



DEPARTMENT OF DEFENSE

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Office of the Secretary

DOD-2007-OS-0086; 0790-AI24

32 CFR Part 286

DoD Freedom of Information Act (FOIA) Program

AGENCY: Department of Defense.

ACTION: Interim final rule.

SUMMARY: This part revises the Department of Defense (DoD) Freedom of Information Act (FOIA) regulation to implement the FOIA and incorporate the provisions of the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016. This part promotes uniformity in the Department of Defense (DoD) FOIA Program. It takes precedence over all DoD Component issuances that supplement and implement the DoD FOIA Program.

DATES: *Effective date:* This rule is effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. *Comment date:* Comments must be received by **[INSERT 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: James Hogan, 571-372-0462.

SUPPLEMENTARY INFORMATION:

EXECUTIVE SUMMARY

This rule revises 32 CFR part 286 to implement section 552 of title 5, United States Code (U.S.C.) and incorporate the provisions of the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016. This part promotes uniformity in the DoD FOIA Program across the entire Department.

The FOIA, 5 U.S.C. 552, requires agencies to “promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests [the FOIA] and establishing procedures and guidelines for determining when such fees should be waived or reduced.” Additionally, according to the FOIA, an agency may, in its regulation, designate those components that can receive FOIA requests, provide for the aggregation of certain requests, and provide for multitrack processing of requests. Finally, the FOIA requires agencies to “promulgate regulations...providing for expedited processing of requests for records.”

This rule implements changes to conform to the requirements of the following amendments to the FOIA: the OPEN Government Act of 2007, Public Law 110–175 and the FOIA Improvement Act of 2016, Public Law 114-185. These changes include the roles of the FOIA Public Liaison in § 286.4, § 286 .5, §2 86.8, §2 86.9, and § 286.12; the roles of the FOIA Requesters Service Centers in § 286.3, § 286.4, § 286.5, §2 86.8, § 286.9, § 286.11, and § 286.12; the processing of FOIA requests, §286.7; the timing of responses to FOIA requests, § 286.8; and the fees schedules, Subpart E.

This regulatory action imposes monetary costs to the DoD and the public. The average cost to the DoD to implement the FOIA for the past five years is over \$82,000,000. The benefit of this regulatory action to the public is that it promotes uniformity in the DoD FOIA Program across the entire Department and provides notice of DoD’s FOIA policies and procedures to the public.

The revisions to this rule will be reported in future status updates as part of DoD's retrospective plan under Executive Order 13563 completed in August 2011. DoD's full plan can be accessed at: <http://www.regulations.gov/#!docketDetail;D=DOD-2011-OS-0036>.

JUSTIFICATION FOR INTERIM FINAL RULE

The DoD is issuing this rule as an interim final rule with a request for comments to comply with a statutory deadline in the FOIA Improvement Act of 2016. Section 3 of the Act requires agencies to review and issue regulations in accordance with the amendments in the Act no later than 180 days after the enactment of the Act. The FOIA Improvement Act of 2016 was signed by the President on June 30, 2016; therefore, agencies need to issue regulations no later than the end of December 2016.

Additionally, this rule implements amendments made in the OPEN Government Act of 2007. The DoD's issuance of its revised FOIA regulation was previously delayed due to reorganization, process changes, and re-coordination requirements based on the inclusion of the new legislative amendments and Presidential guidance.

PUBLIC COMMENTS ON PROPOSED RULE

The DoD published a proposed FOIA rule for comment on September 3, 2014 (79 FR 52500-52524) that was not promulgated as a final rule. Just after that time, the Office of Information Policy, Department of Justice (DOJ) published its Guidance for Agency FOIA Regulations along with a recommended template to be used by agencies in the development of their regulations. Accordingly, the DoD made the decision to revise its regulation at 32 CFR part 286 so that, to the practical extent possible, it aligned with the template recommended by DOJ. The sections of the previous proposed rule that are not included in this interim rule will be in a separate internal manual, DoD Manual 5400.07. This manual contains DoD FOIA processing guidance that is internal to the department and is not legally required to be in this rule.

During the previous public comment period on the proposed rule, the DoD received a number of comments that are related to this interim rule and our incorporation of the OPEN

Government Act of 2007 amendments. Those comments, and the Department's adjudication of those comments, follow.

COMMENT: The previous proposed rule contained the following definition of consultation: the "process whereby a federal agency transfers a FOIA responsive document to another federal agency or non-government entity, in certain situations, to obtain recommendations on the releasability of the document." One commenter states that this definition fails to set parameters for determining when consultation is appropriate.

This commenter "believes that a 'consultation' should occur only when another agency, agency component, or non-government entity has a 'substantial interest' in any of the responsive records or portions thereof. While FOIA is silent as to the meaning of the term 'substantial interest,' the Office of Information Policy ('OIP') suggests a 'substantial interest' exists when records either 'originate[] with another agency' or the records contain 'information that is of interest to another agency or component.' For its part, the Department of Justice's FOIA regulations provide that 'consultation' (or 'referral') is appropriate when another agency originated the record or, more generally, is 'better able to determine whether the record is exempt from disclosure.'"

This commenter further "proposes that DoD redefine 'consultation' accordingly: *Consultation.* The process whereby a federal agency transfers a FOIA responsive record to another federal agency, agency component, or non-government entity, when such party has a substantial interest in the responsive record, in order to obtain recommendations on the releasability of the record. After review, the record is returned to the original agency for response to the FOIA requester or further review."

This commenter also asks the DoD to introduce a definition of "substantial interest" as follows: "*Substantial interest.* Another agency, agency component, or nongovernment entity possesses a 'substantial interest' in a FOIA responsive record, such that consultation may be appropriate, whenever (1) the responsive record originates with that same agency, agency component, or non-government entity, or (2) when the agency, agency component, or non-government entity is better positioned to judge the proper application of the FOIA exemptions, given the circumstances of the request or its familiarity with the facts necessary to judge the proper withholding of exempt material."

RESPONSE: Our interim rule adopts the definition of "consultation" from the DOJ FOIA rule template, and we believe this is the appropriate definition. It does not contain the phrase "substantial interest." Furthermore, we are not adding a definition of "substantial interest." The proposed definition is too narrow and unnecessarily restricts the discretionary decision-making authority of DoD officials when determining what other agencies or DoD Components should review a requested document prior to release under the FOIA.

COMMENT: One commenter appreciates our definition because it tracks the new statutory definition codified by the OPEN Government Act of 2007 and explicitly abandons the outdated "organized and operated" standard proposed in guidance by the Office of Management and Budget in 1987. They go on to say that the proposed definition could be improved by explaining the manner in which "alternative media shall be considered to be news-media entities." Accordingly, they requested we amend the definition of "representative of the news media" by incorporating the entirety of the statutory standard or by adding some short indication of the application of the fee category to non-traditional news media forms and requesters. They believe that the proposed definition itself should refer to the important role of technology vis-a-vis the

news media requester fee category, potentially utilizing as a starting point the examples provided in the statute.

RESPONSE: We appreciate the comment concerning the definition of "representative of the news media". With our new interim rule, we are now adopting the definition as published in the DOJ FOIA regulation template. We believe that this definition accurately reflects the Act.

COMMENT: Another commenter claims our proposed definition is deeply flawed because it states that news is information that is about current events or that would be of current interest to the public.

They go on to say that “news can and frequently does concern historic past events. For example, there are any number of news stories that unveil the truth about important events of the past, perhaps because they were classified or restricted or secret in some manner. There are reporters who focus on important news stories about previously unknown aspects of World War II or Korea or Vietnam or the Persian Gulf Conflicts. There is important reporting on atomic veterans, Agent Orange exposure, chemical weapons testing, and so on. Why would important reporting on those past events not be considered news?”

“Limiting the definition to current events means that the government agency would be taking on the role of editor to decide what is important, and suggests that any news coverage about past events is not newsworthy. This definition is particularly disturbing because many of the important news stories involving DoD records concern past events and are precisely the type of news reporting that should be recognized as news for purposes of the Freedom of Information Act.”

“I understand that the definition could be interpreted to stretch to cover past events. But unless it is stated explicitly, there are components which may misinterpret the definition, and adhere to a narrower definition of news.”

“Therefore, I propose that the definition be amended to include the sentence: ‘This may include historic past events.’”

RESPONSE: Because we believe the phrase “would be of current interest to the public” adequately addresses the commenter’s concern, we did not accept this recommendation.

Furthermore, this section of the definition of "representative of the news media" mirrors the Act and the DOJ FOIA regulation template word for word.

COMMENT: One commenter mentions that the list of tasks for the FOIA Public Liaison omits two important tasks for the FOIA Public Liaison. “First, there is explaining the status of an overdue request. Second, the Public Liaison can help to coordinate opportunities for a requester to clarify or narrow the scope of a request. This clarification or narrowing may require some two way discussion for the requester to understand how they may best clarify or narrow the request, including a discussion of specific impediments to the processing of the request.”

RESPONSE: We rejected this recommendation because it is our intention here to list only the statutory duties of the FOIA Public Liaison. We agree this list is not all-inclusive, and accordingly there could be a number other duties that FOIA Public Liaisons will perform. However, these other duties, to include those that the commenter mentions, are included within the scope of the statutory duties of the FOIA Public Liaison.

COMMENT: One commenter recommends a change to the section concerning Confidential Commercial Information. Specifically, the DoD mirrors the language of Executive Order 12600, which says that when providing the submitter of commercial information the opportunity to

provide comment on the agency's release of its information under the FOIA, DoD Components should provide the submitter with a reasonable amount of time to comment. The commenter recommends, instead, that the submitter be given ten business days to respond to the notice with reasons for withholding disclosure. If the submitter fails to respond within the allotted ten days, the Agency must conclude that the submitter has no objection to disclosure of the requested information.

RESPONSE: We appreciate this comment, and agree that ten business days is a very reasonable time frame. However, because of the wide diversity of acquisition environments within the Department of Defense, it may be the case a longer period of time would be more reasonable. The DoD Components have very different acquisition environments; we have contracts concerning, for example, uniforms, office supplies, landscaping, complex information technology systems, satellites, healthcare, construction, and food. Accordingly, we believe that the individual components are best situated to determine the reasonable time for submitter response for their unique situations.

COMMENT: Once commenter recommends that upon submission of confidential information by the submitter to the DoD, the DoD should require the submitter to designate with good-faith effort any portions of the submission the submitter considers to be exempt under Exemption 4. A good-faith effort designation can be useful because it allows the DoD to work with information submitted beforehand that would help in its determination on whether to disclose information submitted by the submitter. They further suggest that the submitter's designation expire ten years after the date of submission unless the submitter requests, and provides justification for, a longer designation period. They state that the proposed section should be added as follows: "*Designation of confidential business information.* In the event a FOIA

request is made for confidential business information previously submitted to the Government by a commercial entity or on behalf of it (referred to as a `submitter'), the regulations in this section apply. When submitting confidential business information, the submitter must use a good-faith effort to designate, by use of appropriate markings, at the time of submission or at a reasonable time thereafter (generally, within 30 days), any portions of the submitter's submission the submitter considers to be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). The submitter's designation will expire ten years after the date of submission unless the submitter requests, and provides justification for, a longer designation period.”

RESPONSE: Some DoD Components have adopted a similar practice, and we believe that given the wide variety of DoD contracts (as described in the previous response), this procedure is best left with the components to determine whether it's appropriate for them. Additionally, this is actually an acquisition and not a FOIA policy recommendation; therefore, this rule is not the appropriate place for the policy. Furthermore, this policy (of proactively determining the confidential business information without a FOIA request) suffers from a defect. When a FOIA request is received for this type of information, the FOIA provides the “push” to the Agency to release the information, and Executive Order 12600 provides the submitter the opportunity to protect it. With the FOIA, the Agency has the legal authority to release information over the objections of the submitter, and with the Executive Order the submitter can prevent such a release under the Administrative Procedures Act. However, in the process recommended by this commenter, if the submitter asks the Agency to protect information that the Agency clearly believes is not protectable under Exemption 4, it has no recourse to persuade or convince the submitter to make a more reasonable determination. The inevitable, yet unintended,

consequence would be less contract information being released to the public; in effect, less transparency.

COMMENT: A commenter discussed our proposed rule's reference to the FOIA exclusions, 5 U.S.C. § 552(c)(1)-(3). They believe that this allows the DoD to make a misrepresentation regarding the actual existence of records to the requester. Specifically, they objected to the following wording: Because of the possibility of the existence of excluded records, DoD law enforcement components will respond to all FOIA requests when no records are located or when located records fall within an exclusion by stating that no records responsive to the FOIA were found.

This commenter believes “the justification the proposed regulation provides for misrepresentation — ‘the possibility of the existence of excluded records’ — is insufficient. The FOIA contemplates a need for nondisclosure in cases of records the release of which could threaten the efficacy of law enforcement, but in no way does it countenance lying to requesters. Law enforcement may reasonably demand flexibility in the principles of open government that the FOIA seeks to advance, but it cannot require complete abdication of those principles. It is also unclear from the proposed regulations whether the DoD would believe itself authorized to make misrepresentations to Legislatures as to the existence of (b)(7) records.”

This commenter recommends instead that the agency follow the approach set out in the Department of Justice's guidelines regarding exclusions. The agency should have internal accountability mechanisms to ensure that exclusions are not overused. It should also include language in all FOIA responses informing the requester of the existence of exclusions and should also post information about exclusions on its public website.

RESPONSE: The procedures that we had in the proposed rule were appropriate and in accordance with the Act and DOJ procedural guidance. However, we have deleted much of the procedural guidance for exclusions and now our section on this topic mirrors the DOJ FOIA regulation template.

COMMENT: One commenter appreciated the requirement that a FOIA Requester Service Center must provide a requester with an estimated date of completion for their FOIA request when the requester enquires about the status of a request. However, the commenter also indicated that there is not a good accountability measure listed to ensure that dates given are given in good faith.

RESPONSE: We are not sure what the commenter means by “accountability measure,” or how it would apply to this rule. Therefore, we did not adopt their recommendation.

COMMENT: One commenter recommend that in the section concerning expedited processing, we should provide examples of compelling need, imminent loss of due process rights, and humanitarian need.

RESPONSE: We appreciate this comment; however, for the sake of brevity, we are not including examples. Furthermore, in this case the use of examples risks the possibility of adding confusion to the understanding of the issue.

COMMENT: One commenter is concerned that we were separating the definition of compelling need from the main body of the regulation.

RESPONSE: We appreciate this comment. Our previous proposed rule had a definitions section separate from the body of the rule. Now that we are publishing our rule according to the DOJ FOIA regulation template, the definition is located within the body of the rule.

COMMENT: In the fees section of our proposed rule, and in our current rule, we have a “business as usual approach” concerning the costs associated with the processing of electronic records. Specifically, the proposed rule said that a “business as usual approach exists when the DoD Component has the capability to process a FOIA request for electronic records without a significant expenditure of monetary or personnel resources. DoD Components are not required to conduct a search that does not meet this business as usual criterion.” A commenter mentions that this has no foundation in law, and obfuscates the true reasonableness standard for electronic searches set out in 5 U.S.C. § 552(a)(3)(C). They propose that it should be eliminated.

RESPONSE: We agree with the commenter and have removed the “business as usual” criterion.

COMMENT: One commenter is concerned about the absence of "substantial interest" in the discussion of consultations with and referrals to other agencies, agency components, or non-government entities. They mention the proposed rule contains varying references to "substantial interest," "equity interest," and "interest or equity." This commenter recommends that DoD standardize its language by using "substantial interest" to avoid confusion. It also should provide a clear statement that consultation ought never to occur with an entity that does not possess a substantial interest in responsive records.

RESPONSE: Because we have adopted the DOJ FOIA regulation template, we have standardized the use of the word “interest,” it is not further modified by “substantial” or “equity”.

COMMENT: One commenter recommends that DoD revise the practice of not advising FOIA requesters that a consultative process has been undertaken "unless information is withheld by the consulted agency." This commenter believes that “transparency and an open government-hallmarks of FOIA- mandate that agencies provide requesters with this information.”

RESPONSE: Because we have adopted the DOJ FOIA regulation template, which does not include this practice, the interim final rule also does not include guidance to not inform FOIA requesters of consultations.

COMMENT: Concerning the procedure of advising FOIA requesters of their appeal rights, one commenter states that the time limits on submission of administrative appeals should recognize the Justice Department's statements on the possibility of lengthy delays on mail reaching government agencies due to security screening. They suggest that the postmark of the letter can be used to satisfy the appeal deadline for an administrative appeal, as is permitted in most legal situations.

RESPONSE: With our adoption of the DOJ FOIA regulation template, we have now adopted this procedure.

COMMENT: One commenter mentions the language in our proposed rule which concerns commercial requesters. It indicates that a "representative of the news media could make a FOIA request that is for commercial use (e.g., a magazine publisher asking for duty addresses of DoD personnel to solicit them to buy subscriptions to the magazine)." The commenter notes that while it is theoretically possible that if a FOIA request could be submitted to DoD by a member of the news media for such a purpose, such a scenario is unlikely and, at the very least, uncommon. This commenter further contents that a FOIA request is submitted by a member of the news media, there should be a strong presumption that the requestor is entitled to classification as a "representative of the news media" for fee purposes.

RESPONSE: We agree, and with our adoption of the DOJ FOIA regulation template, this subsection was deleted.

COMMENT: One commenter mentions that our proposed subsection on fees discusses examples of news media entities such as publishers of periodicals who make their products available for purchase or subscription by the general public. This commenter believes that this requirement fails to include the large variety and number of online news organizations, many of which provide their products free of charge to internet readers. Therefore, they propose that the subsection should be adjusted to recognize this reality. They ask that we “remove the requirement that a publisher of periodicals must make their products available for purchase or subscription, as that requirement unnecessarily impedes the qualification of many legitimate news media entities at the present time.”

RESPONSE: Because we are adopting the DOJ FOIA regulation template, this phrase is no longer in our regulation.

COMMENT: Another commenter had a similar issue with this section. “[The] FOIA states that examples of news-media entities include ‘publishers of periodicals . . . who make their products available for purchase by or subscription by *or free distribution to the general public.*’ The Proposed Rule, on the other hand, inexplicably truncates the definition to exclude publishers that make their publications available for ‘free distribution to the general public.’ There are countless media entities that provide their services to the public for free or through an advertisement-based model, including the overwhelming majority of broadcast and online news outlets. ABC News, National Public Radio, CBS News, Slate, NBC News, Politico, Pro Publica, and PBS are just a handful of examples of organizations that provide news to the public for free. It would be absurd for the DoD not to recognize these and other news organizations that provide free or advertising-supported journalism as representatives of the news media.”

“Furthermore, the authority under which the DoD is empowered to promulgate regulations regarding its implementation of FOIA, 5 U.S.C. § 552(a)(4)(A)(i), states that [s]uch agency regulations *shall* provide that . . . [e]xamples of news-media entities are . . . publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public.”

“While the statute says such examples are ‘not all-inclusive,’ the DoD cannot promulgate regulations that are *less* inclusive than what Congress has indicated. As the Supreme Court has held with regard to an agency’s construction of a statute which it administers, ‘[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’ Therefore, [we urge] the DoD to expand its definition of news-media entities to include publishers who make their products available for free to the public, in accordance with the express direction of Congress in the 2007 OPEN Government Act.”

RESPONSE: Our adoption of the DOJ FOIA regulation template revises this subsection to satisfactorily adopt this commenter’s recommendation.

COMMENT: One commenter requests that DoD elaborate on the meaning of "alternative media." Specifically, they state: “While DoD has followed FOIA's instruction to consider evolving ‘methods of news delivery’ and ‘alternative media’ formats when defining a news media entity, the proposed section would benefit from some examples that could provide guidance to FOIA officers when considering fee category requests. Specifically, [we are] concerned that nascent news media organizations, which have yet to demonstrate a large readership or a history of reporting and dissemination, could be excluded.”

“Ensuring an expanded definition of ‘alternative media’ is entirely consistent with judicial precedent. For example, the U.S. Court of Appeals for the District of Columbia Circuit has noted that FOIA's legislative history demonstrates ‘it is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected In fact, any person or organization which regularly publishes or disseminates information to the public ... should qualify ... as a ‘representative of the news media.’ The U.S. District Court for the District of Columbia has similarly construed DoD's current fee category regulation, 32 C.F.R. 286.28(e)(7)(i), to include, for example, regular publishers of periodicals, even when those periodicals are simply disseminated by e-mail or posted on a frequently visited website.”

“The legislative history of FOIA also suggests the need for improvement in the treatment of ‘alternative media.’ Senator Patrick Leahy, co-sponsor of the OPEN Government Act, stated that the changes to the definition of ‘representative of the news media’ would ensur[e] that anyone who gathers information to inform the public, including ... bloggers, may seek a fee waiver[.]’ He also stated that the new definition covered ‘Internet blogs and other Web-based forms of media ... free newspapers and individuals performing a media function who do not necessarily have a prior history of publication.’ Co-sponsor Senator John Cornyn affirmed Senator Leahy's view that the new definition ‘‘grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.’”

“Accordingly, [we request] that DoD expand the proposed definition of ‘representative of the news media’ by incorporating the entirety of the statutory standard and by adding some short indication of the application of fee category to non-traditional news media forms and requesters.”

RESPONSE: We understand and appreciate this recommendation; however, we are not revising this subsection as requested. We do not believe that an expanded definition of “alternative media” is necessary. Any such elaboration or definition risks excluding some types of alternative media. Additionally, the DOJ FOIA regulation template, which we have adopted, does not contain any such expanded definition.

COMMENT: This same commenter requests “that DoD provide further explanation of how it will determine whether potential news media requesters possess the editorial skill to use responsive records to create a ‘distinct work’ and the sufficient intent to ‘distribute[] that work to an audience.’ News media requesters often prove this skill and intent with varying levels of specificity. DoD should clarify the standard of proof it will apply to these requests. Moreover, it should clarify the extent to which information about the requester that is not contained in the request will be used to determinate the veracity of a requester's claims. For example, DoD should explain whether it is appropriate to examine the history of an organization, its past practices with regard to FOIA records, and the detail of its planned use of responsive records, subject to editorial considerations and the content of the production. [We recommend] that DoD permit after-the-fact factual considerations, but that it remind FOIA offices that news media requester status is not static, so as to accommodate nascent news media persons or entities and others transitioning into news reporting.”

RESPONSE: We appreciate this recommendation; however, we do not believe that this rule is the appropriate place for a further explanation of how we should determine whether a potential news media requester meets the statutory standard or not. DOJ has not provided guidance in this area, and if they do we will pass it to the DoD Components.

COMMENT: This commenter also points out that the proposed rule states, in part, that “[f]reelance journalists may be regarded as working for a news organization” This commenter contends that “this language appears to largely mirror the language in the 2007 OPEN Government Act, which was codified at 5 U.S.C. § 552(a)(4)(A)(iii). However, the language of the Proposed Rule changes the imperative ‘shall’ of FOIA to a permissive ‘may.’ As stated above, the authority under which the DoD is empowered to promulgate regulations regarding its implementation of FOIA, 5 U.S.C. § 552(a)(4)(A)(i), states that ‘[s]uch agency regulations *shall* provide that . . . [a] freelance journalist *shall* be regarded as working for a news-media entity’ The DOD has no power to modify a clear and essential term contained in a statute through the regulatory process. The Proposed Rule must be changed such that it properly reflects the will of Congress.”

RESPONSE: The DOJ FOIA regulation template, which we adopted, uses the term “will” which we believe has the same imperative force as “shall”.

COMMENT: This commenter also is concerned that a subsection of the proposed rule may be interpreted too narrowly by FOIA officers. The proposed rule states that “[a] person or entity that merely disseminates documents received pursuant to the FOIA to an audience would not qualify as a representative of the news media because, in this case, the person or entity is not using editorial skills to turn raw materials into a distinct work.” The commenter contends “While it is true that FOIA defines ‘a representative of the news media’ as a person or entity that gathers information and uses its editorial skills to turn such information into a distinct work for distribution, the Proposed Rule would benefit from clarifying language instructing FOIA officers that it should be interpreted liberally in favor of the requestor. A person or entity that meets the definition of ‘a representative of the news media’ may, in certain circumstances, disseminate

documents received pursuant to a FOIA request in full, oftentimes publishing such documents online alongside or as a supplement to a news article or other commentary. This practice is beneficial, and should not lead to the denial of media fee status.”

RESPONSE: We believe that this paragraph does not contradict the FOIA; it is very clear that the Act requires a representative of the news media to use “editorial skills.” However, since this sentence is not in the DOJ FOIA regulation template, we do not have it in our interim rule.

REGULATORY PROCEDURES

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563, “Improving Regulation and Regulatory Review”

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This interim final rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB) under the requirements of these Executive Orders.

Public Law 104-4, “Unfunded Mandates Reform Act” (2 U.S.C. Ch. 25)

This interim final rule is not subject to the Unfunded Mandates Reform Act because it does not contain a federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100M or more in any one year.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Ch. 6)

It has been certified that this interim final rule is not subject to the Regulatory Flexibility Act because it does not have a significant economic impact on a substantial number of small entities. The rule implements the procedures for processing FOIA requests within the Department of Defense, which do not create such an impact.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Ch. 35)

This interim final rule does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. This interim final rule will not have a substantial effect on state and local governments, or otherwise have federalism implications.

List of Subjects in 32 CFR Part 286

Freedom of Information Act.

Accordingly, 32 CFR part 286 is revised to read as follows:

Subpart A—General Provisions

Sec.

286.1 Purpose.

286.2 Applicability.

Subpart B—FOIA Requests

286.3 General information.

286.4 FOIA Public Liaisons and the Office of Government Information Services.

286.5 Description of records sought.

286.6 Preservation of records.

Subpart C—FOIA Request Processing

286.7 General provisions.

286.8 Timing of responses to requests.

286.9 Responses to requests.

286.10 Confidential Commercial Information.

Subpart D—Appeals

286.11 Processing of appeals.

Subpart E—Fees

286.12 Schedule of fees.

286.13 Fees for technical data.

Authority: 5 U.S.C. 552.

PART 286 - DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

Subpart A—General Provisions

§286.1 Purpose.

This part contains the rules that the public follows in requesting information from the Department of Defense (DoD) in accordance with the FOIA, as amended, 5 U.S.C. 552, and how those requests will be processed by the DoD. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, as amended, 5 U.S.C. 552a, are processed in accordance with 32 Code of Federal Regulations (CFR) part 310. Additionally, the Directorate for Oversight and Compliance maintains a DoD FOIA Handbook for the public to use in obtaining information from the DoD. This handbook contains information about specific procedures particular to the DoD with respect to the public requesting

DoD records. This handbook includes descriptions of DoD Components and the types of records maintained by different DoD Components. It is available at

<http://open.defense.gov/Transparency/FOIA/FOIAHandbook.aspx>.

§286.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

Subpart B–FOIA Requests

§286.3 General information.

(a) The DoD has a decentralized system for responding to FOIA requests, with each DoD Component designating at least one FOIA Requester Service Center (RSC) to process records from that component. All DoD RSCs have the capability to receive requests electronically either through email or a web portal. To make a request for records, a requester should write directly to the DoD Component that maintains the records being sought. A request will receive the quickest possible response if it is addressed to the RSC of the DoD Component that maintains the records sought. Addresses and contact information for the RSCs are available at

<http://www.foia.gov/report-makerequest.html>. This web site has the contact information for the following DoD Components: the OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, Department of the Army, Department of the Navy, Department of the Air Force, Armed Services Board of Contract Appeals, Defense Commissary Agency, Defense Contract Audit Agency, Defense Contract Management Agency, Defense Finance and

Accounting Service, Defense Health Agency, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Security Service, Defense Technical Information Center, Defense Threat Reduction Agency, Joint Personnel Recovery Agency, DoD Education Activity, National Geospatial-Intelligence Agency, National Guard Bureau, National Reconnaissance Office, National Security Agency/Central Security Service, Office of the Inspector General of the Department of Defense, United States Africa Command, United States Central Command, United States European Command, United States Northern Command, United States Pacific Command, United States Special Operations Command, United States Strategic Command, and United States Transportation Command.

(b) The OSD/Joint Staff FOIA RSC also processes FOIA requests for the Criminal Investigation Task Force, Defense Acquisition University, Defense Advanced Research Projects Agency, Defense Equal Opportunity Management Institute, Defense Legal Services Agency, Defense Microelectronics Activity, Defense Media Activity, Defense POW/MIA Accounting Agency, Defense Security Cooperation Agency, Defense Technology Security Administration, Defense Travel Management Office, DoD Human Resources Activity, DoD Test Resource Management Center, Joint Improvised-Threat Defeat Agency, Missile Defense Agency, National Defense University, Office of Economic Adjustment, Pentagon Force Protection Agency, Uniform Services University of the Health Sciences, Washington Headquarters Services and White House Military Office.

(c) A requester who is making a request for records about himself or herself, regardless of whether the records are in a Privacy Act system of records, must comply with the verification of identity requirements as determined by the DoD Component in accordance with 32 CFR part 310.

§286.4 FOIA Public Liaisons and the Office of Government Information Services.

(a) Each DoD Component has at least one FOIA Public Liaison. FOIA Public Liaisons are responsible for working with requesters that have any concerns about the service received from a FOIA RSC, reducing delays in the processing of FOIA requests, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. Contact information for DoD Component FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>.

(b) Engaging in dispute resolution services provided by OGIS. Mediation is a voluntary process. If a requester seeks dispute resolution services from the Office of Government Information services (OGIS), the DoD will actively engage as a partner to the process in an attempt to resolve the dispute.

§286.5 Description of records sought.

(a) Requesters must reasonably describe the records sought and provide sufficient detail to enable personnel to locate those records with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist personnel in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the DoD Component's FOIA RSC or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request the DoD Component determines that it does not reasonably describe the records sought, the DoD Component shall inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the DoD Component's FOIA contact or FOIA Public

Liaison. Requesters are encouraged to make every effort to reasonably describe the requested records in order to avoid any delays in the processing of their requests.

(b) Requesters may specify the preferred form or format (including electronic formats) for the requested records. DoD Components will accommodate the request if the record is readily reproducible in that form or format.

(c) Requesters must provide contact information, such as a telephone number, email address, and/or mailing address, to assist the DoD Component in communicating and providing released records.

§286.6 Preservation of records.

Each DoD Component shall preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration (NARA). Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

Subpart C—FOIA Request Processing

§286.7 General provisions.

(a) *Responsibilities.* The DoD Component receiving a FOIA request for a record that it maintains is responsible for making a determination on the request and responding to the FOIA requester. In determining which records are responsive to a request, a DoD Component ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the DoD Component shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to deny requests.* DoD Components will designate one or more Initial Denial Authorities (IDA) with the authority to deny any requests for records that are maintained by that agency.

(c) *Re-routing of misdirected requests.* DoD Components receiving a misdirected FOIA request for records clearly originating with another DoD Component (e.g. the Air Force receives a FOIA request for a Navy contract) will route the FOIA request to the appropriate DoD Component and inform this DoD Component of the date the FOIA request was initially received. Additionally, it will advise the FOIA requester of the routing of the request. This routing requirement only applies to those FOIA requests directed to a DoD Component that seek documents for which the DoD is responsible. If it is known that responsibility for the requested records rests with a non-DoD Federal agency (e.g., Department of State), then the DoD Component need only advise the FOIA requester to submit the FOIA request to the proper Federal agency. DoD Components will not route misdirected FOIA requests to a Defense Criminal Investigation Organization or Intelligence Community component without first contacting the other component or agency for guidance.

(d) *Consultation, referral, and coordination.* When reviewing records located in response to a request, the DoD Component may determine that another DoD Component or Federal agency also should determine whether the record is exempt from disclosure under the FOIA. As to any such record, the DoD Component shall proceed in one of the following ways:

(1) *Consultation.* When records originating with a DoD Component that is initially processing a request contain information of interest to another DoD Component or other Federal agency, the DoD Component initially processing the request should typically consult with all interested DoD Components or other Federal agencies prior to making a release determination. The DoD

Component initially processing the request, under these circumstances, will ultimately respond to the requester and release any responsive material. The consulted DoD Component will notify the sending DoD Component or other Federal agency when the consultation is received and the consultation tracking number.

(2) *Referral.* (i) When the DoD Component initially processing the request believes that a different DoD Component or other Federal agency is best able to determine whether to disclose the record, the DoD Component typically should refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. Under these circumstances, the DoD Component or other Federal agency receiving the referral will ultimately make a release determination on the records and respond to the requester.

(ii) Whenever a DoD Component refers a record to another DoD Component or Federal agency, it will document the referral, refer a copy of the referred record, and notify the requester of the referral, informing the requester of the name and FOIA address of the DoD Component or Federal agency to which the record was referred.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the DoD Component or agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. Under these circumstances, the consultation process is the appropriate means for coordination. See §286.7(d)(1). For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could

cause an unwarranted invasion of the personal privacy of the third party. Similarly, if a DoD Component locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the DoD Component that received the request should coordinate with the originating DoD Component or agency to seek its views the disclosure of the record. The release determination for the record should then be conveyed to the requester by the DoD Component that originally received the request.

(4) *Timing of responses to consultations and referrals.* All consultations and referrals received by the DoD Component will be processed according to the date that the FOIA request was initially received by a Federal agency.

(5) *Agreements regarding consultations and referrals.* DoD Components may establish written agreements with other DoD Components or other Federal agencies to eliminate the need for consultations or referrals with respect to particular types of records, providing these agreements do not conflict with this rule, or another law, rule, or regulation.

§286.8 Timing of responses to requests.

(a) *In general.* DoD Components ordinarily will respond to requests on a first-in/first-out basis according to their order of receipt. In instances involving misdirected requests that are re-routed pursuant to § 286.7(c), the response time will commence on the date that the request is received by the appropriate DoD Component's FOIA RSC, but in any event not later than 10 working days after the request is first received by any DoD Component's FOIA RSC that is designated to receive requests.

(b) *Multitrack processing.* All DoD Components must designate a specific track for requests that are granted expedited processing in accordance with the standards set forth in the FOIA and paragraph (e) of this section. DoD Components may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors a DoD Component may consider are the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. DoD Components should advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of “unusual circumstances,” as defined in the FOIA, and the DoD Component extends the time limit on that basis, the DoD Component must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. See 5 U.S.C. 552(a)(6)(B). Where the extension exceeds 10 working days, the DoD Component shall, in accordance with the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. Furthermore, the requester will be advised that the DoD Component FOIA Public Liaison is available for this purpose and of their right to seek dispute resolution services from OGIS.

(d) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, DoD Components may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute

a single request that would otherwise involve unusual circumstances. DoD Components will not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) The FOIA establishes two reasons for expediting the processing of initial FOIA requests: compelling need and other cases determined by the agency. See 5 U.S.C. 552(a)(6)(E). Administrative appeals may be expedited for the same reasons. The DoD Components must make expedited processing determinations within 10 calendar days after receipt of a request that meets the criterion of reasonably describing the requested records in §286.5(a). Once the DoD Component decides to grant expedited processing, the request is processed as soon as practicable. Adverse actions by DoD Components on requests for expedited processing, or a failure to respond to those requests in a timely manner, are subject to judicial review.

(i) *Compelling need.* Expedited processing is granted to a requester upon a specific request for such and when the requester demonstrates a compelling need for the information. A compelling need exists when:

(A) The failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or

(B) The information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity.

(ii) *DoD additional expedited processing circumstances.* If the DoD Component decides to expedite the request for either of the following reasons, the request will be processed in the expedited track behind those requests qualifying for expedited processing as a compelling need.

(A) *Imminent loss of due process rights.* Expedited processing is granted to a requester if loss of substantial due process rights is imminent.

(B) *Humanitarian need.* Expedited processing is granted when the failure to obtain the requested information on an expedited basis could reasonably be expected to harm substantial humanitarian interests.

(2) A request for expedited processing may be made at any time. Requests for expedited processing must be submitted to the DoD Component that maintains the records. When making a request for expedited processing of an administrative appeal, the request should be submitted to the DoD Component's appellate authority.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For requesters seeking expedited processing under paragraph (e)(1)(i)(B) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, and not an incidental or secondary activity, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. Requests for expedited processing under paragraph (e)(1)(ii)(A) of this section must include a description of the due process rights that would be lost. This statement must be with the request for expedited processing for it to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(4) A DoD Component shall notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If

expedited processing is granted, the request shall be placed in the processing track for expedited requests, and processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted upon expeditiously.

§286.9 Responses to requests.

(a) *In general.* DoD FOIA RSCs will, to the extent practicable, communicate with requesters having access to the Internet using electronic means, such as email or web portal.

(b) *Acknowledgments of requests.* DoD Components will acknowledge requests in writing and assign individualized tracking numbers. DoD Components will include these tracking numbers and any tracking numbers used by FOIA requesters in all correspondence.

(c) *Estimated dates of completion and interim responses.* Upon request, the DoD Component will provide an estimated date by which the DoD Component expects to provide a response to the requester. If a request involves a voluminous amount of material or searches in multiple locations, the DoD Component may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once a DoD Component makes a determination to grant a request in full or in part, it shall notify the requester in writing. The DoD Component also shall inform the requester:

(1) Of any fees charged under §286.12; and

(2) That they may contact the DoD Component FOIA Public Liaison for further assistance.

(e) *Adverse determinations of requests.* A DoD Component making an adverse determination denying a request in any respect will notify the requester of that determination in writing.

Adverse determinations, or denials of requests, include decisions that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the

information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial will include:

- (1) The name and title or position of the IDA;
- (2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the DoD Component in denying the request;
- (3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;
- (4) For any information denied under Exemption 1, the applicable section or sections of the appropriate Executive order on classification that establishing continued classification of the information;
- (5) For any information denied under Exemption 3, the specific statute relied upon to deny the information along with a short description of the statute;
- (6) A statement that the requester must appeal no later than 90 days after the date of the denial and along with instructions on how to appeal to the DoD Component appellate authority. The instructions will include the appellate authority's duty title, the mailing address for the appeal, and instructions on how the requester can appeal electronically; and
- (7) A statement advising the requester of their right to seek dispute resolution services from the DoD Component FOIA Public Liaison or OGIS.

(g) *Markings on released documents.* Records disclosed in part will be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also will be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event that a DoD Component identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the DoD Component should confer with the Directorate for Oversight and Compliance, which will confer with the Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

(2) A DoD Component invoking an exclusion shall maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§286.10 Confidential Commercial Information.

(a) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the DoD Component from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under

Exemption 4. These designations shall expire 10 years after the date of submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The DoD Component shall promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the DoD Component determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The DoD Component has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(2) The notice shall include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the DoD Component may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section shall not apply if:

(1) The DoD Component determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, the agency shall give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) The DoD Component shall specify a reasonable time period within which the submitter must respond to the notice referenced in paragraph (c) of this section.

(2) If a submitter has any objections to disclosure, it should provide the DoD Component a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. The DoD Component is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this section may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The DoD Component shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever the DoD Component decides to disclose information over the objection of a submitter, the DoD Component shall provide the submitter written notice, which shall include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the DoD Component intends to release them; and

(3) A specified disclosure date, which shall be a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the DoD Component shall promptly notify the submitter.

(i) *Requester notification.* The DoD Component shall notify a requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information over the submitter's objections; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

Subpart D—Appeals

§286.11 Processing of appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the DoD Component's appellate authority. Examples of adverse determinations are provided in §286.9(e). Appeals can be submitted by mail or online in accordance with the requirements provided in the DoD Component's final response. Requesters that are not provided with appeal requirements should contact the FOIA RSC processing their request to obtain the requirements. The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The Heads of the following DoD Components will serve as, or appoint an appropriate official to serve as, the component's appellate authority: 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 Health Agency, 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/Central Security Service, and the Office of the Inspector General of the Department of Defense.

(2) The Deputy Chief Management Officer (DCMO) will serve as the appellate authority for the OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, Armed Services of Contract Appeals, Defense Technical Information Center, Joint Personnel Recovery Agency, DoD Education Activity, National Guard Bureau, United States Africa Command, United States Central Command, United States European Command, United States Northern Command, United States Pacific Command, United States Special Operations Command, United States Strategic Command, and United States Transportation Command. The DCMO may delegate this authority to an appropriate official of the DCMO staff.

(3) An appeal will normally not be adjudicated if the request becomes a matter of FOIA litigation. This decision should be made after consultation with the Department of Justice attorney responsible for the litigation.

(c) *Decisions on appeals.* A decision on an appeal must be made in writing and signed by the appellate authority. A decision that upholds a DoD Component's determination in whole or in part will contain a statement that identifies the reasons for the affirmance, including any FOIA

exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit. If a decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The DoD Component will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(d) *When an appeal is required.* A requester generally must first submit a timely administrative appeal before seeking review by a court of a DoD Component's adverse determination.

Subpart E—Fees

§286.12 Schedule of fees.

(a) *In general.* DoD Components shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: commercial; non-commercial scientific or educational institutions or news media; and all other requesters. Different fees are assessed depending on the category. Requesters may seek a fee waiver. DoD Components shall consider such requests in accordance with the requirements in paragraph (m) of this section. In order to resolve any fee issues that arise under this section, a DoD Component may contact a requester for additional information. DoD Components shall ensure that searches, review, and duplication are conducted in the most efficient and least expensive manner. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* is a request that asks for information for a use or purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. A DoD Component's decision to place a requester in the commercial use

category will be made on a case-by-case basis based on the requester’s intended use of the information. DoD Components will notify requesters of their placement in this category.

(2) *Direct costs* are those expenses that a DoD Component incurs in searching for and, in the case of commercial use requests, reviewing records in order to respond to a FOIA request. DoD direct costs for human activity are at Table 1.

Table 1. FOIA Hourly Processing Fees

Type	Grade	Hourly Rate
Administrative	E-9/GS-8 and below	\$24
Professional	Contractor/O-1 to O-6/W-1 to W-5/GS-9 to GS-15	\$48
Executive	O-7 and above and Senior Executive Service	\$110

(3) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. DoD Components may seek verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

(5) *Noncommercial scientific institution* is an institution that is not operated on a “commercial” basis, as defined in paragraph (b)(1) of this section 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. A requester in this category must show that the request is authorized by and

is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. DoD Components will advise requesters of their placement in this category.

(6) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. 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 that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, DoD Components shall also consider a requester’s past publication record in making this determination. DoD Components will advise requesters of their placement in this category.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential

commercial information submitter under §286.11, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Fee category*. Fees are assessed based on the category determined to be appropriate for the requester's category. The fee category of a requester that is an attorney or any other agent representing a client is determined by the fee category of the attorney's client. If the fee category of the client is not clear, then the DoD Components should ask the requester for clarification. If an attorney does not provide enough information to determine the fee category of the client, then the DoD Component may assign commercial fee category to the requester.

(d) *Charging fees*. In responding to FOIA requests, DoD Components will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (m) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, DoD Components should not add any additional costs to charges calculated under this section.

(1) *Search*. (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees shall be charged for all other requesters, subject to the restrictions of paragraph (e) of this section. DoD Components may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees shall be charged as listed at Table 1.

(iii) Requesters will be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. These costs will not include the time it takes to run the program and extract data. Requesters will be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by a DoD Component at a Federal records center operated by NARA, additional costs will be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* Duplication fees will be charged to all requesters, subject to the restrictions of paragraph (e) of this section. DoD Components will honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the DoD Component in the form or format requested. Where photocopies are supplied, DoD Components will provide one copy per request at \$.15 per page. For copies of records produced on tapes, disks, or other media, or other forms of duplication, DoD Components will charge the direct costs of producing the copy, including operator time in accordance with Table 1. DoD Components will charge record reproduction fees at the hourly rates in Table 1 if the creation of the electronic copies requires unique security procedures incurring considerable operator time, costing more than printing paper copies.

(3) *Review.* Review fees will be charged to requesters who make commercial use requests. Review fees shall be assessed in connection with the initial review of the record, i.e., the review

conducted by a DoD Component to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with a DoD Component's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (d)(1)(ii) of this section.

(e) *Restrictions on charging fees.* (1) When a DoD Component determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, no search fees will be charged.

(2) If a DoD Component fails to comply with the time limits in which to respond to a request it may not charge search fees, or, in the instances of requests from requesters described in paragraph (e)(1) of this section, may not charge duplication fees except as described in (e)(2)(i) through (iii).

(i) When a DoD Component determines that unusual circumstances, as those terms are defined by the FOIA, apply to the processing of the request, and provides timely written notice to the requester, then the DoD Component is granted an additional ten days until the fee restriction in paragraph (e)(2) of this section applies.

(ii) When a DoD Component determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, provides timely written notice to the requester, and has discussed with the requester (or made three good faith attempts to do so) on how the requester can effectively limit the scope of the request, the fee restriction in paragraph (e)(2) of this section does not apply.

(iii) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, DoD Components shall provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.

(f) *Notice of anticipated fees in excess of \$25.00.* (1) When a DoD Component determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the DoD Component shall notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the DoD Component will advise the requester accordingly. If the requester is a noncommercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) When a requester is notified that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the

requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. DoD Components are not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the DoD Component estimates that the total fee will exceed that amount, the DoD Component will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The DoD Component will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) DoD Components will make available their FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(g) Charges for other services. Although not required to provide special services, if a DoD Component chooses to do so as a matter of administrative discretion, the direct costs of providing the service shall be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(h) Charging interest. DoD Components may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges shall be assessed at the rate

provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the DoD Component. DoD Components shall follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Aggregating requests.* When a DoD Component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the DoD Component may aggregate those requests and charge accordingly. DoD Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, DoD Components will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(j) *Advance payments.* (1) For requests other than those described in paragraphs (k)(2) or (3) of this section, a DoD Component shall not require the requester to make an advance payment before work is commenced or continued on a request.

(2) When a DoD Component determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. A DoD Component may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 calendar days of the billing date, a DoD Component may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the DoD Component

may require that the requester make an advance payment of the full amount of any anticipated fee before the DoD Component begins to process a new request or continues to process a pending request or any pending appeal. Where a DoD Component has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which a DoD Component requires advance payment, the request shall not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the DoD Component's fee determination, the request will be closed.

(k) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the DoD Component shall inform the requester of the contact information for that program.

(l) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application specifically demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) A DoD Component will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the following three factors are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public shall be considered. DoD Components will presume that a representative of the news media satisfies this criterion.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, DoD Components shall consider the following criteria:

(A) DoD Components will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters will be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the DoD Component will determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (m)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. DoD Component s ordinarily will presume that when a news media requester has satisfied the factors in paragraphs (m)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester.

Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the DoD Component and should address the criteria referenced in paragraphs (l)(1) and (2) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester is required to pay any costs incurred up to the date the fee waiver request was received.

(m) *Tracking of costs.* DoD Components will track processing costs for each FOIA request on DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost," or by using DD Form 2086-2, "Freedom of Information (FOI) Consultation and Request Summary".

§286.13 Fees for technical data.

(a) Technical data shall be released to a requester after all reasonable costs of search, review, and duplication are paid by the requester as authorized by 10 U.S.C. 2328.

(b) Technical data means information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to the supplies procured by the DoD. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation. This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and computer software documentation.

(1) 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. Costs will be tracked on DD Form 2086-1, “Record of Freedom of Information (FOI) Processing Cost for Technical Data” (available at <http://www.dtic.mil/whs/directives/infomgt/forms/efoms/dd2086-1.pdf>).

(2) The DoD Components will retain the fees received by the release of technical data under the FOIA, and will merge it with and make it available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with the FOIA request.

(3) Table 2 will be used to determine document production fees.

Table 2. FOIA Document Production Fees – Technical Data

Type	Cost
Aerial Photographs, Specifications, Permits, Charts, Diagrams, Technical Drawings, Blueprints, and Other Technical Documents (per page or copy)	\$2.50
<p>Engineering Data</p> <p> Aperture Cards, per card</p> <p> Silver Duplicate Negative</p> <p> When Keypunched and Verified</p> <p> Diaz Duplicate Negative</p> <p> When Keypunched and Verified</p> <p> 35 mm Roll Film, per frame</p> <p> 16 mm Roll Film, per frame</p> <p> Paper Prints (engineering drawings), each (per square foot)</p> <p> Paper Reprints of Microfilm Images, each</p>	<p>\$3.00</p> <p>\$3.50</p> <p>\$1.00</p> <p>\$3.50</p> <p>\$3.00</p> <p>\$1.00</p> <p>\$0.65</p> <p>\$0.30</p> <p>\$0.10</p>
<p>Other Technical Data Records</p> <p> Paper Copy (standard size paper up to 8 1/2 x 14, photocopier or printer)</p> <p> CD/DVD</p> <p> Microfiche Produced, each</p> <p> Certification and Validation with Seal, each document</p>	<p>\$0.15</p> <p>\$5.00</p> <p>\$3.50</p> <p>\$50.00</p>

(c) The DoD Components will waive the payment of costs required in paragraph (a) of this section that are greater than the costs that would be required for release of this same information under §286.12 if:

- (1) The FOIA request is made by a U.S. citizen or a U.S. corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or to 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 U.S. contractor. However, the DoD Components may require the citizen or corporation to pay a deposit in an amount equal to but not more than the cost of complying with the FOIA 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 DoD Component determines, in accordance with paragraph (m) of §286.12, that such a waiver is in the interest of the United States.

Dated: December 23, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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