§ 286.23(f), 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.

(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 § 286.23(f), they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantiative response. The DoD component shall continue to process the case expeditiously.

(e) *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 so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

(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:

(i) 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 paragraph (a) of this section.

(ii) 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.

(iii) The final denial shall include the name and title or position of the official responsible for the denial.

(iv) 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.

(v) When the denial is based upon an exemption 3 statute (subpart C of this part), 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.

(vi) The response shall advise the requester of the right to judicial review.

(f) *Consultation.* (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.

(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.

[63 FR 65420, Nov. 25, 1998; 63 FR 67724, Dec. 8, 1998]

§ 286.25 Judicial actions.

(a) *General.* (1) This section states current legal and procedural rules for the convenience of the reader. The statemetns 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 refused a record by the head of a Component or an appellate designee or when the DoD Component has failed to respond with the time limits prescribed by the FOIA and in this part.

(b) *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.

(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 requester record in camera (in private) to determine whether the denial was justified.

(d) *Actions by the court.* (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.

(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.

(3) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the witholding 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.

(4) 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.

(e) *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.

(f) *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.

Subpart F—Fee Schedule

§ 286.28 General provisions.

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

(b) *Application.* (1) The fees described in this subpart apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines. 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,[11] which does not supersede the collection of fees under the FOIA. Nothing in this subpart 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

[11] See footnote 1 to § 286.1(a).