



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: Final rule.

SUMMARY: This rule 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. DoD will be removing individual component rulemakings in this area as subsequent actions to this rule.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: James Hogan at 571-372-0462, or email osd.mc-alex.odcmo.mbx.dod-foia-policy-office@mail.mil.

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.

Comments and Responses

On Thursday, January 5, 2017 (82 FR 1192-1206), the Department of Defense published an interim final rule titled “DoD Freedom of Information Act (FOIA) Program” for a 60-day public comment period. The public comment period ended on March 6, 2017. Two public comments were received. This section addresses the public comments.

Comment: From my reading of changes proposed to this regulation, I fully support this. I support this because it is making reporting and process of FOIA requests the same thought the entire Department of Defense. If this regulation was not passed it would make getting information

much more complicated as some areas in the department could deny requests while others could over report. With the uniformity in this regulation, there would be less room for error in the department. Overall this should be implemented as soon as possible because the United States can't afford to under or over report our defense actions.

Response: The Department of Defense appreciates this commenter's support for our regulation.

Comment: The "FOIA" provides access to the inner-workings of the government. The government, including the military represents "we the people." It's important that we not create a different standard for the disclosure of information that serves the public interest. Even though the government can exercise its discretion as to what information to release, it's important that there be a "uniform" standard across different agencies of the government. For this reason, I support this proposal.

Response: The Department of Defense appreciates this commenter's support for our regulation.

Expected Cost Savings of This Rule

The Department of Defense currently has 14 separate FOIA rules. With the finalization of this department-wide rule, DoD will revoke all component-level FOIA rules. This rulemaking will reduce costs to the public by consolidating the requirements for requests for access to DoD information.

FOIA requesters are a diverse community, including lawyers, industry professionals, reporters, and members of the public. Costs for these requestors can include the time required to research the current FOIA rule for each component and the time and preparation required to submit a request/appeal. DoD FOIA subject matter experts estimate that 40% of FOIA requests to DoD may involve consultation of the Code of Federal Regulations and the department's several FOIA regulations. DoD estimates the consolidation to one FOIA regulation will save

those referring to the CFR for FOIA guidance approximately 30 minutes of research, review, and compliance time.

For purposes of estimating opportunity costs, DoD subject matter experts deemed it reasonable to use the average of a lawyer's/judicial law clerk's mean hourly wage (\$66.44/hour), as informed by the Bureau of Labor and Statistics, and the 2016 federal minimum wage (\$9/hour) to approximate an hourly wage for an average FOIA requester. That rate is \$37.72/hour.

Through this consolidation, DoD expects to save the requester community at least \$384,080 annually, as reflected in the chart below using FY 2016 data (annualized costs over perpetuity at a 7 percent discount rate is -\$384,080; present value costs is -\$5,486,857). The cost savings anticipated by the repeal of the DoD Component rules are accounted for in this rulemaking. Individual repeal actions for the DoD Component rules will refer back to this rule.

Rule	Component	# 2016 Requests		40% of FOIA Requests		Time Per Request		Hourly Wage of Requester		Projected Cost Savings to Public
285	DoD	1,794	x	40%	x	30 minutes	x	\$37.72	=	-\$ 13,533.94
287	DISA	590	x	40%	x	30 minutes	x	\$37.72	=	-\$ 4,450.96
290	DCAA	93	x	40%	x	30 minutes	x	\$37.72	=	-\$ 701.59
291	DTRA(DNA)	78	x	40%	x	30 minutes	x	\$37.72	=	-\$ 588.43
292	DIA	902	x	40%	x	30 minutes	x	\$37.72	=	-\$ 6,804.69
293	NGA(NIMA)	109	x	40%	x	30 minutes	x	\$37.72	=	-\$ 822.30
295	DoD IG	772	x	40%	x	30 minutes	x	\$37.72	=	-\$ 5,823.97
296	NRO	165	x	40%	x	30 minutes	x	37.72	=	-\$ 1,244.76
298	DSS (DIS)	310	x	40%	x	30 minutes	x	\$37.72	=	-\$ 2,338.64
299	NSA/CSS	1,881	x	40%	x	30 minutes	x	\$37.72	=	-\$ 14,190.26
518	Army	25,775	x	40%	x	30 minutes	x	\$37.72	=	-\$194,446.60
701	Navy	9,605	x	40%	x	30 minutes	x	\$37.72	=	-\$ 72,460.12
806	Air Force	4,918	x	40%	x	30 minutes	x	\$37.72	=	-\$ 37,101.39
300	DLA	3,920	x	40%	x	30 minutes	x	\$37.72	=	-\$ 29,572.48
TOTAL:										-\$384,080.13

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 rule is not a significant regulatory action under EO 12866.

Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”

This final rule is considered an EO 13771 deregulatory action. Details on the estimated cost savings of this rule are discussed in the “expected cost savings” section of the rule.

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

This 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 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 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 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, the interim rule published at 82 FR 1192-1206 on January 5, 2017, is adopted as final with the following changes:

PART 286—[AMENDED]

1. The authority citation for part 286 continues to read as follows:

Authority: 5 U.S.C. 552.

§ 286.7 [Amended]

2. In § 286.7, amend paragraph (c) in the first sentence by removing the phrase “inform this DoD Component” and adding in its place “inform them”.

Dated: February 1, 2018.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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