



## 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:** Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency (OATSD(PCLT)), Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** The DoD is finalizing amendments to its Freedom of Information Act (FOIA) regulation to update organizational names, add additional FOIA Requester Service Centers, and adopt the standards in the Department of Justice's (DOJ) Template for Agency FOIA Regulations noting the decision to participate in FOIA alternative dispute resolution (ADR) services is voluntary on the part of the requester and DoD.

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

**FOR FURTHER INFORMATION CONTACT:** Toni Fuentes at 571-372-0462.

### SUPPLEMENTARY INFORMATION:

#### I. BACKGROUND

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.

#### II. REGULATORY HISTORY

On February 6, 2018 (83 FR 5196-5197), the DoD finalized revisions to its FOIA regulation to incorporate the provisions of the Openness Promotes Effectiveness in our National Government Act of 2007 and the FOIA Improvement Act of 2016. On July 2, 2020, the DoD published a proposed rule titled *DoD Freedom of Information Act (FOIA) Program; Amendment* (85 FR 39856-39858) to update certain administrative aspects of the Department's implementation of the FOIA, including adding an additional FOIA Requester Service Center. DoD also proposed 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. One public comment was received, which was off-topic and not pertinent to this rule. However, in the final coordination of this rule, the Department has elected to make other administrative changes which are discussed below.

### **III. DISCUSSION OF ADDITIONAL AMENDMENTS ADDED BY THE FINAL RULE**

DoD has determined that public comment is unnecessary before finalizing these amendments as they are administrative and are internal to DoD and the management of DoD's FOIA Program. Therefore, DoD did not request public comments on this final rule, even though DoD is making several additional amendments with this final rule.

In this final rule, and per Deputy Secretary of Defense Memorandum dated September 1, 2021, *Disestablishment of the Chief Management Officer, Realignment of Functions and Responsibilities, and Related Issues*<sup>1</sup>), DoD is changing the Directorate for Oversight and Compliance to the Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency (OATSD(PCLT)). Also, the Defense Security Service is being changed to Defense Counterintelligence and Security Agency, and DoD is updating its web link for DoD Component FOIA Public Liaison contact information.<sup>2</sup>

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<sup>1</sup> <https://media.defense.gov/2021/Sep/03/2002847421/-1/-1/0/DISESTABLISHMENT-OF-THE-CMO-REALIGNMENT-OF-FUNCTIONS-AND-RESPONSIBILITIES-AND-RELATED-ISSUES.PDF>.

<sup>2</sup> Osd.mc-alex.oatsd-pclt.mbx.foia-liaison@mail.mil.

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. DoD is adding United States Cyber Command (USCYBERCOM), United States Southern Command (USSOUTHCOM), and United States Space Command (USSPACECOM) as authorized FOIA Requester Service Centers. USSOUTHCOM was inadvertently omitted in the proposed rule. Since these service centers have 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 (OSD) and Joint Staff FOIA Requester Service Center. DoD is also adding the United States Space Force as an authorized DoD FOIA Requester Service Center.

DoD is updating paragraph (b) of §286.3 to remove the list of DoD subcomponents whose FOIA requests are processed by the OSD/Joint Staff requester service center. DoD is removing this list of subcomponents because it does not provide a list of subcomponents of DoD Components whose FOIA requests are processed by other requester service centers within the Department.

This rule also clarifies language concerning DoD's participation in FOIA "Dispute Resolution," found in § 286.4 by adopting DOJ's Template for Agency FOIA Regulations to clarify the Department possesses the discretion to determine whether to participate in FOIA alternative dispute resolution when ADR is requested by a FOIA requester.

This rule also amends paragraph (f)(3) in §286.9 to require a statement detailing the application of any foreseeable harm in applying FOIA exemptions based on DOJ guidance,<sup>3</sup> requiring agencies to document foreseeable harm or legal bars to disclosure when processing requests, and include language that they considered the foreseeable harm standard within responses to requesters. DoD has updated this paragraph to comply with the DOJ requirement.

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<sup>3</sup> <https://www.justice.gov/oip/oip-guidance-applying-presumption-openness-and-foreseeable-harm-standard>.

DoD is adding Armed Services Board of Contract Appeals to paragraph (b)(1) and removing it from paragraph (b)(2) in §286.11. This component was inadvertently listed under paragraph (b)(2) but was granted appellate authority previously.

#### **IV. IMPACT OF THIS RULE**

##### **COSTS**

The Department does not anticipate any costs to the public associated with these rule amendments as they are administrative in nature and impact DoD internal operations of its FOIA program. Prior to establishing their own FOIA Requester Service Center, USCYBERCOM's and USSPACECOM's FOIA requests were serviced by the United States Strategic Command (USSTRATCOM) FOIA Requester Service Center. Since FOIA requests concerning USCYBERCOM and USSPACECOM previously existed, the cost associated with processing the request is unchanged and realigned from USSTRATCOM to the new FOIA Requester Service Centers.

##### **BENEFITS**

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

This rule also clarifies that DoD possesses the discretion to determine whether to participate in FOIA alternative dispute resolution when ADR is requested by a FOIA requester. This clarification is necessary to ensure that FOIA 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, amending this language clarifies that the alternative dispute resolution process is governed by the National Archives and Records Administration, the Office of Government Information Service as mandated by the FOIA.

Adding the foreseeable harm statement helps requesters understand what standards the Department considered when processing their requests.

## **V. REGULATORY COMPLIANCE ANALYSIS**

### **A. 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. This rule has been designated not significant, under section 3(f) of Executive Order 12866.

### **B. Congressional Review Act (5 U.S.C. 801 et seq.)**

The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the Federal Register, whichever is later. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

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

The Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule will implement the procedures for processing FOIA requests within the DoD,

which do not create such an impact. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

**D. Sec. 202, Public Law 104-4, “Unfunded Mandates Reform Act”**

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532(a)) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates may result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, in any one year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

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

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

**F. 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.

**G. Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”**

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or affects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

**List of Subjects in 32 CFR Part 286**

Freedom of information.

For reasons stated in the preamble, 32 CFR part 286 is amended 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.

**§286.1 [Amended]**

2. Amend §286.1 by removing the words “Directorate for Oversight and Compliance” and adding in its place the words “Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency (OATSD(PCLT))”.

3. Amend §286.3 by:

a. In paragraph (a):

i. Removing the text “<http://www.foia.gov/report-makerequest.html>” and adding in its place the text “<https://www.foia.gov>”.

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

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

iv. Removing the words “Pacific Command” and adding in their place the words “Indo-Pacific Command”.

v. Adding the words “United States Southern Command, United States Space Command, and United States Space Force,” before the words “United States Special Operations Command”.

b. Revising paragraph (b).

c. In paragraph (c), removing “32 CFR part 310” and adding in its place “32 CFR 310.3(c) through (e)”.

The revision reads as follows:

**§286.3 General information.**

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(b) The OSD/Joint Staff FOIA RSC also processes FOIA requests for several DoD agencies and field activities, as well as other DoD organizations. A list of these agencies, field activities, and DoD organizations is available at <https://www.esd.whs.mil/FOID/Submit-Request/>.

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4. Amend §286.4 by:

a. In paragraph (a), removing the text “<http://www.foia.gov/report-makerequest.html>” and adding in its place the text “<https://www.foia.gov>”.

b. Revising paragraph (b).

The revision reads as follows:

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

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

5. Amend §286.9 by:

a. Revising paragraph (f)(2).

b. In paragraph (h)(1), removing the words “Directorate for Oversight and Compliance” and adding in their place the acronym “OATSD(PCLT)”.

The revision reads as follows:

**§286.9 Responses to requests.**

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(f) \* \* \*

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied and a statement detailing the application of any foreseeable harm in applying FOIA exemptions by the DoD Component in denying the request;

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**§286.11 [Amended]**

6. Amend §286.11 by:

a. In paragraph (b)(1):

i. Adding the words “Armed Services Board of Contract Appeals,” after the words “appellate authority:”.

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

b. In paragraph (b)(2):

i. Removing the words “Deputy Chief Management Officer (DCMO)” and adding in their place the words “Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency (ATSD(PCLT))”.

ii. Removing the words “Armed Services of Contract Appeals”.

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

iv. Removing the words “Pacific Command” and adding in their place the words “Indo-Pacific Command”.

v. Adding the words “United States Southern Command,” before the words “United States Special Operations Command”.

vi. Adding the words “United States Space Command,” before the words “United States Strategic Command”.

vii. Removing the acronym “DCMO” and adding in its place the acronym “ATSD(PCLT)” wherever it appears in the last sentence.

Dated: November 27, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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