

SUBCHAPTER N—FREEDOM OF INFORMATION ACT PROGRAM

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

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.

SOURCE: 82 FR 1197, Jan. 5, 2017, unless otherwise noted.

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. Addition-

ally, 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

§ 286.4

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

32 CFR Ch. I (7-1-19 Edition)

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 them 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

§ 286.8

32 CFR Ch. I (7–1–19 Edition)

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.

[82 FR 1197, Jan. 5, 2017, as amended at 83 FR 5197, Feb. 6, 2018]

§ 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 post-marked, 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 affirmation, 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 sup-

porting 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 (Pub. L. 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.

(1) *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:

§ 286.13

32 CFR Ch. I (7-1-19 Edition)

(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 sat-

isfied and any commercial interest is not the primary interest furthered by the request. DoD Components 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 (1)(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/eforms/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
Engineering Data:	
Aperture Cards, per card	3.00
Silver Duplicate Negative	
When Key punched and	
Verified	1.00
Diaz Duplicate Negative	
When Key punched and	
Verified	3.00
35 mm Roll Film, per frame	1.00
16 mm Roll Film, per frame	0.65
Paper Prints (engineering drawings), each (per square foot)	0.30

TABLE 2—FOIA DOCUMENT PRODUCTION FEES—TECHNICAL DATA—Continued

Type	Cost
Paper Reprints of Microfilm Images, each	0.10
Other Technical Data Records:	
Paper Copy (standard size paper up to 8½ x 14, photocopier or printer)	0.15
CD/DVD	5.00
Microfiche Produced, each	3.50
Certification and Validation with Seal, each document	50.00

(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.

PART 286h—RELEASE OF ACQUISITION-RELATED INFORMATION

- Sec.
- 286h.1 Purpose.
- 286h.2 Applicability and scope.
- 286h.3 Policy.
- 286h.4 Responsibilities.

AUTHORITY: Pub. L. 101-189.

SOURCE: 55 FR 28614, July 12, 1990, unless otherwise noted.