

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.

*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 the definitions *initial denial authority* and *administrative appeal* in this section.

*DoD Component.* An element of the Department of Defense, as defined in § 286.2(b), authorized to receive and act independently on FOIA requests. (See appendix G to this part). A DoD Component has its own initial denial authority (IDA), appellate authority, and legal counsel.

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

*Federal agency.* As defined by 5 U.S.C. 552(f)(1), 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.

*FOIA request.* A written request for DoD records, 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, this part, or DoD Component supplementing regulations or instructions. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically.

*Initial Denial Authority (IDA).* An official who has been granted authority by the head of a DoD component to with-

hold 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 § 286.4(d)(3), 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.

*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 official's own conduct.

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#### § 286.4 Policy.

(a) *Compliance with the FOIA.* DoD personnel are expected to comply with the FOIA, this part, 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.

(b) *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.

(c) *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 part and any supplemental regulations published by the DoD Components.

(d) *Prompt action on requests.* (1) Generally, when a member of the public

complies with procedures established in this part 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 10 working days (20 working days effective October 2, 1997). 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 paragraph (d)(2) of this section). 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 § 286.23. 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.

(2) *Multitrack processing.* When a Component has a significant number of pending requests that prevents a response determination being made within 10 working days (20 working days effective October 2, 1997), 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 (d)(3) of this section. 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 (d)(3) of this section. 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 (d)(3) of this section), 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.

(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.

(i) *Compelling need.* 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.

(ii) *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 § 286.28(e)(7)(i)) 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. "Urgently needed" 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.

(iii) 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.

(iv) *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.

(v) These same procedures also apply to requests for expedited processing of administrative appeals.

(e) *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 Com-

ponents 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 subpart C of this part). Exemptions 2, 5, and 7(A)(B)(D) and (E) (see subpart C of this part) 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.

(f) *Public domain.* Nonexempt records released under the authority of this part 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 exemptions that may otherwise apply. Disclosure to a properly constituted advisory committee, to Congress, or to other Federal Agencies does not waive the exemption. (See §286.22(d)). 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 part apply if the same individual seeks the records in a private or personal capacity.

(g) *Creating a record.* (1) A record must exist and be in the possession and control of Department of Defense at the time of the research to be considered subject to this part 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 subpart F of this part.

(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.

(h) *Description of requested record.* (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 in paragraph (h)(2) of this section. 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.

(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.):

(i) 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.

(ii) 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.

(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.

(4) The following guidelines deal with requests for personal records: Ordinarily, when personal identifiers are provided only in connection with a request of 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 recoded 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. If the record is required to be released under the FOIA, 5 U.S.C. 552a does not bar its disclosure. See paragraph (m) of this section for the relationship between the FOIA and the Privacy Act.

(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.

(i) *Referrals.* (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 shall 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 shall still 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.

(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.

(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 FOIS 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 §286.22(e).

(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 the 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 § 286.22(e).

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

(6) Agencies outside the Department of Defense that are subject to the FOIA.

(i) 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.

(ii) 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.

(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' file shall be forwarded to the Office of the Assistant Secretary of Defense (Public Affairs) (OASD(PA)), Attn: 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.

(8) To the extent referrals are consistent with the policies expressed by this paragraph (i) referrals between offices of the same DoD Component are authorized.

(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.

(j) *Authentication.* 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, 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.

(k) *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, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3,<sup>3</sup> it authorizes and requires the Combatant Commands to process FOIA requests in accordance with DoD Directive 5400.7 and this part. The Combatant Commands shall forward directly to the OASD(PA) 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 A to this part.

(2) Combatant Commands shall maintain an electronic reading room for FOIA-processed 5 U.S.C. 552(a)(2)(D) records in accordance with subpart B of this part. Records qualifying for this means of public access also shall be

<sup>3</sup>See footnote 1 to § 286.1(a).

maintained in hard copy for public access at Combatant Commands' respective locations.

(l) *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.

(m) *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:

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

(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), 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.

(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.

(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) 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.

(5) Requesters who seek access to agency records that are not part of a Privacy Act system of records, 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.

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

(7) Requesters shall be advised in final response which Act was used.

(n) *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.

(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.

(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.

(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 paragraph (n)(2) of this section. The classified, non-responsive information need not be reviewed for declassification at this point. Advise the requester than even if the classified information were determined responsive, it would likely be exempt under 5 U.S.C. 552(b)(1), and other exemptions if appropriate. Advise the requester of the right to request this information under separate FOIA request. The separate request shall be placed in the same location within the processing queue as the original request.

(o) *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 (g)(2) of this section.

[62 FR 35351, July 1, 1997, as amended at 62 FR 38197, July 16, 1997]

## Subpart B—FOIA Reading Rooms

### § 286.7 Requirements.

(a) *Reading room.* Each DoD Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the records described in paragraph (b) of this section and § 286.8(a). In addition to the records described in paragraph (b) of this section and § 286.8(a), 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 subpart F of this part.

(b) *Record availability.* The FOIA requires that records described in 5 U.S.C. 552(a)(2)(A), (B), (C), and (D) 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) 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:

(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. 552, that may be cited, used, or relied upon as precedents in future adjudications.

(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.