



OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

32 CFR Part 1704

Mandatory Declassification Review Program

AGENCY: Office of the Director of National Intelligence.

ACTION: Direct final rule with request for comments.

SUMMARY: The Office of the Director of National Intelligence (ODNI) is publishing this direct final rule pursuant to Executive Order 13526, relating to classified national security information. It provides procedures for members of the public to request from ODNI a Mandatory Declassification Review (MDR) of information classified under the provisions of Executive Order 13526 or predecessor orders such that the agency may retrieve it with reasonable effort. This rule also informs requesters where to send requests for an MDR.

DATES: This rule is effective [Insert date 60 days after publication in the FEDERAL REGISTER] without further action, unless adverse comment is received by [insert date

30 days after date of publication in the FEDERAL REGISTER.] If adverse comment is received, ODNI will publish a timely withdrawal of the rule in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Jennifer L. Hudson, 703-874-8085.

SUPPLEMENTARY INFORMATION: It is the policy of the ODNI to act in matters relating to national security information in accordance with Executive Order 13526 and directives issued thereunder by the Information Security Oversight Office (ISOO). The purpose of this rule is to assist in implementing specific sections of Executive Order 13526 concerning the Mandatory Declassification Review (MDR). This is being issued as a direct final rule without prior notice of proposed rulemaking as allowed by the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(A) for rules of agency procedure and interpretation.

#### Regulatory Impact

This rule is not a significant regulatory action for the purposes of Executive Order 12866. This rule is not a major rule as defined in 5 U.S.C. Chapter 8, Congressional Review of Agency Rulemaking. As required by the Regulatory Flexibility Act, we certify that this rule will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies.

## List of Subjects in 32 CFR Part 1704

Declassification, Information, Intelligence, National security information.

For the reasons set forth in the preamble, ODNI adds 32 CFR part 1704 to read as follows:

### PART 1704 -- MANDATORY DECLASSIFICATION REVIEW PROGRAM

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Authority: 50 U.S.C. 3001; E.O. 13526, 75 FR 707, 3 CFR, 2009 Comp, p. 298.

#### §1704.1 Authority and purpose.

- (a) Authority. This part is issued under the authority of 32 CFR 2001.33; Section 3.5 of Executive Order 13526 (or successor Orders); the National Security Act of 1947, as amended (50 U.S.C. 3001 et seq.).
- (b) Purpose. This part prescribes procedures, subject to limitations set forth below, for requesters to request a mandatory declassification review of information classified under Executive Order 13526 or predecessor or successor orders. Section 3.5 of Executive Order 13526 and these regulations are not intended to

and do not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, officers, employees, or agents, or any other person.

§1704.2 Definitions.

For purposes of this part:

Control means the authority of the agency that originates information, or its successor in function, to regulate access to the information. (32 CFR 2001.92)

Day means U.S. Federal Government working day, which excludes Saturdays, Sundays, and federal holidays. Three (3) days may be added to any time limit imposed on a requester by this part if responding by U.S. domestic mail; ten (10) days may be added if responding by international mail.

D/IMD means the Director of the Information Management Division and the leader of any successor organization, who serves as the ODNI's manager of the information review and release program.

Federal Agency means any Executive Agency, as defined in 5 U.S.C. 105; any Military department, as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into the possession of classified information.

Information means any knowledge that can be communicated or documentary material, regardless of its physical form that is owned by, produced by or for, or under the control of the U.S. Government; it does not include information originated by the incumbent President, White House Staff, appointed committees, commissions

or boards, or any entities within the Executive Office that solely advise and assist the incumbent President.

Interested party means any official in the executive, military, congressional, or judicial branches of government, or U.S. Government contractor who, in the sole discretion of the ODNI, has a subject matter or other interest in the documents or information at issue.

NARA means the National Archives and Records Administration.

ODNI means the Office of the Director of National Intelligence.

Order means Executive Order 13526, “Classified National Security Information” (December 29, 2009) or successor Orders.

Originating element means the element that created the information at issue.

Presidential libraries means the libraries or collection authorities established under the Presidential Libraries Act (44 U.S.C. 2112) and similar institutions or authorities as may be established in the future.

Referral means coordination with or transfer of action to an interested party.

Requester means any person or organization submitting an MDR request.

### §1704.3 Contact information.

For general information on the regulation in this part or to submit a request for a Mandatory Declassification Review (MDR), please direct your communication by mail to the Office of the Director of National Intelligence, Director of the Information Management Division, Washington, DC 20511; by facsimile to (703) 874-8910; or by e-

mail to DNI-FOIA@dni.gov. For general information on the ODNI MDR program or status information on pending MDR cases, call (703) 874-8500.

§1704.4 Suggestions or comments.

The ODNI welcomes suggestions for improving the administration of our MDR program in accordance with Executive Order 13526. Suggestions should identify the specific purpose and the items for consideration. The ODNI will respond to all communications and take such actions as determined feasible and appropriate.

§1704.5 Guidance.

Address all communications to the point of contact as specified in § 1704.3. Clearly describe, list, or label said communication as an MDR Request.

§1704.6 Exceptions.

MDR requests will not be accepted from a foreign government entity or any representative thereof. MDR requests will not be accepted for documents required to be submitted for pre-publication review or other administrative process pursuant to an approved nondisclosure agreement; for information that is the subject of pending litigation; nor for any document or material containing information contained within an operational file exempted from search and review, publication, and disclosure under the FOIA. If the ODNI has reviewed the requested information for declassification within the past two years, the ODNI will not conduct another review, but the D/IMD will notify the requester of this fact and the prior review decision. Requests will not be accepted from requesters who have outstanding fees for MDR or Freedom of Information Act (FOIA) requests with the ODNI or another federal agency.

§1704.7 Requirements.

An MDR request shall describe the document or material containing the information with sufficient specificity to enable the ODNI to locate it with a reasonable amount of effort.

§1704.8 Fees.

(a) Requesters making requests directly to the ODNI shall be responsible for paying all fees under this regulation.

(b) Requesters making requests directly to the ODNI shall be responsible for reproduction costs as follows: Fifty cents per photocopied page and \$10.00 per CD.

(c) Applicable fees will be due even if the search locates no responsive information or some or all of the responsive information must be withheld under applicable authority.

(1) Computer searching. (i) Clerical/Technical - \$20.00 per hour (or fraction thereof).

(ii) Professional/Supervisory - \$40.00 per hour (or fraction thereof).

(iii) Manager/Senior Professional - \$72.00 per hour (or fraction thereof).

(2) Manual searching. (i) Clerical/Technical - \$20.00 per hour (or fraction thereof).

(ii) Professional/Supervisory - \$40.00 per hour (or fraction thereof).

(iii) Manager/Senior Professional - \$72.00 per hour (or fraction thereof).

(3) Document review. (i) Professional/Supervisory - \$40.00 per hour (or fraction thereof).

(ii) Manager/Senior Professional - \$72.00 (or fraction thereof).

(iii) ODNI will not charge review fees for time spent resolving general legal or policy issues regarding the responsive information.

(iv) Fees may be paid by a check or money order made payable to the Treasurer of the United States.

§1704.9 Determination by originator or interested party.

(a) In general. The originating element(s) of the classified information (document) is always an interested party to any mandatory declassification review; other interested parties may become involved through a referral by the D/IMD when it is determined that some or all of the information is also within their official cognizance.

(b) Required determinations: These parties shall respond in writing to the D/IMD with a finding as to the classified status of the information, including the category of protected information as set forth in section 1.4 of the Order, and if older than ten years, the basis for the extension of classification time under sections 1.5 and 3.3 of the Order. These parties shall also indicate whether withholding is otherwise authorized and warranted in accordance with sections 3.5(c) and 6.2(d) of the Order.

(c) Time. Responses to the requester shall be provided on a first-in/first-out basis, taking into account the business requirements of the originating element(s) and other interested parties, and, in accordance with Executive Order 13526, ODNI will respond to requesters within one year of receipt of requests.

(d) The IMD FOIA Branch Chief, in consultation with the D/IMD and the Classification Management Branch Chief, will ordinarily be the deciding official on initial reviews of MDR requests to the ODNI.

§1704.10 Appeals.

(a) Administrative. Appeals of initial decisions must be received in writing by the D/IMD within 60 days of the date of mailing of the ODNI's decision. The appeal must identify with specificity the documents or information to be considered on appeal and it may but need not provide a factual or legal basis for the appeal.

(1) Exceptions. No appeal shall be accepted from a foreign government entity or any representative thereof. Appeals will not be accepted for documents required to be submitted for pre-publication review or other administrative process pursuant to an approved nondisclosure agreement; for information that is the subject of pending litigation; nor for any document or material containing information contained within an operational file exempted from search and review, publication, and disclosure under the FOIA. No appeals shall be accepted if the requester has outstanding fees for information services at ODNI or another federal agency. In addition, no appeal shall be accepted if the information in question has been the subject of a declassification review within the previous two years.

(2) Receipt, recording, and tasking. The D/IMD will record each appeal received under this part and acknowledge receipt to the requester.

(3) Appellate authority. The ODNI Chief Management Officer (CMO), after consultation with all interested parties or ODNI component organization as well as with the Office of General Counsel, will make a final determination on the appeal within 60 days.

(b) Final appeal. The D/IMD will prepare and communicate the ODNI administrative appeal decision to the requester, NARA, Presidential Library and referring agency, as appropriate. Correspondence will include a notice, if applicable, that a further appeal of ODNI's final decision may be made to the Interagency Security Classification Appeals Panel (ISCAP) established pursuant to section 5.3 of Executive Order 13526. Action by that Panel will be the subject of rules to be promulgated by the Information Security Oversight Office.

Dated: February 11, 2016

Mark W. Ewing,

Chief Management Officer