



**BILLING CODE: 5001-06**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 286**

**[Docket ID: DOD-2019-OS-0069]**

**RIN 0790-AK54**

**DoD Freedom of Information Act (FOIA) Program; Amendment**

**AGENCY:** Department of Defense.

**ACTION:** Proposed rule; amendment.

**SUMMARY:** The Department of Defense (DoD) is proposing to amend its Freedom of Information Act (FOIA) regulation, which last published in the Federal Register as a final rule on February 6, 2018, to update certain administrative aspects of the Department's implementation of the FOIA, including adding an additional FOIA Requester Service Center. DoD is also proposing to clarify, by adopting the standards set forth in the Department of Justice's (DOJ) Template for Agency FOIA Regulations, that the decision to participate in FOIA alternative dispute resolution services is voluntary on the part of the requestor and DoD.

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) number and title, by any of the following methods:

Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID-19 pandemic.

Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name and docket number or RIN for this document. The general policy is for submissions to be made available for public viewing at <http://www.regulations.gov> without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Melissa Walker at 571–372–0462.

**SUPPLEMENTARY INFORMATION:**

Executive Summary

Under the FOIA, 5 U.S.C. 552, agencies are afforded a certain amount of discretion in administratively implementing the Act. For example, agencies can designate which of their Components are authorized to receive FOIA requests. In this proposed amendment, DoD is adding the United States Cyber Command (USCYBERCOM) as an authorized FOIA Requester Service Center. Since the service center has already been implemented, DoD is seeking to align the rule with the action. DoD also seeks to update the list of those Components serviced by the Office of the Secretary of Defense and Joint Staff FOIA Requester Service Center.

Further, this proposed amendment seeks to clarify language concerning DoD’s participation in FOIA “Dispute Resolution,” found in § 286.4. This proposed amendment, which adopts the standard set forth in DOJ’s Template for Agency FOIA Regulations, clarifies that DoD possesses the discretion to determine whether to participate in FOIA alternative dispute resolution when it is requested by a requester.

The amendments become effective once this rule is published as a final rule. The Department does not anticipate any cost associated with this proposed amendment.

### Summary of the Revisions Implemented by this Rule

DoD is proposing to make amendments to update the listed designated FOIA Requester Service Centers and to correct language concerning FOIA alternative dispute resolution.

### Authority

According to the FOIA, 5 U.S.C. 552, an agency may, in its published administrative rules and regulations, designate those components that can receive FOIA requests. Additionally, the FOIA requires agencies to establish FOIA Public Liaisons, which are responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

### Regulatory History

On February 6, 2018 (83 FR 5196-5197), the Department of Defense published a final rule that revised Department of Defense (DoD) Freedom of Information Act (FOIA) regulation to implement the FOIA and incorporate the provisions of the Openness Promotes Effectiveness in our National Government Act of 2007 and the FOIA Improvement Act of 2016.

### Regulatory Impact Analysis

We developed this rule after considering numerous statutes and Executive Orders (E.O.s) related to rulemaking. Below we summarize our analyses based on these statutes or E.O.s.

### Costs

The Department does not anticipate any costs associated with this rule change. Prior to establishing its own FOIA Requester Service Center, USCYBERCOM's FOIA requests were serviced by the United States Strategic Command FOIA Requester Service Center. Since FOIA requests concerning USCYBERCOM previously existed, the cost associated with processing the

request is unchanged and would be realigned from USSTRATCOM to the new FOIA Requester Service Center.

### Benefits

The benefit of USCYBERCOM establishing its own FOIA Requester Service Center is that FOIA action officers would have a direct and deeper knowledge of USCYBERCOM records, allowing for requests to be more readily completed within statutory timelines.

This amendment also clarifies that DoD possesses the discretion to determine whether to participate in FOIA alternative dispute resolution when it is requested by a requester. This clarification is necessary to ensure that requesters understand FOIA alternative dispute resolution is voluntary on the part of both parties and the Agency, as one of the parties to the mediation, may choose not to mediate a given FOIA dispute on a case-by-case basis. Furthermore, adding this language clarifies that the alternative dispute resolution process is governed by the National Archives and Records Administration, the Office of Government Information Service (OGIS) as mandated by the Freedom of Information Act.

### Executive Orders

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

Executive Orders 12866 and 13563 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. It has been determined that this rule is not a significant regulatory action.

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

This rule has been deemed not significant under Executive Order (EO) 12866, “Regulatory Planning and Review,” therefore, the requirements of EO 13771, “Reducing Regulation and Controlling Regulatory Costs” do not apply.

**Congressional Review Act**

This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

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

This proposed 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 proposed 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 will implement 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 proposed 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 proposed 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.

Accordingly, 32 CFR part 286 is proposed to be amended to read as follows:

### **PART 286—DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM**

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

Authority: 5 U.S.C. 552.

#### **§286.3 [Amended]**

2. Amend §286.3 by:

a. In paragraph (a):

i. Adding the words “United States Cyber Command,” after the words “United States Central Command.”

ii. Removing the words “Defense Security Service” and adding in its place the words “Defense Counterintelligence and Security Agency.”

b. In paragraph (b):

i. Adding the words “Defense Digital Service,” after the words “Defense Advanced Research Projects Agency.”

ii. Adding the words “Defense Innovation Unit,” after the words “Defense Equal Opportunity Management Institute.”

iii. Adding the words “Space Development Agency,” after the words “Pentagon Force Protection Agency.”

iv. Removing the words “Joint Improvised-Threat Defeat Agency.”

3. Amend §286.4 by revising paragraph (b) to read as follows:

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

\* \* \* \* \*

(b) Engaging in dispute resolution services provided by OGIS. These dispute resolution processes are voluntary processes. If a DoD Component agrees to participate in the dispute resolution services provided by the Office of Government Information services (OGIS), it will actively engage as a partner to the process in an attempt to resolve the dispute.

**§286.11 [Amended]**

4. Amend §286.11 by:

a. In paragraph (b)(1), removing the words “Defense Security Service” and adding in its place the words “Defense Counterintelligence and Security Agency.”

b. In paragraph (b)(2), adding the words “United States Cyber Command,” after the words “United States Central Command.”

Dated: June 19, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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