Special Nuclear Material: Limitation on Dissemination of Unclassified Information, 10 U.S.C. 128 (reference (n)).

C3.2.1.3.7. Protection of Intelligence Sources and Methods, 50 U.S.C. 403-3(c)(5) (reference (o)).

C3.2.1.3.8. Protection of Contractor Submitted Proposals, 10 U.S.C. 2305(g) (reference (p)).

C3.2.1.3.9. Procurement Integrity, 41 U.S.C. 423 (reference (q)).

C3.2.1.4. Number 4. (5 U.S.C. 552 (b)(4) (reference (a))). Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future; or impair some other legitimate Government interest. Commercial or financial information submitted on a voluntary basis, absent any exercised authority prescribing criteria for submission is protected without any requirement to show competitive harm (see paragraph C3.2.1.4.8., below). If the information qualifies as exemption 4 information, there is **no discretion** in its release. Examples include :

C3.2.1.4.1. Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the DoD Component and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data. See also C5.2.8.2., below, this Regulation. Additionally,

when the provisions of 10 U.S.C. 2305(g) (reference (p)), and 41 U.S.C. 423 (reference (q)) are met, certain proprietary and source selection information may be withheld under exemption 3.

C3.2.1.4.2. Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

C3.2.1.4.3. Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

C3.2.1.4.4. Financial data provided in confidence by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of employees within the Department of Defense.

C3.2.1.4.5. Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

C3.2.1.4.6. Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with Federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with 10 U.S.C. 2320-2321 (reference (r)) and DoD Federal Acquisition Regulation Supplement (DFARS), Chapter 2 of 48 C.F.R., Subpart 227.71-227.72 (reference (s)). Technical data developed exclusively with Federal funds may be withheld under Exemption Number 3 if it meets the criteria of 10 U.S.C. 130 (reference (k)) and DoD Directive 5230.25 (reference (l)) (see subsection C3.2.1., Number 3 C3.2.1.3.5., above).

C3.2.1.4.7. Computer software which is copyrighted under the Copyright Act of 1976 (17 U.S.C. 106) (reference (t)), the disclosure of which would have an adverse impact on the potential market value of a copyrighted work.

C3.2.1.4.8. Proprietary information submitted strictly on a **voluntary** basis, absent any exercised authority prescribing criteria for submission. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Submission of information under these authorities **is not voluntary**. (See also subsection C5.2.8.3., below.)

C3.2.1.5. Number 5. (5 U.S.C. 552 (b)(5) (reference (a))). Those containing information considered privileged in litigation, primarily under the deliberative process privilege. Except as provided in paragraphs Number 5 C3.2.1.5.2. through C3.2.1.5.5., below, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in deliberative records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e) (reference (a))), or within or among DoD

Components. In order to meet the test of this exemption, the record must be both deliberative in nature, as well as part of a decision-making process. Merely being an internal record is insufficient basis for withholding under this exemption. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is **entirely discretionary**.

C3.2.1.5.1. Examples of the deliberative process include:

C3.2.1.5.1.1. The non factual portions of staff papers, to include after-action reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

C3.2.1.5.1.2. 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.

C3.2.1.5.1.3. Those non factual portions of evaluations by DoD Component personnel of contractors and their products.

C3.2.1.5.1.4. 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.

C3.2.1.5.1.5. Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the Government's negotiating position or other commercial interest.

C3.2.1.5.1.6. Records that are exchanged among agency personnel and within and among DoD Components or Agencies as part of the preparation for anticipated administrative proceeding by an Agency or litigation before any Federal, State, or military court, as well as records that qualify for the attorney-client privilege.

C3.2.1.5.1.7. Those portions of official reports of inspection, reports of the Inspector Generals, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

C3.2.1.5.1.8. Planning, programming, and budgetary information that is involved in the defense planning and resource allocation process.

C3.2.1.5.2. If any such intra- or inter-agency record or reasonably segregable portion of such record hypothetically would be made available routinely through the discovery process in the course of litigation with the Agency, then it should not be withheld under the

FOIA. If, however, the information hypothetically would not be released at all, or would only be released in a particular case during civil discovery where a party's particularized showing of need might override a privilege, then the record may be withheld. Discovery is the formal process by which litigants obtain information from each other for use in the litigation. Consult with legal counsel to determine whether exemption 5 material would be routinely made available through the discovery process.

C3.2.1.5.3. Intra- or inter-agency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through discovery, and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

C3.2.1.5.4. A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

C3.2.1.5.5. An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

C3.2.1.6. Number 6. (5 U.S.C. 552 (b)(6) (reference (a))). Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. If the information qualifies as exemption 6 information, there is **no discretion** in its release.

C3.2.1.6.1. Examples of other files containing personal information similar to that contained in personnel and medical files include:

C3.2.1.6.1.1. Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

C3.2.1.6.1.2. Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

C3.2.1.6.2. Home addresses are normally not releasable without the consent of the individuals concerned. This includes lists of home addressees and military quarters' addressees without the occupant's name. In addition, DoD military and civilian personnel's names and duty addresses who are assigned to units that are sensitive, routinely deployable, or stationed in foreign territories, *inclusive of e-mail addresses of personnel assigned to these units*, can constitute a clearly unwarranted invasion of personal privacy.

C3.2.1.6.2.1. Privacy Interest. A privacy interest may exist in personal information even though the information has been disclosed at some place and time. If personal information is not freely available from sources other than the Federal Government, a privacy interest exists in its nondisclosure. The fact that the Federal Government expended funds to prepare, index and maintain records on personal information, and the fact that a requester invokes FOIA to obtain these records indicates the information is not freely available.

C3.2.1.6.2.2. Names and duty addresses published in telephone directories, organizational charts, rosters and similar materials for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories are withholdable under this exemption.

C3.2.1.6.2.3. This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. In such situations, balance the surviving family members' privacy against the public's right to know to determine if disclosure is in the public interest. Additionally, the deceased's social security number should be withheld since it is used by the next of kin to receive benefits. Disclosures may be made to the immediate next of kin as defined in DoD Directive 5154.24 (reference (u)).

C3.2.1.6.2.4. When the subject of an investigative report is the requester of the record and the report is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11-R (reference (v)), and by exemption 6 of the FOIA.

C3.2.1.6.2.5. A clearly unwarranted invasion of the privacy of third parties identified in a personnel, medical or similar record constitutes a basis for deleting those reasonably segregable portions of that record. When withholding third party personal information from the subject of the record and the record is contained in a Privacy Act system of records, consult with legal counsel.

C3.2.1.6.2.6. This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, DoD Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption 6 must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components

shall coordinate with other DoD Components or Federal Agencies **before** referring a record that is exempt under the Glomar concept.

C3.2.1.6.2.6.1. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

C3.2.1.6.2.6.2. Refusal to confirm or deny should not be used when (a) the person whose personal privacy is in jeopardy has provided the requester a waiver of his or her privacy rights; (b) the person initiated or directly participated in an investigation that lead to the creation of an agency record seeks access to that record; or (c) the person whose personal privacy is in jeopardy is deceased, the Agency is aware of that fact, and disclosure would not invade the privacy of the deceased's family. See paragraph Number C3.2.1.6.2.3., above.

C3.2.1.7. Number 7. (5 U.S.C. 552 (b)(7) (reference (a))). Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of Executive Orders or regulations issued pursuant to law. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for law enforcement purposes. **With the exception of parts (C) and (F)** (see subparagraph Number 7 C3.2.1.7.1.3., below) of this exemption, this exemption is **discretionary**. If information qualifies as exemption (7)(C) or (7)(F) (see subparagraph Number 7 C3.2.1.7.1.3., below) information, there is **no discretion** in its release.

C3.2.1.7.1. This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

C3.2.1.7.1.1. Could reasonably be expected to interfere with enforcement proceedings (5 U.S.C. 552(b)(7)(A) (reference (a))).

C3.2.1.7.1.2. Would deprive a person of the right to a fair trial or to an impartial adjudication (5 U.S.C. 552(b)(7)(B) (reference (a))).

C3.2.1.7.1.3. Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record (5 U.S.C. 552(b)(7)(C) (reference (a))).

C3.2.1.7.1.3.1. This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal personally private information, and the public interest in disclosure is not sufficient to outweigh the privacy interest. In this situation, Components shall neither confirm nor deny the existence or nonexistence of the record being requested. This is a Glomar response, and exemption (7)(C) must be cited in the response. Additionally, in order to insure personal privacy is not violated during referrals, DoD Components shall coordinate with other DoD Components or Federal Agencies **before** referring a record that is exempt under the Glomar concept.

C3.2.1.7.1.3.2. A "refusal to confirm or deny" response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a "no records" response when a record does not exist and a "refusal to confirm or deny" when a record does exist will itself disclose personally private information.

C3.2.1.7.1.3.3. Refusal to confirm or deny should not be used when 1 the person whose personal privacy is in jeopardy has provided the requester with a waiver of his or her privacy rights; or 2 the person whose personal privacy is in jeopardy is deceased, and the Agency is aware of that fact.

C3.2.1.7.1.3.4. Could reasonably be expected to disclose the identity of a confidential source, including a source within the Department of Defense; a State, local, or foreign agency or authority; or any private institution that furnishes the information on a confidential basis; and could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation (5 U.S.C. 552(b)(7)(D) (reference (a))).

C3.2.1.7.1.3.5. 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) (reference (a))).

C3.2.1.7.1.3.6. Could reasonably be expected to endanger the life or physical safety of any individual (5 U.S.C. 552(b)(7)(F) (reference (a))).

C3.2.1.7.2. Some examples of exemption 7 are:

C3.2.1.7.2.1. 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.

C3.2.1.7.2.2. 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.

C3.2.1.7.2.3. Information obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized agency or office within a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the purpose of obtaining affirmative or counterintelligence information.

C3.2.1.7.3. The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500, (reference (w))) is not diminished.

C3.2.1.7.4. When the subject of an investigative report is the requester of the record and the report is contained in a Privacy Act system of records, it may only be denied to the requester if withholding is both authorized by DoD 5400.11-R (reference (v)), and by exemption seven of the FOIA.

C3.2.1.7.5. Exclusions. Excluded from the above exemption are the below two situations applicable to the Department of Defense. (Components considering invoking an exclusion should first consult with the Department of Justice, Office of Information and Privacy.)

C3.2.1.7.5.1. Whenever a request is made that involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Components may, during only such times as that circumstance continues, treat the records or information as not subject to the FOIA. In such situation, the response to the requester will state that no records were found.

C3.2.1.7.5.2. Whenever informant records maintained by a criminal law enforcement organization within a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Component may treat the records as not subject to the FOIA, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to 5 U.S.C. 552(b)(7) (reference (a)), the response to the requester will state that no records were found.

C3.2.1.8. Number 8. (5 U.S.C. 552 (b)(8) (reference (a))). Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

C3.2.1.9. Number 9. (5 U.S.C. 552 (b)(9) (reference (a))). Those containing geological and geophysical information and data (including maps) concerning wells.

C4. CHAPTER 4

FOR OFFICIAL USE ONLY

C4.1. GENERAL PROVISIONS

C4.1.1. General. Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public for one or more of the reasons cited in FOIA exemptions 2 through 9 (see Chapter 3) shall be considered as being for official use only. No other material shall be considered or marked "For Official Use Only" (FOUO), and FOUO is not authorized as an anemic form of classification to protect national security interests. Additional information on FOUO and other controlled, unclassified information may be found in reference (g).

C4.1.2. Prior FOUO Application. The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemptions apply, the record may nonetheless be released as a discretionary matter when it is determined that no governmental interest will be jeopardized by its release.

C4.1.3. Historical Papers. Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special status apart from the exemptions under the FOIA (reference (a)).

C4.1.4. Time to Mark Records. The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

C4.1.5. Distribution Statement. Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24 (reference (x)) shall bear that statement and may be marked FOUO, as appropriate.

C4.2. MARKINGS

C4.2.1. Location of Markings

C4.2.1.1. An unclassified document containing FOUO information shall be marked "For Official Use Only" at the bottom on the outside of the front cover (if any), on each page containing FOUO information, and on the outside of the back cover (if any).

C4.2.1.2. Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page. Individual paragraphs shall be marked at the appropriate classification level, as well as unclassified or FOUO, as appropriate.

C4.2.1.3. Within a classified document, an individual page that contains FOUO information but no classified information shall be marked "For Official Use Only" at the top and bottom of the page.

C4.2.1.4. Other records, such as photographs, films, tapes, or slides, shall be marked "For Official Use Only" or "FOUO" in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

C4.2.1.5. FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information
EXEMPT FROM MANDATORY DISCLOSURE
under the FOIA. Exemption(s) applies/apply.

C4.3. DISSEMINATION AND TRANSMISSION

C4.3.1. Release and Transmission Procedures. Until FOUO status is terminated, the release and transmission instructions that follow apply:

C4.3.1.1. FOUO information may be disseminated within DoD Components and between officials of DoD Components and DoD contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

C4.3.1.2. DoD holders of FOUO information are authorized to convey such information to officials in other Departments and Agencies of the Executive and Judicial Branches to fulfill a government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked "For Official Use Only," and the recipient shall be advised that the information may qualify for exemption from public disclosure, pursuant to the FOIA, and that special handling instructions do or do not apply.

C4.3.1.3. Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4 (reference (y)). Release to the GAO is governed by DoD Directive 7650.1 (reference (z)). Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be

requested, without marking the record, to protect against its public disclosure for reasons that are explained.

C4.3.2. Transporting FOUO Information. Records containing FOUO information shall be transported in a manner that prevents disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations, may be sent by fourth-class mail.

C4.3.3. Electronically and Facsimile Transmitted Messages. Each part of electronically and facsimile transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages and facsimiles shall be transmitted in accordance with communications security procedures whenever practicable.

C4.4. SAFEGUARDING FOUO INFORMATION

C4.4.1. During Duty Hours. During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to non-government personnel.

C4.4.2. During Nonduty Hours. At the close of business, FOUO records shall be stored so as to prevent unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or Government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of the National Security Act of 1959 (reference (aa)) shall meet the safeguards outlined for that group of records.

C4.5. TERMINATION, DISPOSAL AND UNAUTHORIZED DISCLOSURES

C4.5.1. Termination. The originator or other competent authority; e.g., initial denial and appellate authorities, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the "For Official Use Only" markings, but records in file or storage need not be retrieved solely for that purpose.

C4.5.2. Disposal

C4.5.2.1. Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to prevent reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but must give due

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

C4.5.2.2. Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. 3301-3314 (reference (ab)), as implemented by DoD Component instructions concerning records disposal.

C4.5.3. Unauthorized Disclosure. The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act (reference (d)) may also result in civil and criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

C5. CHAPTER 5

RELEASE AND PROCESSING PROCEDURES

C5.1. GENERAL PROVISIONS

C5.1.1. Public Information

C5.1.1.1. Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for a DoD record made under the provisions of 5 U.S.C. 552 (a)(3) (reference (a)) of the FOIA may be denied only when:

C5.1.1.1.1. Disclosure would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is subject to one or more of the exemptions of the FOIA.

C5.1.1.1.2. 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.

C5.1.1.1.3. The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the DoD Component concerned. When personally identifiable information in a record is requested by the subject of the record or his attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.

C5.1.1.2. Individuals seeking DoD information should address their FOIA requests to one of the addresses listed in Appendix AP2.

C5.1.2. Requests from Private Parties. The provisions of the FOIA are reserved for persons with private interests as opposed to U.S. Federal Agencies seeking official information. Requests from private persons will be made in writing, and should clearly show all other addressees within the Federal Government to which the request was also sent. This procedure will reduce processing time requirements, and ensure better inter- and intra-agency coordination. However, if the requester does not show all other addressees to which the request was also sent, DoD Components shall still process the request. DoD Components should encourage requesters to send requests by mail, facsimile, or by electronic means. Disclosure of records to individuals under the FOIA is considered public release of information, except as provided for in subsections C1.5.6. and C3.2.1., above.

C5.1.3. Requests from Government Officials. Requests from officials of State or local Governments for DoD Component records shall be considered the same as any other requester. Requests from members of Congress not seeking records on behalf of a Congressional Committee, Subcommittee, either House sitting as a whole, or made on behalf of their constituents shall be considered the same as any other requester (see also subsections C1.5.6., above and C5.1.4., below). Requests from officials of foreign governments shall be considered the same as any other requester. Requests from officials of foreign governments that do not invoke the FOIA shall be referred to appropriate foreign disclosure channels and the requester so notified.

C5.1.4. Privileged Release Outside of the FOIA to U.S. Government Officials

C5.1.4.1. 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:

C5.1.4.1.1. In response to a request of a Committee or Subcommittee of Congress, or to either House sitting as a whole in accordance with DoD Directive 5400.4 (reference (y));

C5.1.4.1.2. To other Federal Agencies, both executive and administrative, as determined by the head of a DoD Component or designee;

C5.1.4.1.3. In response to an order of a Federal court, DoD Components shall release information along with a description of the restrictions on its release to the public;

C5.1.4.2. DoD Components shall inform officials receiving records under the provisions of this paragraph that those records are exempt from public release under the FOIA. DoD Components also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1-R (reference (g)), and information contained in Privacy Act systems of records is subject to DoD 5400.11-R (reference (v)).

C5.1.5. Consultation with Affected DoD Component

C5.1.5.1. When a DoD Component receives a FOIA request for a record in which an affected DoD organization (including a Combatant Command) has a clear and substantial interest in the subject matter, consultation with that affected DoD organization is required. As an example, where a DoD Component receives a request for records related to DoD operations in a foreign country, the cognizant Combatant Command for the area involved in the request shall be consulted before a release is made. Consultations may be telephonic, electronic, or in hard copy.

C5.1.5.2. The affected DoD Component shall review the circumstances of the request for host- nation relations, and provide, where appropriate, FOIA processing assistance to the responding DoD Component regarding release of information. Responding DoD Components shall provide copies of responsive records to the affected DoD Component when requested by the

affected DoD Component. The affected DoD Component shall receive a courtesy copy of all releases in such circumstances.

C5.1.5.3. Nothing in the above paragraphs shall impede the processing of the FOIA request initially received by a DoD Component.

C5.2. INITIAL DETERMINATIONS

C5.2.1. Initial Denial Authority

C5.2.1.1. Components shall limit the number of IDAs appointed. In designating its IDAs, a DoD Component shall balance the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding to each request within the time limitations of the FOIA.

C5.2.1.2. The initial determination whether to make a record available upon request may be made by any suitable official designated by the DoD Component in published regulations. The presence of the marking "For Official Use Only" does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under the FOIA is applicable.

C5.2.1.3. The officials designated by DoD Components to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media.

C5.2.2. Reasons for Not Releasing a Record. The following are reasons for not complying with a request for a record under 5 U.S.C. 552(a)(3) (reference (a)):

C5.2.2.1. No Records. A search of files failed to identify responsive records.

C5.2.2.2. Referrals. The request is transferred to another DoD Component, or to another Federal Agency.

C5.2.2.3. Request Withdrawn. The request is withdrawn by the requester.

C5.2.2.4. 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.

C5.2.2.5. 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.

C5.2.2.6. Not a Proper FOIA Request for Some Other Reason. The requester has failed unreasonably to comply with procedural requirements, *other than fee-related*, imposed by this Regulation or DoD Component supplementing regulations.

C5.2.2.7. Not an Agency Record. The information requested is not a record within the meaning of the FOIA and this Regulation.

C5.2.2.8. Duplicate Request. *The request is a duplicate request (e.g., a requester asks for the same information more than once). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.*

C5.2.2.9. Other (Specify). *Any other reason a requester does not comply with published rules other than those outlined above.*

C5.2.2.10. Partial or Total Denial. The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

C5.2.3. Denial Tests. To deny a requested record that is in the possession and control of a DoD Component, it must be determined that disclosure of the record would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is exempt under one or more of the exemptions of the FOIA. An outline of the FOIA's exemptions is contained in Chapter 3 of this Regulation.

C5.2.4. Reasonably Segregable Portions. Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. Unless indicating the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas indicating removal of information. In no case shall the deleted areas be left "white" without the use of brackets to show the bounds of deleted information. In the case of electronic deletion, or deletion in audiovisual or microfiche records, if technically feasible, the amount of redacted information shall be indicated at the place in the record such deletion was made, unless including the indication would harm an interest protected by the exemption under which the deletion is made. This may be done by use of brackets, shaded areas, or some other identifiable technique that will clearly show the limits of the deleted information. When a record is denied in whole, the response advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release.

C5.2.5. Response to Requester.

C5.2.5.1. Whenever possible, initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 20 working days after receipt of the request by the official designated to respond. When a DoD Component has a significant number of pending requests which prevent a response determination within the 20 working day period, the requester shall be so notified in an interim response, and advised whether

their request qualifies for the fast track or slow track within the DoD Components' multitrack processing system. Requesters who do not meet the criteria for fast track processing shall be given the opportunity to limit the scope of their request in order to qualify for fast track processing. See also subsection C5.1.4. above, for greater detail on multitrack processing and compelling need meriting expedited processing.

C5.2.5.2. When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

C5.2.5.3. When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based, inclusive of a brief statement describing what the exemption(s) cover. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable Executive Order criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the DoD Component.

C5.2.5.4. The final response to the requester should contain information concerning the fee status of the request, consistent with the provisions of Chapter 6, this Regulation. *When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the response letter. Components also shall provide the requester with a complete cost breakdown (e.g., 15 pages of office reproduction at \$0.15 per page; 5 minutes of computer search time at \$43.50 per minute, 2 hours of professional level search at \$25 per hour, etc.) in the response letter.*

C5.2.5.5. The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this Regulation; e.g., 5 U.S.C. 552 (b)(1) (reference (a)). Merely referring to a classification; to a "For Official Use Only" marking on the requested record; or to this Regulation or a DoD Component's regulation does not constitute a proper citation or explanation of the basis for invoking an exemption.

C5.2.5.6. When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

C5.2.5.7. When denying a request for records, in whole or in part, a DoD Component shall make a reasonable effort to estimate the volume of the records denied and provide this estimate to the requester, unless providing such an estimate would harm an interest protected by an exemption of the FOIA. This estimate should be in number of pages or in some other reasonable form of estimation, unless the volume is otherwise indicated through deletions on records disclosed in part.

C5.2.5.8. When denying a request for records in accordance with a statute qualifying as a FOIA exemption 3 statute, DoD Components shall, in addition to stating the particular statute relied upon to deny the information, also state whether a court has upheld the decision to withhold the information under the particular statute, and a concise description of the scope of the information being withheld.

C5.2.6. Extension of Time

C5.2.6.1. In unusual circumstances, when additional time is needed to respond to the initial request, the DoD Component shall acknowledge the request in writing within the 20 day period, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days, except as provided below:

C5.2.6.2. With respect to a request for which a written notice has extended the time limits by 10 additional working days, and the Component determines that it cannot make a response determination within that additional 10 working day period, the requester shall be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request. Refusal by the requester to reasonably modify the request or arrange for an alternative time frame shall be considered a factor in determining whether exceptional circumstances exist with respect to DoD Components' request backlogs. Exceptional circumstances do not include a delay that results from predictable component backlogs, unless the DoD Component demonstrates reasonable progress in reducing its backlog.

C5.2.6.3. Unusual circumstances that may justify delay are:

C5.2.6.3.1. The need to search for and collect the requested records from other facilities that are separate from the office determined responsible for a release or denial decision on the requested information.

C5.2.6.3.2. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are requested in a single request.

C5.2.6.3.3. The need for consultation, which shall be conducted with all practicable speed, with other agencies having a substantial interest in the determination of the request, or among two or more DoD Components having a substantial subject-matter interest in the request.

C5.2.6.3.4. DoD Components may aggregate certain requests by the same requester, or by a group of requesters acting in concert, if the DoD Component reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances set forth above, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated. If the requests are aggregated under these conditions, the requester or requesters shall be so notified.

C5.2.6.3.5. In cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester with a request that he agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. DoD Components are reminded that the requester still retains the right to treat this delay as a defacto denial with full administrative remedies.

C5.2.6.3.6. As an alternative to the taking of formal extensions of time as described in subsection C5.2.6. above, the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

C5.2.7. Misdirected Requests. Misdirected requests shall be forwarded promptly to the DoD Component or other Federal Agency with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the DoD Component that manages the records requested.

C5.2.8. Records of Non-U.S. Government Source

C5.2.8.1. When a request is received for a record that falls under exemption 4 (see subsection Number 4 of Chapter 3, above), that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information [also known as "the submitter" for matters pertaining to proprietary data under 5 U.S.C. 552 (reference (a)) Exemption (b)(4)] [Chapter 3, section 2, subsection C3.2.1., Number 4, this Regulation and E. O. 12600 (reference (ac)),] shall be notified promptly of that request and afforded reasonable time (e.g., 30 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4) of reference (a). If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised, the DoD Component may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

C5.2.8.2. If the submitted information is a proposal in response to a solicitation for a competitive proposal, and the proposal is in the possession and control of DoD, and meets the requirements of 10 U.S.C. 2305(g) (reference (p)), 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 (p) and exemption (b)(3) of reference (a). This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between a DoD Component and the offeror that submitted the proposal. In such situations, normal submitter notice shall be conducted in accordance with paragraph C5.2.8.1., above, except for sealed bids that are opened and read to the public. The term proposal means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive proposal, but does not include an offeror's name or total price or unit prices when set forth in a record other than the proposal itself. Submitter notice, and analysis as appropriate, are required for exemption (b)(4) matters that are not specifically incorporated in reference (p).

C5.2.8.3. If the record or information was submitted on a strictly voluntary basis, absent any exercised authority that prescribes criteria for submission, and after consultation with the submitter, it is absolutely clear that the record or information would customarily not be released to the public, the submitter need not be notified. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Records or information submitted under these authorities **are not** voluntary in nature. When it is not clear whether the information was submitted on a voluntary basis, absent any exercised authority, and whether it would customarily be released to the public by the submitter, notify the submitter and ask that it describe its treatment of the information, and render an objective evaluation. If the decision is made to release the information over the objection of the submitter, notify the submitter and afford the necessary time to allow the submitter to seek a restraining order, or take court action to prevent release of the record or information.

C5.2.8.4. The coordination provisions of this paragraph also apply to any non-U.S. Government record in the possession and control of the DoD from multi-national organizations, such as the North Atlantic Treaty Organization (NATO), United Nations Commands, the North American Aerospace Defense Command (NORAD), the Inter-American Defense Board, or foreign governments. Coordination with foreign governments under the provisions of this paragraph may be made through Department of State, or the specific foreign embassy.

C5.2.9. 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 at the initial stage shall be maintained for a period of six years to meet the statute of limitations requirement.

C5.2.10. Special Mail Services. Components are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. *The requester shall be notified that they are responsible for the full costs of special services.*

C5.2.11. Receipt Accounts. The Treasurer of the United States has established two accounts for FOIA receipts, and all money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer. These accounts, which are described in paragraphs C5.2.11.1. and

C5.2.11.2., below, shall be used for depositing all FOIA receipts, except receipts for industrially funded and non appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Industrially funded and non appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

C5.2.11.1. Receipt Account 3210 Sale of Publications and Reproductions, Freedom of Information Act (reference (ad)). This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles.

C5.2.11.2. Receipt Account 3210 Fees and Other Charges for Services, Freedom of Information Act (reference (ad)). This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

C5.3. APPEALS

C5.3.1. General. If the official designated by the DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, for no record determinations when the requester considers such responses adverse in nature, *or any determination found to be adverse in nature by the requester*. Appeals of Office of the Secretary of Defense and Chairman of the Joint Chiefs of Staff determinations may be sent to the address in Appendix AP2, paragraph AP2.2.1. If a request is merely misaddressed, and the receiving DoD Component simply advises the requester of such and refers the request to the appropriate DoD Component, this shall not be considered a no record determination.

C5.3.2. Time of Receipt. A FOIA appeal has been received by a DoD Component when it reaches the office of an appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

C5.3.3. Time Limits

C5.3.3.1. The requester shall be advised to file an appeal so that it reaches the appellate authority no later than 60 calendar days after the date of the initial denial letter. At the conclusion of this period, the case may be considered closed; however, such closure does not prevent the requester from filing litigation. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the

requester receives the last such notification. Records that are denied shall be retained for a period of six years to meet the statute of limitations requirement.

C5.3.3.2. Final determinations on appeals normally shall be made within 20 working days after receipt. When a DoD Component has a significant number of appeals preventing a response determination within 20 working days, the appeals shall be processed in a multitrack processing system, based at a minimum, on the three processing tracks established for initial requests. See subsection C1.5.4. above, this Regulation. All of the provisions of C1.5.4. apply also to appeals of initial determinations, to include establishing additional processing queues as needed.

C5.3.4. Delay in Responding to an Appeal

C5.3.4.1. If additional time is needed due to the unusual circumstances described in subsection 5-205, above, the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request.

C5.3.4.2. If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in subsection C5.2.6., above, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The DoD Component shall continue to process the case expeditiously. ~~whether or not the requester seeks a court order for release of the records, but a copy of any response provided subsequent to filing of a complaint shall be forwarded to the Department of Justice.~~

C5.3.5. Response to the Requester

C5.3.5.1. When an appellate authority makes a final determination to release all or a portion of records withheld by an IDA, a written response and a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

C5.3.5.2. Final refusal of an appeal must be made in writing by the appellate authority or by a designated representative. The response, at a minimum, shall include the following:

C5.3.5.2.1. The basis for the refusal shall be explained to the requester in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of the FOIA, and with respect to other appeal matters as set forth in subsection C5.3.1., above.

C5.3.5.2.2. When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive Order, and that this determination is based on a

declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

C5.3.5.2.3. The final denial shall include the name and title or position of the official responsible for the denial.

C5.3.5.2.4. In the case of appeals for total denial of records, the response shall advise the requester that the information being denied does not contain meaningful portions that are reasonably segregable.

C5.3.5.2.5. When the denial is based upon an exemption 3 statute (see subsection Number 3 of Chapter 3), the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld.

C5.3.5.2.6. The response shall advise the requester of the right to judicial review.

C5.3.6. Consultation

C5.3.6.1. Final refusal involving issues not previously resolved or that the DoD Component knows to be inconsistent with rulings of other DoD Components ordinarily should not be made before consultation with the DoD Office of the General Counsel.

C5.3.6.2. Tentative decisions to deny records that raise new or significant legal issues of potential significance to other Agencies of the Government shall be provided to the DoD Office of the General Counsel.

C5.4. JUDICIAL ACTIONS

C5.4.1. General

C5.4.1.1. This section 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.

C5.4.1.2. A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the DoD Component has failed to respond within the time limits prescribed by the FOIA and in this Regulation.

C5.4.2. Jurisdiction. The requester may bring suit in the U.S. District Court in the district in which the requester resides or is the requesters place of business, in the district in which the record is located, or in the District of Columbia.

C5.4.3. 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.

C5.4.4. Actions by the Court

C5.4.4.1. When a DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, to include negotiating with the requester to modify the scope of their request, the court may retain jurisdiction and allow the Component additional time to complete its review of the records.

C5.4.4.2. If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

C5.4.4.3. When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions 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.

C5.4.4.2. The court may punish the responsible official for contempt when a DoD Component fails to comply with the court order to produce records that it determines have been withheld improperly.

C5.4.5. Non-United States Government Source Information. A requester may bring suit in a U.S. District Court to compel the release of records obtained from a non-government source or records based on information obtained from a non-government source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the DoD Component shall defer answering or otherwise pleading to the complainant as long as permitted by the Court or until a decision is rendered in the court action of the source, whichever is sooner.

C5.4.6. FOIA Litigation. Personnel responsible for processing FOIA requests at the DoD Component level shall be aware of litigation under the FOIA. Such information will provide management insights into the use of the nine exemptions by Component personnel. Whenever a complaint under the FOIA is filed in a U.S. District Court, the DoD Component named in the complaint shall forward a copy of the complaint by any means to the Director, Freedom of Information and Security Review with an information copy to the DoD Office of the General Counsel, ATTN: Office of Legal Counsel.

C6. CHAPTER 6

FEE SCHEDULE

C6.1. GENERAL PROVISIONS

C6.1.1. Authorities. The Freedom of Information Act (reference (a)), as amended; the Paperwork Reduction Act (44 U.S.C. Chapter 35) (reference (ae)), as amended; the Privacy Act of 1974 (reference (d)), as amended; the Budget and Accounting Act of 1921 and the Budget and Accounting Procedures Act, as amended (see 31 U.S.C.) (reference (af)); and 10 U.S.C. 2328 (reference (ag)).

C6.1.2. Application

C6.1.2.1. The fees described in this Chapter apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines (reference (ah)). They reflect direct costs for search, review (in the case of commercial requesters); and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as *DoD 7000.14-R* (reference (ai)), which does not supersede the collection of fees under the FOIA. Nothing in this Chapter shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552 (a)(4)(a)(vi)) (reference (a)) means any statute that enables a Government Agency such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as the GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

C6.1.2.2. The term "direct costs" means those expenditures a Component actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to an FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. These factors have been included in the fee rates prescribed at Section C6.2. of this Chapter. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

C6.1.2.3. The term "search" includes all time spent looking, both manually and electronically, for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the record to determine if it, or portions

thereof are responsive to the request. Components should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Component and the requester. For example, Components should not engage in line-by-line searches when duplicating an entire document known to contain responsive information would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is not search time, but review time. See paragraph C6.1.2.5., below, for the definition of review, and paragraphs C6.1.3.5. and C6.2.2.2., below, for information pertaining to computer searches.

C6.1.2.3.1. When requested, and when there is reason to believe that some records will be located, Components shall conduct partial searches. A partial search is defined as any search conducted until the requester's hourly and/or fee threshold is met, even if responsive documents are not located. In the case of news media, educational and noncommercial scientific requesters, an hourly threshold must be specified by the requester before the Component begins searching. However, if, by a Component's role or mission, the conduct of a partial search would harm an interest protected by a FOIA exemption, the Component shall not conduct a partial search.

C6.1.2.4. The term "duplication" refers to the process of making a copy of a document in response to an FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disc), among others. Every effort will be made to ensure that the copy provided is in a form that is reasonably useable, the requester shall be notified that the copy provided is the best available and that the Agency's master copy shall be made available for review upon appointment. For duplication of computer tapes and audiovisual, the actual cost, including the operator's time, shall be charged. In practice, if a Component estimates that assessable duplication charges are likely to exceed \$25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

C6.1.2.5. The term "review" refers to the process of examining documents located in response to an FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does not include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the initial review. Components may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

C6.1.3. Fee Restrictions

C6.1.3.1. No fees may be charged by any DoD Component if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the

exception of requesters seeking documents for a commercial use, Components shall provide the first two hours of search time, and the first one hundred pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and ten minutes of search time, and resulted in one hundred and five pages of documents, a Component would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than, the cost to the Component for billing the requester and processing the fee collected, no charges would result.

C6.1.3.2. Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if a Component, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DoD Component, or another Federal Agency to action their portion of the request, the referring Component shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

C6.1.3.3. The elements to be considered in determining the "cost of collecting a fee" are the administrative costs to the Component of receiving and recording a remittance, and processing the fee for deposit in the Department of Treasury's special account. The cost to the Department of Treasury to handle such remittance is negligible and shall not be considered in Components' determinations.

C6.1.3.4. For the purposes of these restrictions, the word "pages" refers to paper copies of a standard size, which will normally be "8 1/2 x 11" or "11 x 14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout however, might meet the terms of the restriction.

C6.1.3.5. In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$24.00 (two hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time. In the event the direct operating cost of the hardware configuration cannot be determined, computer search shall be based on the salary scale of the operator executing the computer search. See Section C6.2., this Chapter, for further details regarding fees for computer searches.

C6.1.4. Fee Waivers

C6.1.4.1. Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in subsection C6.1.5. below, 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.

C6.1.4.2. When assessable costs for a FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

C6.1.4.3. Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis, consistent with the following factors:

C6.1.4.3.1. 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."

C6.1.4.3.1.1. The subject of the request. Components should analyze whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Department of Defense. Requests for records in the possession of the Department of Defense which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value, will likely not contribute to public understanding of the operations or activities of the Department of Defense. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the Department of Defense; however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of the Department of Defense, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of the Department of Defense.

C6.1.4.3.1.2. 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 operations or activities of the Department of Defense, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a previously released record that has been heavily redacted, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the Department of Defense must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful new information concerning the operations and activities of the Department of Defense.

C6.1.4.3.1.3. 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.

C6.1.4.3.1.4. The significance of the contribution to public understanding. In applying this factor, Components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists before the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing 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. Components shall not make value judgments as to whether the information is important enough to be made public.

C6.1.4.3.2. Disclosure of the information "is not primarily in the commercial interest of the requester."

C6.1.4.3.2.1. The existence and magnitude of a commercial interest. If the request is determined to be of a commercial interest, Components should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to 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, Components may draw inference from the requester's identity and circumstances of the request. In such situations, the provisions of subsection C6.1.5. below, apply. Components are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must clearly override any personal or non-profit interest.

C6.1.4.3.2.2. The primary interest in disclosure. Once a requester's commercial interest has been determined, Components should then determine if the disclosure would be primarily in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a primary interest. Therefore, any commercial interest becomes secondary to the primary interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they

represent); however, normally such pursuits are primarily undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest primarily of a commercial nature.

C6.1.4.4. Components are reminded that the factors and examples used in this subsection are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, Components should rule in favor of the requester.

C6.1.4.5. In addition, the following additional circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

C6.1.4.5.1. A record is voluntarily created to prevent an otherwise burdensome effort to provide voluminous amounts of available records, including additional information not requested.

C6.1.4.5.2. A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. \$15.00 - \$30.00).

C6.1.5. Fee Assessment

C6.1.5.1. Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

C6.1.5.2. In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Components shall adhere to the following procedures:

C6.1.5.2.1. 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:

C6.1.5.2.1.1 Notify the requester to provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (i.e., 30 calendar days), the Component shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

C6.1.5.2.1.2. Advise the requester that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Component.

C6.1.5.2.2. Requesters should submit a fee declaration appropriate for the below categories.

C6.1.5.2.2.1. Commercial. Requesters should indicate a willingness to pay all search, review and duplication costs.

C6.1.5.2.2.2. Educational or Noncommercial Scientific Institution or News Media. Requesters should indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

C6.1.5.2.2.3. All Others. Requesters should indicate a willingness to pay assessable search and duplication costs if more than two hours of search effort or 100 pages of records are desired.

C6.1.5.2.3. If the above conditions are not met, then the request need not be processed and the requester shall be so informed.

C6.1.5.2.4. In the situations described by subparagraphs C6.1.5.2.1. and C6.1.5.2.2., above, Components must be prepared to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Components' actual costs exceed the amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement.

C6.1.5.2.5. No DoD Component may require advance payment of any fee; i.e., payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Component.

C6.1.5.2.6. Where a Component estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the Component shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

C6.1.5.2.7. Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the Component may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he or she has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Component begins to process a new or pending request from the requester. Interest will be at the rate prescribed in 31 U.S.C. 3717 (reference (aj)), and confirmed with respective Finance and Accounting Offices.

C6.1.5.2.8. After all work is completed on a request, and the documents are ready for release, Components may request payment before forwarding the documents, particularly for those requesters who have no payment history, or for those requesters who have failed previously to pay a fee in a timely fashion (i.e., within 30 calendar days from the date of the billing). In the case of the latter, the provisions of subparagraph C6.1.5.2.7., above, apply.

C6.1.5.2.9. When Components act under subparagraphs C6.1.5.2.1. through C6.1.5.2.7, above, 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).

C6.1.5.2.10. Components may charge for time spent searching for records, even if that search fails to locate records responsive to the request. Components may also charge search and review (in the case of commercial requesters) time if records located are determined to be exempt from disclosure. In practice, if the Component estimates that search charges are likely to exceed \$25.00, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his or her willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

C6.1.5.3. Commercial Requesters. Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought. (See subsection C1.5.8. above.)

C6.1.5.3.1. The term "commercial use" request refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, Components must determine the use to which a requester will put the documents requested. Moreover, where a Component has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Components should seek additional clarification before assigning the request to a specific category.

C6.1.5.3.2. When Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents. Moreover, 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 criteria, 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.

C6.1.5.4. Educational Institution Requesters. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters

must reasonably describe the records sought (see subsection C1.5.8. above). The term "educational institution" refers to a pre-school, a public or private elementary or secondary school, an institution of graduate high education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. Fees shall be waived or reduced in the public interest if the criteria of subsection C6.1.4., above, have been met.

C6.1.5.5. Non-Commercial Scientific Institution Requesters. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought (see subsection C1.5.8., above). The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as defined in subparagraph C6.1.5.3., above, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. Fees shall be waived or reduced in the public interest if the criteria of subsection C6.1.4., above, have been met.

C6.1.5.6. Components shall provide documents to requesters in paragraphs C6.1.5.4. and C6.1.5.5., above, for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in these categories, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.

C6.1.5.7. Representatives of the news media. Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought (see subsection C1.5.8., above). Fees shall be waived or reduced if the criteria of subsection C6.1.4., above, have been met.

C6.1.5.7.1. 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 that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Components may also look to the past publication record of a requester in making this determination.

C6.1.5.7.2. To be eligible for inclusion in this category, a requester must meet the criteria in subparagraph C6.1.5.7.1., above, and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

C6.1.5.7.3. "Representative of the news media" does not include private libraries, private repositories of Government records, or middlemen, such as information vendors or data brokers.

C6.1.5.8. All Other Requesters. Components shall charge requesters who do not fit into any of the categories described in subsections C6.1.5.3., C6.1.5.4., C6.1.5.5., or C6.1.5.7., fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought (see subsection C1.5.8., above). Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974 (reference (d)), which permit fees only for duplication. Components are reminded that this category of requester may also be eligible for a waiver or reduction of fees if disclosure of the information is in the public interest as defined under subsection C6.1.4.1., above. (See also subparagraph C6.1.5.3.2.)

C6.1.6. Aggregating Requests. Except for requests that are for a commercial use, a Component may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document 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 Agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30 day period had been made to avoid fees. For requests made over a longer period however, such a presumption becomes harder to sustain and Components should have a solid basis for determining that aggregation is warranted in such cases. Components are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may Components aggregate multiple requests on unrelated subjects from one requester.

C6.1.7 Effect of the Debt Collection Act of 1982 (P.L. 97-365) (reference (ak)). The Debt Collection Act of 1982 (P.L. 97-365) (reference (ak)) provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Components may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as

prescribed in 31 U.S.C. 3717 (reference (aj)). 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 reference (ak).

C6.1.8. Computation of Fees. The fee schedule in this Chapter shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized. *The appropriate fee category of the requester shall be applied before computing fees.*

C6.1.9. Refunds. *In the event that a Component discovers that it has overcharged a requester or a requester has overpaid, the Component shall promptly have a refund check issued to the requester.*

C6.2. COLLECTION OF FEES AND FEE RATES

C6.2.1. Collection of Fees. Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs. Collection of fees may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the DoD Component, or the Component has determined that the fee will be in excess of \$250 (see subsection C6.1.5., above).

C6.2.2. Search Time.

C6.2.2.1. Manual Search

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical	E9/GS8 and below	12
Professional	O1-O6/GS9-GS15	25
Executive	O7/GS16/ES1 and above	45

C6.2.2.2. Computer Search. Fee assessments for computer search consists of two parts; individual time (hereafter referred to as human time), and machine time.

C6.2.2.2.1. Human time. Human time is all the time spent by humans performing the necessary tasks to prepare the job for a machine to execute the run command. If execution of a run requires monitoring by a human, that human time may be also assessed as computer search. The terms "programmer/operator" shall not be limited to the traditional programmers or operators. Rather, the terms shall be interpreted in their broadest sense to incorporate any human involved in performing the computer job (e.g. technician, administrative support, operator, programmer, database administrator, or action officer).

C6.2.2.2.2. Machine time. Machine time involves only direct costs of the Central Processing Unit (CPU), input/output devices, and memory capacity used in the actual

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

C6.2.3. Duplication

<u>Type</u>	<u>Cost per Page (cents)</u>
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)

C6.2.4. Review Time (in the case of commercial requesters)

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical	E9/GS8 and below	12
Professional	O1-O6/GS9-GS15	25
Executive	O7/GS16/ES1 and above	45

C6.2.5. Audiovisual Documentary Materials. Search costs are computed as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

C6.2.6. Other Records. Direct search and duplication cost for any record not described in this section shall be computed in the manner described for audiovisual documentary material.

C6.2.7. Costs for Special Services. Complying with requests for special services is at the discretion of the Components. Neither the FOIA, nor its fee structure cover these kinds of services. Therefore, Components may recover the costs of special services requested by the requester after agreement has been obtained in writing from the requester to pay for one or more of the following services:

C6.2.7.1. Certifying that records are true copies.

C6.2.7.2. Sending records by special methods such as express mail, etc.

C6.3. COLLECTION OF FEES AND FEE RATES FOR TECHNICAL DATA

C6.3.1. Fees for Technical Data

C6.3.1.1. Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays all reasonable costs attributed to search, duplication and review of the records to be released. Technical data, as used in this section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information. DoD Components shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. All reasonable costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full costs shall include all direct and indirect costs to conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable under section C6.2. of this chapter for other types of information released under the FOIA.

C6.3.1.2. Waiver. Components shall waive the payment of costs required in paragraph C6.3.1.1., above, which are greater than the costs that would be required for release of this same information under section C6.2. of this chapter if:

C6.3.1.2.1. The request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, Components may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

C6.3.1.2.2. The release of technical data is requested in order to comply with the terms of an international agreement; or,

C6.3.1.2.3. The Component determines in accordance with paragraph C6.1.4.1., above, that such a waiver is in the interest of the United States.

C6.3.1.3. Fee Rates

C6.3.1.3.1. Search Time

C6.3.1.3.1.1. Manual Search

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical (Minimum Charge)	E9/GS8 and below	13.25 8.30

Professional and Executive (To be established at actual hourly rate prior to search. A minimum charge will be established at 1/2 Minimum Charge)Professional

C6.3.1.3.1.2. Computer search is based on the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage (based upon the scale in subparagraph C6.3.1.3.1.1., above) for the computer operator and/or programmer determining how to conduct, and subsequently executing the search will be recorded as part of the computer search. See paragraph C6.2.2.2., above, for further details regarding computer search.

C6.3.1.3.2. Duplication

<u>Type</u>	<u>Cost</u>
Aerial photograph, maps, specifications, permits, charts, blueprints, and other technical engineering documents	\$2.50
Engineering data (microfilm)	
(a) Aperture cards	
<u>1</u> Silver duplicate negative, per card	.75
When key punched and verified, per card	.85
<u>2</u> Diazo duplicate negative, per card	.65
When key punched and verified, per card	.75
(b) 35mm roll film, per frame	.50
(c) 16mm roll film, per frame	.45
(d) Paper prints (engineering drawings), each	1.50
(e) Paper reprints of microfilm indices, each	.10

C6.3.1.3.3. Review Time

<u>Type</u>	<u>Grade</u>	<u>Hourly Rate (\$)</u>
Clerical (Minimum Charge)	E9/GS8 and below	13.25 8.30

Professional and Executive (To be established at actual hourly rate prior to review. A minimum charge will be established at an hourly rate).

C6.3.1.4. Other Technical Data Records. Charges for any additional services not specifically provided in subsection C6.3.1.3., above, consistent with Volume 11A of DoD 7000.14-R (reference (ai)), shall be made by Components at the following rates:

- | | |
|--|--------|
| (1) Minimum charge for office copy (up to six images) | \$3.50 |
| (2) Each additional image | .10 |
| (3) Each typewritten page | 3.50 |
| (4) Certification and validation with seal, each | 5.20 |
| (5) Hand-drawn plots and sketches, each hour or fraction thereof | 12.00 |

C7. CHAPTER 7

REPORTS

C7.1. REPORTS CONTROL

C7.1.1. General.

C7.1.1.1. *The Annual Freedom of Information Act Report is mandated by the statute and reported on a fiscal year basis. Due to the magnitude of the requested statistics and the need to ensure accuracy of reporting, DoD Components shall track this data as requests are processed. This will also facilitate a quick and accurate compilation of statistics. DoD Components shall forward their report to the Directorate for Freedom of Information and Security Review no later than November 30 following the fiscal year's close. It may be submitted electronically and via hard copy accompanied by a computer diskette. In turn, DoD will produce a consolidated report for submission to the Attorney General, and ensure that a copy of the DoD consolidated report is placed on the Internet for public access.*

C7.1.2. Existing DoD standards and registered data elements are to be utilized to the greatest extent possible in accordance with the provisions of DoD Manual 8320.1-M, "Data Administration Procedures" (reference (al)).

C7.1.3. The reporting requirement outlined in this Chapter is assigned Report Control Symbol **TBD**.

C7.1.2. Annual Report Content. The current edition of DD Form 2564 will be used to submit component input. Instructions for completion follows:

C7.1.2.1. ITEM 1 Initial Request Determinations

C7.1.2.1.1. Total Requests Processed. Enter the total number of initial FOIA requests responded to (completed) during the fiscal year. Note: Since more than one action frequently is taken on a completed case, Total Actions (see C7.1.2.1.6., below) the sum of Items C7.1.2.1.2. (below) through C7.1.2.1.5. (below), can exceed Total Requests Processed (See Appendix AP5 for form layout).

C7.1.2.1.2. Granted in Full. Enter the total number of initial FOIA requests responded to that were granted in full during the fiscal year. (This may include requests granted by your office, yet still requiring action by another office.)

C7.1.2.1.3. Denied in Part. Enter the total number of initial FOIA requests responded to and denied in part based on one or more of the FOIA exemptions. *(Do not report "Other Reason Responses" as a partial denial here, unless a FOIA exemption is used also.)*

C7.1.2.1.4. Denied in Full. Enter the total number of initial FOIA requests responded to and denied in full based on one or more of the FOIA exemptions. *(Do not report "Other Reason Responses" as denials here, unless a FOIA exemption is used also.)*

C7.1.2.1.5. "Other Reason" Responses. Enter the total number of initial FOIA requests in which you were unable to provide all or part of the requested information based on an "Other Reason" response. C7.1.2.2.2. below, explains the *nine* possible "Other Reasons."

C7.1.2.1.6. Total Actions. Enter the total number of FOIA actions taken during the fiscal year. This number will be the sum of C7.1.2.1.2. through C7.1.2.1.5., above. Note: Total Actions must be equal to or greater than the number of Total Requests Processed (C7.1.2.1.1., above).

C7.1.2.2. ITEM 2 Initial Request Exemptions and Other Reasons

C7.1.2.2.1. Exemptions Invoked on Initial REQUEST Determinations. Enter the number of times an exemption was claimed for each request that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of C7.1.2.1.3. and C7.1.2.1.4., above. *Note that the (b)(7) exemption is reported by subcategory (A) through (F): (A) INTERFERE WITH ENFORCEMENT; (B) FAIR TRIAL RIGHT; (C) INVASION OF PRIVACY; (D) PROTECT CONFIDENTIAL SOURCE; (E) DISCLOSE TECHNIQUES; and (F) ENDANGER LIFE OR SAFETY.*

C7.1.2.2.2. "Other Reasons" Cited on Initial Determinations. Identify the "Other Reason" response cited when responding to a FOIA request and enter the number of times each was claimed.

C7.1.2.2.2.1. No Records. Enter the number of times a search of files failed to identify records responsive to subject request.

C7.1.2.2.2.2. Referrals. Enter the number of times a request was referred to another DoD Component or Federal Agency for action.

C7.1.2.2.2.3. Request Withdrawn. Enter the number of times a request and/or appeal was withdrawn by a requester. [For appeals, report number in Item 4b on the report form (see Appendix AP5).]

C7.1.2.2.2.4. Fee-Related Reason. Requester is unwilling to pay the fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with a fee estimate.

C7.1.2.2.2.5. Records not Reasonably Described. Enter the number of times a FOIA request could not be acted upon since the *record had not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search*.

C7.1.2.2.2.6. Not a Proper FOIA Request for Some Other Reason. Enter the number of times the requester has failed unreasonably to comply with procedural requirements, other than fee-related (described in C7.1.2.2.2.4., above), imposed by this Regulation or a DoD Component's supplementing regulation.

C7.1.2.2.2.7. Not an Agency Record. Enter the number of times a requester was provided a response indicating the requested information was not a record within the meaning of the FOIA and this Regulation.

C7.1.2.2.2.8. Duplicate Request. Record number of duplicate requests closed for that reason (e.g., request for the same information by the same requester). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, courier) at the same or different times.

C7.1.2.2.2.9. Other (Specify). Any other reason a requester does not comply with published rules, other than those reasons outlined above.

C7.1.2.2.2.10. Total. Enter the sum of C7.1.2.2.2.1. through C7.1.2.2.2.9. above, in the block provided on the form. This number will be equal to or greater than the number in 7-200a.(5) (above) since more than one reason may be claimed for each "Other Reason" response.

C7.1.2.2.3 (b)(3) Statutes Invoked on Initial Determinations. Identify the number of times you have used a specific statute to support each (b)(3) exemption. List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure you cite the specific sections of the acts invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 2a on the report form.

C7.1.2.3. ITEM 3 Appeal Determinations

C7.1.2.3.1. Total Appeal Responses. Enter the total number of FOIA appeals responded to (completed) during the fiscal year.

C7.1.2.3.2. Granted in Full. Enter the total number of FOIA appeals responded to and granted in full during the year.

C7.1.2.3.3. Denied in Part. Enter the total number of FOIA appeals responded to and denied in part based on one or more of the FOIA exemptions. *(Do not report "Other Reason Responses" as a partial denial here, unless a FOIA exemption is used also.)*

C7.1.2.3.4. Denied in Full. Enter the total number of FOIA appeals responded to and denied in full based on one or more of the FOIA exemptions. *(Do not report "Other Reason Responses" as denials here, unless a FOIA exemption is used also.)*

C7.1.2.3.5. "Other Reason" Responses. Enter the total number of FOIA appeals in which you were unable to provide the requested information based on an "Other Reason" response *(as outlined in "Other Reasons" in C7.1.2.2.2., above)*.

C7.1.2.3.6. Total Actions. Enter the total number of FOIA appeal actions taken during the fiscal year. This number will be the sum of C7.1.2.3.2. through C7.1.2.3.5., above, and should be equal to or greater than the number of Total Appeal Responses, C7.1.2.3.1., above.

C7.1.2.4. ITEM 4 Appeal Exemptions and Other Reasons

C7.1.2.4.1. Exemptions Invoked on Appeal Determinations. Enter the number of times an exemption was claimed for each appeal that was denied in full or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal to or greater than the sum of C7.1.2.3.3. and C7.1.2.3.4..

C7.1.2.4.2. "Other Reasons" Cited on Appeal Determinations. Identify the "Other Reason" response cited when responding to a FOIA appeal and enter the number of times each was claimed. See C7.1.2.2.2. above for description of "Other Reasons." This number can be equal to or possibly greater than the number in C7.1.2.3.5., above, since more than one reason may be claimed for each "Other Reason" response.

C7.1.2.4.3. (b)(3) Statutes Invoked on Appeal Determinations. Identify the number of times you have used a specific statute to support each (b)(3) exemption identified in item 4a on the report form (Appendix AP5). List the statutes used to support each (b)(3) exemption; the number of instances in which the statute was cited; note whether or not the statute has been upheld in a court hearing; and provide a concise description of the material withheld in each individual case by the statute's use. Ensure you cite the specific sections of the statute invoked. The total number of instances reported will be equal to or greater than the total number of (b)(3) exemptions listed in Item 4a on the report form.

C7.1.2.5. ITEM 5 Number and Median Age of Initial Cases Pending:

C7.1.2.5.1. Total Initial Cases Pending:

C7.1.2.5.1.1. As Of Beginning Report Period: Midnight, 2400 hours, September 30 of the Preceding Year -OR- 0001 hours, October 1 at the beginning of the report period.

C7.1.2.5.1.2. As Of End Report Period: Midnight, 2400 hours, at the close of the reporting period.

C7.1.2.5.2. Median Age of Initial Requests Pending: Report the median age in days (includes holidays and weekends) of initial requests pending.

C7.1.2.5.2.1. As Of Beginning Report Period: Midnight, 2400 hours, September 30 of the Preceding Year -OR- 0001 hours, 1 October at the beginning of the report period.

C7.1.2.5.2.2. As Of End Report Period: Midnight, 2400 hours, at the close of the reporting period.

C7.1.2.5.3. Examples of Median Calculation.

C7.1.2.5.3.1. If given five cases aged 10, 25, 35, 65, and 100 days from date of receipt as of the previous September 30th, the total requests pending is five (5). The median age (days) of open requests is the middle, not average value, in this set of numbers (10, 25, 35, 65, and 100), 35 (the middle value in the set).

C7.1.2.5.3.2. If given six pending cases, aged 10, 20, 30, 50, 120, and 200 days from date of receipt, as of the previous September 30th, the total requests pending is six (6). The median age (days) of open requests 40 days (the mean [average] of the two middle numbers in the set, in this case the average of middle values 30 and 50).

C7.1.2.5.4. Accuracy of Calculations. Agencies are responsible for the accuracy of their calculations. As backup, it is highly recommended that you record the raw data [entire sample used] to perform calculations in this section. This will enable you to recalculate median [and mean values if you desire] as necessary. Further, if you have the raw data from your subordinate elements, you can determine your department's/agency's median.

C7.1.2.5.5. Average. If a component believes that "average" (mean) processing time is a better measure of their performance, then they should report "averages" (means) as well as their median values (e.g., with data reflected and plainly labeled on plain bond as an attachment to the report). However, "average" (mean) values will not be included in the consolidated DoD report unless all components report it.

C7.1.2.6. ITEM 6 Number of Initial Requests Received During the Fiscal Year. Enter the total number of initial FOIA requests received during the reporting period (fiscal year being reported).

C7.1.2.7. ITEM 7 Types of Requests Processed and Median Age. Information is reported for three types of initial requests completed during the reporting period: Simple;

Complex; and Expedited Processing. The following items of information are reported for these requests:

C7.1.2.7.1. Total Number of Initial Requests. Enter the total number of initial requests processed [completed] during the reporting period (fiscal year) by type (Simple, Complex and Expedited Processing) in the appropriate row on the form.

C7.1.2.7.2. Median Age (Days). Enter the median number of days [calendar days including holidays and weekends] required to process each type of case (Simple, Complex and Expedited Processing) during the period in the appropriate row on the form.

C7.1.2.7.3. Example. Given seven Initial Requests, Multitrack -- Simple completed during the fiscal year, aged 10, 25, 35, 65, 79, 90 and 400 days when completed. The total number of requests completed was seven (7). The median age (days) of completed requests is 65, the middle value in the set.

C7.1.2.8. ITEM 8 Fees Collected from the Public. Enter the total amount of fees collected from the public during the fiscal year. This includes search, review and reproduction costs only.

C7.1.2.9. ITEM 9 FOIA Program Costs.

C7.1.2.9.1. Number of Full Time Staff: Enter the number of personnel your agency had dedicated to working FOIA full time during the fiscal year. This will be expressed in work-years [manyyears]. For example: "5.1, 3.2, 1.0, 6.5, et al." A sample calculation follows:

<u>Employee</u>	<u>Number Months Worked</u>	<u>Work-Years</u>	<u>Note</u>
SMITH, Jane	6	.5	Hired full time at middle of fiscal year.
PUBLIC, John Q.	4	.34	Dedicated to full time FOIA processing last quarter of fiscal year.
BROWN, Tom	12	1.0	Worked FOIA full time all fiscal year.
TOTAL:	22	1.84 work-years	

C7.1.2.9.2. Number of Part Time Staff: Enter the number of personnel your agency had dedicated to working FOIA part time during the fiscal year. This will be expressed in work-years [manyyears]. For example: "5.1, 3.2, 1.0, 6.5, et al." A sample calculation follows:

<u>Employee</u>	<u>Number Hours Worked</u>	<u>Work-Years</u>	<u>Note</u>
PUBLIC, John Q.	200	.1	Amount of time devoted to part time FOIA processing before becoming full time FOIA processor in previous example.

WHITE, Sally	400	.2	Processed FOIA's part time while working as paralegal in General Counsel's Office.
PETERS, Ron	1,000	.5	Part time employee dedicated to FOIA processing.
TOTAL: 1,600/2,000 hours (hours worked in a year) equals 0.8 work-years.			

C7.1.2.9.3. Estimated Litigation Cost: Report your best estimate of litigation costs for the FY.

C7.1.2.9.4. Total Program Cost: Report the total cost of FOIA program operation within your agency. Include your litigation costs in this total.

C7.1.2.9.5. Note: While you do not have to report detailed cost information as in the past, you should be able to explain the technique by which you derived your agency's total cost figures if the need arises.

C7.1.2.10. ITEM 10 AUTHENTICATION: The official that approves the agency's report submission to DoD will sign and date; enter typed name and duty title; and provide the both the agency's name and phone number for questions about the report.

C7.1.3. Electronic Publication. The consolidated DoD Annual FOIA Program Report is the official annual FOIA report within DoD, and is available to the public in either paper or electronic format.

C8. CHAPTER 8

EDUCATION AND TRAINING

C8.1. RESPONSIBILITY AND PURPOSE

C8.1.1. Responsibility. The Head of each DoD Component is responsible for the establishment of educational and training programs on the provisions and requirements of this Regulation. The educational programs should be targeted toward all members of the DoD Component, developing a general understanding and appreciation of the DoD FOIA Program; whereas, the training programs should be focused toward those personnel who are involved in the day-to-day processing of FOIA requests, and should provide a thorough understanding of the procedures outlined in this Regulation.

C8.1.2. Purpose. The purpose of the educational and training programs is to promote a positive attitude among DoD personnel and raise the level of understanding and appreciation of the DoD FOIA Program, thereby improving the interaction with members of the public and improving the public trust in the DoD.

C8.1.3. Scope and Principles. Each Component shall design its FOIA educational and training programs to fit the particular requirements of personnel dependent upon their degree of involvement in the implementation of this Regulation. The program should be designed to accomplish the following objectives:

C8.1.3.1. Familiarize personnel with the requirements of the FOIA and its implementation by this Regulation.

C8.1.3.2. Instruct personnel, who act in FOIA matters, concerning the provisions of this Regulation, advising them of the legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information.

C8.1.3.3. Provide for the procedural and legal guidance and instruction, as may be required, in the discharge of the responsibilities of initial denial and appellate authorities.

C8.1.3.4. Advise personnel of the penalties for noncompliance with the FOIA.

C8.1.4. Implementation. To ensure uniformity of interpretation, all major educational and training programs concerning the implementation of this Regulation should be coordinated with the Director, Freedom of Information and Security Review.

C8.1.5. Uniformity of Legal Interpretation. In accordance with DoD Directive 5400.7 (reference (b)), the DoD Office of the General Counsel shall ensure uniformity in the legal position and interpretation of the DoD FOIA Program.

AP1. APPENDIX 1

COMBATANT COMMANDS - PROCESSING PROCEDURES FOR FOIA APPEALS

AP1.1. General

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

AP1.1.2. The policy change in 1.a., above, authorizes and requires the Combatant Commands to process FOIA requests in accordance with reference (b) and DoD Instruction 5400.10 (reference (am)) and to forward directly to the Director, Freedom of Information and Security Review, all correspondence associated with the appeal of an initial denial for information under the provisions of the FOIA.

AP1.2. Responsibilities of Commands. Combatant Commanders in Chief shall:

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

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

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

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

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

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

AP1.2.7. Provide to the Director, Freedom of Information and Security Review when the request for a record is denied in whole or in part, a copy of the response to the requester or his

representative, and any internal memoranda that provide background information or rationale for the denial.

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

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

AP1.3. Fees for FOIA Requests. The fees charged for requested records shall be in accordance with Chapter 6, above.

AP1.4. Communications. Excellent communication capabilities currently exist between the Director, Freedom of Information and Security Review and the *Freedom of Information Act Offices of the Combatant Commands*. This communication capability shall be used for FOIA cases that are time sensitive.

AP1.5. Information Requirements

AP1.5.1. The Combatant Commands shall submit to the Director, Freedom of Information and Security Review, an annual report. The instructions for the report are outlined in Chapter 7, above.

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

AP2. APPENDIX 2

ADDRESSING FOIA REQUESTS

AP2.1. General

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

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

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

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

Executive Secretariat

Under Secretary of Defense (Policy)

- Assistant Secretary of Defense (International Security Affairs)
- Assistant Secretary of Defense (International Security Policy)
- Assistant Secretary of Defense (Special Operations & Low Intensity Conflict)
- Assistant Secretary of Defense (Strategy & Requirements)
- Deputy to the Under Secretary of Defense (Policy Support)
- Director of Net Assessment
- Defense Security Assistance Agency
- Defense Technology Security Administration

Under Secretary of Defense (Acquisition & Technology)

- Deputy Under Secretary of Defense (Logistics)
- Deputy Under Secretary of Defense (Advanced Technology)
- Deputy Under Secretary of Defense (Acquisition Reform)
- Deputy Under Secretary of Defense (Environmental Security)
- Deputy Under Secretary of Defense (Space)
- Deputy Under Secretary of Defense (International & Commercial Programs)
- Deputy Under Secretary of Defense (Industrial Affairs & Installations)
- Assistant to the Secretary of Defense (Nuclear, Chemical & Biological Defense Programs)

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

AP2.2.2. Department of the Army. Army records may be requested from those Army officials who are listed in 32 CFR 518 (reference (ao)). Send requests to the Freedom of Information and Privacy Acts Office, SAIS-IA-R/FP, Suite 201, 1725 Jefferson Davis Hwy, Arlington, VA 22202-4102, for records of the Headquarters, U.S. Army, or if there is uncertainty as to which Army activity may have the records.

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

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

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

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

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

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

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

AP2.2.10. National Imagery and Mapping Agency (NIMA). FOIA requests for NIMA records may be sent to the National Imagery and Mapping Agency, General Counsel's Office, GCM, Mail Stop D-10, 4600 Sangamore Road, Bethesda, MD 20816-5003.

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

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

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

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

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

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

AP2.3.1. DoD TRICARE Support Office. Director, TRICARE Support Office, Fitzsimmons USAG Building 611, Aurora, CO 80045-6900.

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

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

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

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

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

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

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

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

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

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

AP2.4. National Guard Bureau. FOIA requests for National Guard Bureau records may be sent to the Chief, National Guard Bureau, ATTN: NGB-ADM, Room 2C363, 2500 Army Pentagon, Washington, DC 20310-2500.

AP2.5. Miscellaneous. If there is uncertainty as to which DoD Component may have the DoD record sought, the requester may address a Freedom of Information request to the Directorate for Freedom of Information and Security Review, Room 2C757, *1155 Defense Pentagon, Washington, DC 20301-1155*.

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST

Please read instructions on back before completing form.

**REPORT CONTROL
SYMBOL**

1. REQUEST NUMBER		2. TYPE OF REQUEST (X one)		3. DATE COMPLETED (YYYYMMDD)	
	a. INITIAL		b. APPEAL		

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

13. FOR FOI OFFICE USE ONLY					
a. SEARCH FEES PAID		f. TOTAL COLLECTABLE COSTS			
b. REVIEW FEES PAID		g. TOTAL PROCESSING COSTS			
c. COPY FEES PAID		h. TOTAL CHARGED			
d. TOTAL PAID		i. FEES WAIVED/REDUCED (X one)	Yes	No	
e. DATE PAID (YYYYMMDD)		• Chargeable to all requesters after application of all waiver criteria. •• Chargeable only to commercial requesters.			

INSTRUCTIONS FOR COMPLETING DD FORM 2086

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

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

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

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

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

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

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

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

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

Forms (Include any type of printed forms)

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

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

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

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

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

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

13. FOR FOI OFFICE USE ONLY

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

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

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

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

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

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

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

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

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

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST FOR TECHNICAL DATA <i>Please read instructions on back before completing form.</i>						REPORT CONTROL SYMBOL	
1. REQUEST NUMBER		2. TYPE OF REQUEST (X one)		3. DATE COMPLETED (YYYYMMDD)			
		<div style="display: flex; justify-content: space-between;"> a. INITIAL b. APPEAL </div>					
4. CLERICAL HOURS (E-9/GS-8 and below)		TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)	
a. SEARCH				<div style="display: flex; align-items: center;"> X <div style="border: 1px solid black; padding: 5px; text-align: center;">\$ 13.25</div> = </div>			
b. REVIEW/EXCISING							
c. CORRESPONDENCE AND FORMS PREPARATION							
d. OTHER ACTIVITY							
e. MINIMUM CHARGE							
				\$ 8.30			
5. PROFESSIONAL HOURS (O-1 - O-6/GS-9 - GS/GM-15)		TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)	
a. SEARCH				<div style="display: flex; align-items: center;"> X <div style="border: 1px solid black; padding: 5px; text-align: center;">ACTUAL HOURLY RATE</div> = </div>			
b. REVIEW/EXCISING							
c. COORDINATION/APPROVAL/DENIAL							
d. OTHER ACTIVITY							
e. MINIMUM CHARGE							
				1/2 HOURLY RATE			
6. EXECUTIVE HOURS (O-7/GM-16/ES 1 and above)		TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)	
a. SEARCH				<div style="display: flex; align-items: center;"> X <div style="border: 1px solid black; padding: 5px; text-align: center;">ACTUAL HOURLY RATE</div> = </div>			
b. REVIEW/EXCISING							
c. COORDINATION/APPROVAL/DENIAL							
d. MINIMUM CHARGE							
						1/2 HOURLY RATE	
7. COMPUTER SEARCH		TOTAL HOURS (1)		HOURLY RATE (2)		COST (3)	
a. MACHINE HOURS				<div style="display: flex; align-items: center;"> X <div style="border: 1px solid black; padding: 5px; text-align: center;">\$ 13.25 OR MINIMUM</div> = </div>			
b. PROGRAMMER/OPERATOR TIME							
- Clerical							
- Professional							
						ACTUAL OR MINIMUM	
8. REPRODUCTION		NUMBER (1)		RATE (2)		COST (3)	
a. AERIAL PHOTOGRAPHS, SPECIFICATIONS, PERMITS, CHARTS, BLUEPRINTS, AND OTHER TECHNICAL DOCUMENTS				<div style="display: flex; align-items: center;"> X <div style="border: 1px solid black; padding: 5px; text-align: center;">\$ 2.50</div> = </div>			
b. ENGINEERING DATA (Microfilm)							
- Aperture cards							
-- Silver duplicate negative, per card							
-- When keypunched and verified, per card							
-- Diazo duplicate negative, per card							
-- When keypunched and verified, per card							
- 35 mm roll film, per frame							
- 16 mm roll film, per frame							
- Paper prints (engineering drawings), each							
- Paper reprints of microfilm indices, each							
c. AUDIOVISUAL MATERIALS (Insert actual cost in block (2))							
d. OTHER TECHNICAL DATA RECORDS							
Charges for any additional services not specifically provided above shall be made by components at the following rates:							
- Minimum charge for office copy (up to six images)						\$ 3.50	
- Each additional image				<div style="display: flex; align-items: center;"> X <div style="border: 1px solid black; padding: 5px; text-align: center;">3.50</div> = </div>			
- Each typewritten page							
- Certification and validation with seal, each							
- Hand-drawn plots and sketches, each hour or fraction thereof							
						12.00	
* Chargeable to all requesters.							
9. FOR FOI OFFICE USE ONLY							
a. SEARCH FEES PAID				f. TOTAL COLLECTABLE			
b. REVIEW FEES PAID				g. TOTAL PROCESSING			
c. COPY FEES PAID				h. TOTAL CHARGED			
d. TOTAL PAID				i. FEES WAIVED/REDUCED (X one)			
e. DATE PAID (YYYYMMDD)						<div style="display: flex; justify-content: space-around;"> YES NO </div>	

INSTRUCTIONS FOR COMPLETING DD FORM 2086-1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Search/Review/Excising - See explanation above.

Coordination/Approval/Denial - See explanation above.

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

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

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

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

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

9. FOR FOI OFFICE USE ONLY

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

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

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

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

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

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

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

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

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

**ANNUAL REPORT
FREEDOM OF INFORMATION ACT**

REPORT CONTROL SYMBOL

1 INITIAL REQUEST DETERMINATIONS

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

2a. EXEMPTIONS INVOKED ON INITIAL REQUEST DETERMINATIONS

(b)(1)	(b)(2)	(b)(3)	(b)(4)	(b)(5)	(b)(6)		
(b)(7)(A)	(b)(7)(B)	(b)(7)(C)	(b)(7)(D)	(b)(7)(E)	(b)(7)(F)	(b)(8)	(b)(9)

2b. "OTHER REASONS" CITED ON INITIAL DETERMINATIONS

1	2	3	4	5	6	7	8	9	TOTAL

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

(1)(b)(3) STATUTE CLAIMED	NUMBER OF INSTANCES	COURT UPHELD? (Yes or No)	CONCISE DESCRIPTION OF MATERIAL WITHHELD

3. APPEAL DETERMINATIONS

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

4a. EXEMPTIONS INVOKED ON APPEAL DETERMINATIONS																			
(b)(1)		(b)(2)		(b)(3)		(b)(4)		(b)(5)		(b)(6)									
(b)(7)(A)		(b)(7)(B)		(b)(7)(C)		(b)(7)(D)		(b)(7)(E)		(b)(7)(F)									
4b. "OTHER REASONS" CITED ON INITIAL DETERMINATIONS																			
1		2		3		4		5		6		7		8		9		TOTAL	
4c. STATUTES CITED ON APPEAL (b)(3) EXEMPTIONS																			
(1)(b)(3) STATUTE CLAIMED						NUMBER OF INSTANCES		COURT UPHELD? (Yes or No)		CONCISE DESCRIPTION OF MATERIAL WITHHELD									
5. NUMBER AND MEDIAN AGE OF INITIAL CASES PENDING										<i>As of Beginning Report Period (1)</i>				<i>As of End Report Period (2)</i>					
a. TOTAL INITIAL REQUESTS PENDING (open)																			
b. MEDIAN AGE (in days) OF OPEN INITIAL REQUESTS																			
6. TOTAL NUMBER OF INITIAL REQUESTS RECEIVED DURING THE FISCAL YEAR																			
7. TYPES OF INITIAL REQUESTS PROCESSED AND MEDIAN AGE																			
										TOTAL NUMBER OF CASES				MEDIAN AGE (Days)					
a. SIMPLE																			
b. COMPLEX																			
c. EXPEDITED PROCESSING																			
8. TOTAL AMOUNT COLLECTED FROM THE PUBLIC														\$					
9. PROGRAM COST:										10. AUTHENTICATION:									
a. NUMBER OF FULL TIME STAFF:										a. SIGNATURE (Approving Official)									
b. NUMBER OF PART TIME STAFF:										b. TYPED NAME AND DUTY TITLE:									
c. ESTIMATED LITIGATION COST:						\$				c. AGENCY NAME AND PHONE NUMBER:									
d. TOTAL PROGRAM COST:						\$													

AP6. APPENDIX 6

DOD FREEDOM OF INFORMATION ACT PROGRAM COMPONENTS

Office of the Secretary of Defense/Chairman of the Joint Chiefs of Staff/Combatant Commands,
Defense Agencies, and the DoD Field Activities

Department of the Army

Department of the Navy

Department of the Air Force

Defense Information Systems Agency

Defense Contract Audit Agency

Defense Intelligence Agency

Defense *Security* Service

Defense Logistics Agency

National Imagery and Mapping Agency

Defense Special Weapons Agency

National Security Agency

Office of the Inspector General, Department of Defense

Defense Finance and Accounting Service

National Reconnaissance Office

PATRICIA L. TOPPINGS
Alternate OSD Federal Register
Liaison Officer
Department of Defense
PHONE: 703-697-4111/DSN 227-4111
FAX: 614-8532/DSN 224-8532
E-MAIL: ptoppings@osd.pentagon.mil

Date: November 17, 1998

Memo For Office of the Federal Register

SUBJECT: Request for Photographing
Pages 125 & 126, 128 & 129, and 131 & 132
of the Attached Final Rule Containing
DoD Freedom of Information Act Program
Regulation

Request to have Pages 125 & 126 (DD Form 2086), 128 & 129
(DD Form 2086-1), and 131 & 132 (DD Form 2564) of the
attached final rule containing DoD Freedom of Information Act
Program Regulation photographed.

Also, please provide me with the publication date of the rule.

Thanks

Attachments: a/s



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



ADMINISTRATION &
MANAGEMENT

18 NOV 1996

The Honorable Newt Gingrich
Speaker of the House of Representatives
H-326, The Capitol
Washington, DC 20515

Dear Mr. Speaker:

In accordance with section 801 of Public Law 104-121, "Congressional Review of Agency Rulemaking," March 29, 1996, the Department of Defense is transmitting herewith for your review a final rule, "DoD Freedom of Information Act Program," and a concise general statement relating to the rule.

Any inquiries or comments concerning this rule should be addressed to Mr. Charlie Talbott, telephone 703-697-1160.

Sincerely,

D. O. Cooke
Director

Attachments:
As stated



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



ADMINISTRATION &
MANAGEMENT

18 NOV 1996

The Honorable Robert P. Murphy
Comptroller General of
the United States
Washington, DC 20548

Dear Mr. Murphy:

In accordance with section 801 of Public Law 104-121, "Congressional Review of Agency Rulemaking," March 29, 1996, the Department of Defense is transmitting herewith for your review a final rule, "DoD Freedom of Information Act Program," and a concise general statement relating to the rule.

Any inquiries or comments concerning this rule should be addressed to Mr. Charlie Talbott, telephone 703-697-1160.

Sincerely,

D. O. Cooke
Director

Attachments:
As stated



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



ADMINISTRATION &
MANAGEMENT

18 NOV 1996

The Honorable Albert Gore, Jr.
President of the Senate
S-212, The Capitol
Washington, DC 20501

Dear Mr. President:

In accordance with section 801 of Public Law 104-121, "Congressional Review of Agency Rulemaking," March 29, 1996, the Department of Defense is transmitting herewith for your review a final rule, "DoD Freedom of Information Act Program," and a concise general statement relating to the rule.

Any inquiries or comments concerning this rule should be addressed to Mr. Charlie Talbott, telephone 703-697-1160.

Sincerely,

D. O. Cooke
Director

Attachments:
As stated

Department of Defense Regulation 5400.7-R, "DoD Freedom of Information Act Program"

Statement of the Final Rule

This final revision to the Freedom of Information Act Regulation for the Department of Defense conforms to the requirements of the Electronic Freedom of Information Act Amendments of 1996 (5 U.S.C. § 552, as amended by Public Law 104-231). This reissuance contains amendments made since the last issuance. This final rule incorporates agency comments received. One public comment was received but was not incorporated because it was a misinterpretation of the Freedom of Information Act.



DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

02 SEP 1998

Ref: 98-CORR-123

MEMORANDUM FOR CHIEF, DIRECTIVES & RECORDS BRANCH
ATTN: OSD FEDERAL REGISTER LIAISON OFFICER

SUBJECT: Reissuance of DoD Regulation 5400.7-R Subject to
Section 801 of Public Law 104-121

Please have the Director, Administration and Management (DA&M) sign the attached three letters that I have approved, to the Speaker of the House of Representatives, the Comptroller General of the United States, and the President of the Senate as required by section 801 of Public Law 104-121. Also, please have DA&M sign the Executive Order 12866 Submission.

This package has been coordinated with OGC and ASD(LA), both of which concurred.

A. H. Passarella
Director

Attachment:
As stated

Concurrence:

ASD(LA)

D. H. Rogers 21 Aug. 98

OGC

S. Aley 19 Aug 98



(b)(5)



DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

98-11

November 5, 1998

MEMORANDUM FOR GENERAL COUNSEL, WASHINGTON HEADQUARTERS
SERVICES

SUBJECT: Regulatory Review; Federal Register Publication of Final Rule, 32 CFR
Part 286, "DoD Freedom of Information Act Program Regulation"

At Tab A is the subject final rule for your coordination.

A certification statement signed by the Acting Director, DFOISR and coordinated
by the GC, DoD is attached at Tab B.

Upon completion of your coordination, please telephone my office for
pickup at extension 697-4111.

PATRICIA L. TOPPINGS
Alternate OSD Federal Register
Liaison Officer
Department of Defense

Attachments

a/s





DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

02 SEP 1998

Ref: 98-CORR-123

**MEMORANDUM FOR THE DIRECTOR OF ADMINISTRATION AND
MANAGEMENT**

SUBJECT: Certification Statement that 32 CFR Part 286 is not
Subject to Executive Order 12866, Public Law 104-4,
Public Law 96-354, and Public Law 96-511

Executive Order 12866, "Regulatory Planning and Review"

It has been determined that 32 CFR Part 286 is not a significant regulatory action. The rule 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 of the Unfunded Mandates Reform Act (Public Law 104-4)

It has been determined that this regulatory action does not contain a Federal mandate that may result in the 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 this rule 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. This rule implements the Freedom of Information Act (5 U.S.C. § 552), a statute concerning the release of Federal Government records, and does not economically impact Federal Government relations with the private sector.



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

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



A. H. Passarella
Director

Concurrence:

OGC

Saley 19 Aug 98

W
H
S

12 NOV 1998

**Directives and Records Division
Correspondence and Directives Directorate**

MEMO FOR: Mr. Cooke

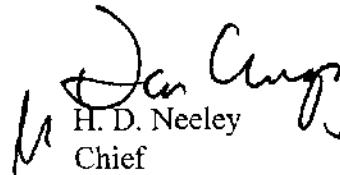
THROUGH: Director, C&D

DEC 13 1998

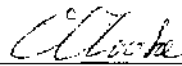
SUBJECT: Congressional Review of Agency Rulemaking,
"DoD Freedom of Information Act Program Regulation"

Request your signature on the attached memorandums to the Speaker of the House of Representatives (Tab A), the Comptroller General of the United States (Tab B), and the President of the Senate (Tab C) for compliance with Public Law 104-121 and approval to have 32 CFR part 286 published in the Federal Register (TAB D).

The Office of Legislative Affairs and the Office of General Counsel, DoD, have coordinated and are attached on the left side of the folder.


H. D. Neeley
Chief

Attachments
a/s


Approved. D. O. Cooke *13 Dec 98* Date

Disapproved. D. O. Cooke Date

EXECUTIVE ORDER 12866 SUBMISSION

Important

Please read the instructions on the reverse side before completing this form.

For additional forms or assistance in completing this form, contact the OIRA Docket Library, (202) 395-6880, or your OIRA Desk Officer.

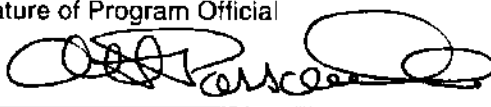
Send three copies of this form and supporting material (four copies if Economically Significant or an Unfunded Mandate) to:

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Docket Library, Room 10102
725 17th Street N.W.
Washington, DC 20503

1. Agency/Subagency originating request Department of Defense Office of the Secretary	2. Regulation Identifier Number (RIN) 0790-AG58
3. Title DoD Freedom of Information Act Program (DoD 5400.7-R)	
4. Stage of Development _____ Prerule _____ Proposed Rule _____ Interim Final Rule _____ <input checked="" type="checkbox"/> Final Rule _____ Final Rule - No material change _____ Notice _____ Other _____ Description of Other	5. Legal Deadline for this submission a) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No b) Date ____/____/____ DD MM YYYY c) <input checked="" type="checkbox"/> Statutory <input type="checkbox"/> Judicial
7. Agency Contact (person who can best answer questions regarding the content of this submission) Mr. Charlie Y. Talbott Phone (703) 697-1180	6. Designations a) Economically Significant (E.O. 12866) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No b) Unfunded Mandate (2 U.S.C. 1532) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If either of the above is "Yes," submit four (4) complete packages to OIRA

Certification for Executive Order 12866 Submissions

The authorized regulatory contact and the program official certify that the agency has complied with the requirements of E.O. 12866 and any applicable policy directives.

Signature of Program Official 	Date 2 Sep 98
Signature of Authorized Regulatory Contact	Date

W

H

S

**L. M. Bynum
Chief, Federal Register and
Administrative Branch
Alternate OSD Federal Register
Liaison Officer
Department of Defense
703-697-4111
DSN 227-4111
FAX 614-8532**

Date: September 2, 1998

Memo for Ed Springer/395-3562

SUBJECT: Description of Rules

Attached is a description of rules for "DoD Freedom of Information Act Program Regulation". If no response is received any later than **September 17th**, concurrence is assumed.

Attachment
a/s

DESCRIPTION OF RULES

DEPARTMENT/REGULATORY COMPONENT:

Department of Defense/Office of the Secretary

TITLE: DoD Freedom of Information Act Program Regulation (DoD 5400.7-R)

RIN: 0790-AG58

PART NUMBER: 32 CFR Part 286

SIGNIFICANT: Substantive/Nonsignificant

UPCOMING ACTION: Final rule

PLANNED SUBMISSION/PUBLICATION: September/October 1998

STATUTORY DEADLINE: None

DESCRIPTION: This final rule conforms to the requirements of the Electronic Freedom of Information Act Amendments of 1996. This revision reflects substantial and administrative changes since May 1997, as a result of Department of Defense reorganization efforts as well as clarifications to the Regulation. This final rule also provides guidance to the Department of Defense on the implementation of this amended law.

**NAME AND TELEPHONE NUMBER (including area code) OF PROGRAM
OFFICIAL WHO CAN ANSWER DETAILED QUESTIONS:**

Charlie Talbott, WHS/FOIA, 703-697-1180



Signature of Action Officer



Date of Signature



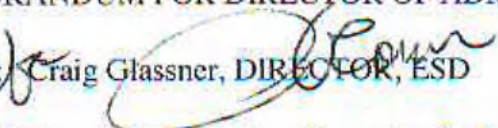
DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155



ACTION MEMO

April 11, 2006

MEMORANDUM FOR DIRECTOR OF ADMINISTRATION AND MANAGEMENT

FROM:  Craig Glassner, DIRECTOR, ESD

SUBJECT: Administrative Change to DoD Regulation 5400.7-R, "DoD Freedom of Information Act (FOIA) Program"

- Request chapter 4 from subject regulation be deleted as this function (For Official Use Only) has been assigned to the Under Secretary of Defense (Intelligence). Because the information contained in chapter 4 also appears in Appendix 3 of DoD Regulation 5200.1-R and in the Directive-Type memorandum "Interim Information Security Guidance," it causes confusion as to who is the authority on FOUO. Further, the Government Accountability Office (GAO) faulted DoD for not having one definitive authority on FOUO.
- Although this change is administrative in nature, a USD(I) coordination was obtained.

RECOMMENDATION: DA&M issue the change and establish a link from chapter 4 of DoD Regulation 5400.7-R to Appendix 3 of DoD Regulation 5200.1-R and to Directive-Type memorandum "Interim Information Security Guidance," stating "For FOUO Information, see Appendix 3 of DoD Regulation 5200.1-R and 'Interim Information Security Guidance.'"

COORDINATION: Christina Bromwell of USD(I) has no objection to this action (email 4-11-2006).

Attachment:
As stated

Prepared by: David Maier, WHS/DFOISR, 703-696-4695



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-R¹.

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

¹ 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 7.² 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

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

Justice (DOJ) Guide).³ 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

³ 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 exception 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-O5/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.dema.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/foia/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.html>.

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 Centretech 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.

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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