

(3) * * * The summary described in paragraph (c)(2)(iii)(B)(2) of this section must advise the participant of the right, if any, to defer receipt of the distribution and of the consequences of failing to defer such receipt, must set forth a summary of the distribution options under the plan, must refer the participant to the most recent version of the notice (and, in the case of a notice provided in any document containing information in addition to the notice, must identify that document and must provide a reasonable indication of where the notice may be found in that document, such as by index reference or by section heading), and must advise the participant that, upon request, a copy of the notice will be provided without charge.

* * * * *

(vi) *Consequences of failing to defer*—(A) A notice under this paragraph (c)(2) that is required to describe the consequences of failing to defer receipt of a distribution until it is no longer immediately distributable must, to the extent applicable under the plan and in a manner designed to be easily understood, provide the participant with the information set out in paragraphs (c)(2)(vi)(A)(1) through (5) of this section and explain why it is relevant to a decision whether to defer.

(1) A description of the following federal tax implications of failing to defer: differences in the timing of inclusion in taxable income of an immediately commencing distribution that is not rolled over (or not eligible to be rolled over) and a distribution that is deferred until it is no longer immediately distributable (including, as applicable, differences in the taxation of distributions of designated Roth contributions within the meaning of section 402A); application of the 10% additional tax on certain distributions before age 59½ under section 72(t); and, in the case of a defined contribution plan, loss of the opportunity upon immediate commencement for future tax-favored treatment of earnings if the distribution is not rolled over (or not eligible to be rolled over) to an eligible retirement plan described in section 402(c)(8)(B).

(2) In the case of a defined benefit plan, a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and upon commencement when the benefit is no longer immediately distributable (assuming no future benefit accruals). The statement need not vary based on the participant's marital status if the plan is permitted, pursuant to

§ 1.417(a)(3)–1(c)(2)(ii), to provide a QJSA explanation that does not vary based on the participant's marital status.

(3) In the case of a defined contribution plan, a statement that some currently available investment options in the plan may not be generally available on similar terms outside the plan and contact information for obtaining additional information on the general availability outside the plan of currently available investment options in the plan.

(4) In the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from fees and expenses that apply to the participant's account and contact information for obtaining additional information on the fees and expenses that apply to the participant's account.

(5) An explanation of any provisions of the plan (and provisions of an accident or health plan maintained by the employer) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distribution. Such provisions would include, for example: plan terms under which a participant who fails to defer may lose eligibility for retiree health coverage or eligibility for early retirement subsidies or social security supplements; plan terms under which the benefit of a rehired participant who failed to defer may be adversely affected by the decision not to defer; and, in the case of a defined contribution plan, plan terms under which undistributed benefits that otherwise are nonforfeitable become forfeitable upon the participant's death.

(B) *Location of information; incorporation by reference.* In general, the information required to be provided in a notice under this paragraph (c)(2)(vi) must appear together (for example, in a list of consequences of failing to defer). However, the notice will not be treated as failing to satisfy the requirements of this paragraph (c)(2)(vi) merely because the notice includes a cross-reference to where the required information may be found in notices or other information provided or made available to the participant, as long as the notice of consequences of failing to defer includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision whether to defer.

* * * * *

(h) *Consequences of Failing to Defer Effective/Applicability Date.* The provisions in paragraph (c) of this

section that describe the requirement to notify participants of the consequences of failing to defer are effective for notices provided on or after the first day of the first plan year beginning on or after January 1, 2010.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E8–23918 Filed 10–8–08; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 288

[DoD–2008–OS–0059; RIN 0790–A129]

Office of the Secretary of Defense and Joint Staff Freedom of Information Act Program

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This part establishes Office of the Secretary of Defense (OSD) policy, assigns responsibilities, and prescribes procedures for the effective administration of the Freedom of Information Act (FOIA) Program in OSD and the Joint Staff. This part supplements and implements part 286 of 32 CFR, the DoD Freedom of Information Act Regulation.

DATES: Comments must be received by December 8, 2008.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

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

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Dave Henshall, 703–696–3243.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, “Regulatory Planning and Review”

It has been certified that 32 CFR part 288 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order 12866, as amended by Executive Order 13422.

Sec. 202, Pub. L. 104–4, “Unfunded Mandates Reform Act”

It has been certified that 32 CFR part 288 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

Public Law 96–354, “Regulatory Flexibility Act” (5 U.S.C. 601)

It has been certified that 32 CFR part 288 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 implements the procedures for processing FOIA requests within the OSD and JS components.

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

It has been certified that 32 CFR part 288 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, “Federalism”

It has been certified that 32 CFR part 288 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

1. The States;
2. The relationship between the National Government and the States; or
3. The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 288

Freedom of information.

Accordingly, title 32 of the Code of Federal Regulations, Chapter I, Subchapter N is proposed to be amended by adding part 288 as follows:

PART 285—OFFICE OF THE SECRETARY OF DEFENSE AND JOINT STAFF FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

Sec

- 288.1 Purpose.
- 288.2 Applicability.
- 288.3 Definitions.
- 288.4 Policy.
- 288.5 Responsibilities.
- 288.6 Procedures.
- 288.7 Information requirements.

Appendix to Part 288—DoD Agencies and Field Activities, And Other Defense Organizations Served by the Freedom of Information Division

Authority: 5 U.S.C. 552.

§ 288.1 Purpose.

This part establishes Office of the Secretary of Defense (OSD) policy, assigns responsibilities, and prescribes procedures for the effective administration of the Freedom of Information Act (FOIA) Program in OSD and the Joint Staff (JS). This part supplements and implements part 286 of 32 CFR, the DoD Freedom of Information Act Regulation.

§ 288.2 Applicability.

This part applies to OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and the Defense Agencies and DoD Field Activities listed in the appendix to this part. They will hereafter be referred to collectively as the “OSD and JS Components.”

§ 288.3 Definitions.

Appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority to reverse an initial denial authority (IDA) decision to withhold all or part of a requester record or to deny a request for a fee waiver, reduction of fees, or expedited processing, or any other adverse determination.

Consultation. The process whereby a DoD Component transfers a FOIA responsive document to another Component, Federal agency, or non-U.S. government entity to obtain recommendations on the releasability of the document. After review, the document is returned to the original Component for response to the requester or further review.

FOIA request. A written request for records, made by a person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a

fugitive from the law, that either explicitly or implicitly invokes the FOIA. A request must reasonably describe the records sought and be submitted in compliance with this part 286 of 32 CFR.

IDA. An individual granted the authority to make initial determinations as to the releasability of records to the public.

Privacy Act request. A written request from a U.S. citizen or alien lawfully admitted for permanent residence seeking records on himself or herself that are contained within a Privacy Act system of records.

Referral. The process whereby a DoD Component transfers a request to another DoD Component or Federal agency for one of two reasons. 1. The DoD Component that receives the request determines that responsive records are with another DoD Component or Federal agency, and therefore transfers that request to the other DoD Component or agency for processing and direct response to the requester. 2. The DoD Component that receives the request locates documents that originated with another DoD Component or Federal agency. In this case, the request and documents are transferred to the originating DoD Component or Federal agency for response directly to the requester. This also applies to the situation where a responsive document is transferred to a higher-level authority for response to the requester.

§ 288.4 Policy.

It is OSD policy that OSD and JS Components shall promote the public trust by making the maximum amount of information available to the public on the operation and activities of the Department of Defense, consistent with the Department’s responsibility to protect national security and other sensitive DoD information.

§ 288.5 Responsibilities.

(a) The Chief, Freedom of Information Division (FOID), Executive Services Directorate, Washington Headquarters Services (WHS), shall organize, direct, and manage the Office of Freedom of Information (OFOI), the Defense Freedom of Information Policy Office (DFOIPO), and the OSD/JS Privacy Office, and ensure their mutually supported functions are integrated to promote maximum efficiency.

(b) Additionally, the Chief, FOID, shall:

- (1) Direct and administer the DoD FOIA Program within the OSD and JS Components.

(2) Execute policies and establish procedures to ensure compliance with 32 CFR parts 285 and 286.

(3) Maintain the OSD/JS FOIA Requester Service Center (RSC).

(4) Serve as the central point of contact (POC) within the OSD and JS Components for the receipt of all FOIA initial requests for records of the OSD Components.

(5) Forward FOIA and Privacy Act requests for records from the public to the OSD Components having possession, control, and/or equities in the requested record.

(6) Respond to FOIA and Privacy Act requesters concerning OSD/JS records.

(7) Maintain a document management system of FOIA and Privacy Act requests.

(8) Conduct educational training for the OSD Components on the requirements and implementation of the FOIA, 5 U.S.C. 552, in accordance with 32 CFR part 286.

(9) Administer the OSD/JS FOIA RSC Web Site. This includes OSD and JS compliance with 5 U.S.C. 552(a)(2).

(10) Receive processing fees for deposit in the U.S. Treasury FOIA.

(11) Serve concurrently as Chief, DFOIPO, and shall:

(i) Receive, process, and review all FOIA appeals for the OSD and JS Components and the Combatant Commands and make recommendations to the appellate authority for final adjudication of these FOIA appeals.

(ii) Provide FOIA litigation support to the Office of the General Counsel, Department of Defense.

(c) The General Counsel, WHS, shall provide assistance and advice to the Pentagon Force Protection Agency (PFPA) and WHS components in the processing of initial denials of requested PFPA and WHS records.

(d) The General Counsel, Department of Defense, shall:

(1) Provide assistance and advice to the OSD Components in the processing of initial denials of requested records.

(2) Coordinate with the Department of Justice on all final appeals for requested records when litigation is likely.

(3) Through the Office of Legislative Counsel, provide assistance and advice to OFOI in the processing and final review of Secretary and Deputy Secretary-level records.

(e) The Heads of OSD and JS Components shall:

(1) Process FOIA requests received from the OFOI in accordance with this part and 32 CFR part 286.

(2) Serve as the IDA, who is authorized to make initial determinations on initial requests for records under 5 U.S.C. 552. This

responsibility may be delegated to a representative authorized to deny information on their behalf.

(3) Designate an office and an individual(s) as the POC for FOIA matters. Provide written notice to OFOI of delegated IDAs and POCs, including notice of changes.

(4) Coordinate with legal counsel as necessary on proposed denials of records.

(5) Provide OFOI with a brief statement of the reasons for the denial, including the identification of any exemptions applied.

(6) Alert OFOI when the issues raised by a FOIA request are of unusual significance, precedent setting, or otherwise require special guidance from OFOI.

(7) Forward all FOIA requests that are received directly from the requester (known as "out-of-channels requests") to OFOI for entry into the FOIA case tracking system.

(8) Establish procedures to mark record copies and to notify holders of classified records that have been downgraded, declassified, or reclassified as a result of a review under 5 U.S.C. 552.

(9) Provide instructions to employees who administer FOIA matters under this part and 32 CFR parts 285 and 286.

(10) Include a "FOIA" link on Component Web sites to the OSD/JS FOIA RSC (<http://www.dod.mil/pubs/foi/>) to assist requesters in properly directing their FOIA requests to the correct office for processing.

§ 288.6 Procedures.

(a) *General.* A request to the OSD/JS RSC for access to information under the provisions of 32 CFR part 286 may be denied upon the determination that:

(1) The requested information is exempt under 5 U.S.C. 552.

(2) The requester has failed to comply with the procedural requirements imposed by 32 CFR parts 285 and 286.

(b) *Processing FOIA Requests Within The OSD and JS Components.* (1) The OFOI receives two types of FOIA requests: Direct requests from a member of the public asking for access to DoD, OSD, or JS information; and referrals or consultations from other DoD and non-DoD agencies that contain OSD or JS documents or other agency documents with OSD or JS equities. In each case, OFOI shall forward the FOIA request (and responsive documents if a referral or consultation) to the OSD or JS Component having responsibility for the requested information. Any FOIA request received by an OSD or JS Component out of channels from a source other than OFOI shall be directed

to OFOI without delay for formal entry into the case tracking system. The OSD or JS Component should commence work on the request, pending its return from the OFOI.

(2) FOIA requests shall be sent by OFOI to the OSD or JS Component having responsibility for the information, along with SD Form 466, "Freedom of Information Action (Cover Sheet);" SD Form 472, "Request Information Sheet;" and DD Form 2086, "Record of Freedom of Information (FOI) Processing Cost." The SD Form 472 and the DD Form 2086 shall be completed and returned to OFOI when processing is complete along with the documents located as a result of the search. OSD or JS Components shall forward information denied in total or in part to OFOI at the initial request stage. The OSD and JS Components shall conduct document searches at the Federal Records Center, Suitland, Maryland, if the documents have been retired to that center. Documents that have been transferred to the National Archives and Records Administration (NARA) are considered the property of NARA and are not subject to OSD and JS Component searches.

(3) If an OSD or JS Component believes that a FOIA request is forwarded to them by OFOI for processing in error the OSD or JS Component's IDA will explain on the SD Form 472 why the OSD or JS Component is not the appropriate office and identify the specific component or other agency of the Government that is likely to have responsibility for the information.

(4) OFOI shall assign a suspense date to each request tasked to the OSD and JS Components by which the receiving component must respond to OFOI. Requests for extensions shall be made to OFOI at least 3 working days before the suspense date. Extensions of time shall be made by OFOI and granted on a case-by-case basis depending on whether the reasons provided qualify as "unusual circumstances" as defined by the FOIA.

(5) When a request requires a search by an OSD or JS Component and the requested record is released in full or denied in its entirety, one copy of the requested record, a completed SD Form 472, and DD Form 2086 shall be delivered to OFOI. If the located record is denied in part, two copies of the requested record shall be delivered to OFOI. One copy will indicate the denied information with red pencil brackets, and the other copy will be "clean," with no brackets. Those Components using electronic redaction software may indicate denied information by electronic brackets or

highlights. OFOI will redact the document electronically and prepare it for release to the requester.

(6) If OFOI provides the OSD or JS Component with a document for review that was located by another agency, the Component will return the document tasked for review back to OFOI with its release recommendations. The OSD or JS Component will indicate any exempt information with red pencil brackets or electronically.

(7) The FOIA, 5 U.S.C. 552(b) requires the release of segregable information not otherwise exempt. At a minimum, review for segregability shall be at the paragraph level. If OFOI determines that the information is not properly segregated, it will be returned to the OSD or JS Component for further review.

(8) Completed copies of the SD Form 472 and DD Form 2086 shall be returned with the packet. When a denial is based on a security classification according to the criteria outlined in DoD 5200.1-R,¹ the component's decision rationale shall indicate that a current review of the record supports continued classification. The explanation shall also contain the specific rationale from Executive Order 12958 that supports the decision for continued classification of the requested record. All denials of information require the signature of the IDA on the SD Form 472.

(9) A classified document containing unclassified information may not be denied in total under Exemption 1, 5 U.S.C. 552(b)(1), unless the unclassified information, when taken in aggregate, would reveal classified information. This determination must be made in accordance with section 1.7 of Executive Order 12958. Denial of unclassified information not meeting that standard may only be accomplished by exerting one or more of Exemptions 2 through 9 of 5 U.S.C. 552.

(10) All documents, regardless of classification, that are responsive to a FOIA request must be provided to OFOI for processing. This includes Confidential, Secret, Top Secret, and Sensitive Compartmented Information records. OSD and JS Components may contact the OFOI Security Manager to verify OFOI's clearance level for access to classified information.

(11) When an OSD and JS Component cannot locate a requested record and a "no record" determination is made, the explanation on the SD Form 472 shall so state and be signed by the IDA. Complete copies of the SD Form 472

and DD Form 2086 shall be returned with the packet.

(c) *Processing FOIA Appeals Within the OSD and JS Components.* (1) When an appeal involves documents denied by an OSD or JS Component IDA, DFOIPO shall review the entire case file of the initial action to determine if the information was properly denied in accordance with 32 CFR part 286 and 5 U.S.C. 552. If the initial action is deemed proper, then DFOIPO will recommend to the appellate authority that the initial action be upheld. When DFOIPO determines that the initial denial should not be upheld on appeal, it shall make a new release recommendation to the OSD or JS Component and return the denied information to OSD or JS Component for its reconsideration. Documents will be processed and returned to OFOI in accordance with the processing procedures outlined in paragraph (b) of this section.

(2) When an appeal involves an initial "no record" response, DFOIPO shall review the entire case file to determine if the initial search was adequate. If DFOIPO determines that the administrative record cannot support the adequacy of the initial search, the OSD or JS Component shall be tasked to provide more detailed accounting of the initial search, conduct a new search, or both. If it is determined that the initial administrative record shows that the initial search was adequate, DFOIPO will advise the appellate authority to uphold the original determination.

(3) If the appeal concerns an administrative decision made by DFOIPO such as denial of expedited processing, fee waiver, or a fee category determination, DFOIPO shall review the original case file, along with additional documentary evidence presented by the requester, and make a recommendation to the appellate authority for final adjudication.

(4) When the final determination by DFOIPO involves a full grant, the Chief, FOID or designee shall notify the requester of that determination.

§ 288.7 Information requirements.

The DoD Annual FOIA Report is assigned Report Control Symbol DD-DA&M(A) 1365 in accordance with the requirements of DoD 8910.1-M.²

Appendix to Part 288—DoD Agencies and Field Activities, and Other Defense Organizations Served by the Freedom of Information Division

American Forces Information Service

Armed Forces Radiology Research Institute
 Defense Acquisition University
 Defense Advanced Research Projects Agency
 Defense Business Transformation Agency
 Defense Equal Opportunity Management Institute
 Defense Legal Services Agency
 Defense Media Activity
 Defense Microelectronics Activity
 Defense Modeling and Simulation Office
 Defense Prisoner of War/Missing Persons Office
 Defense Security Cooperation Agency
 Defense Systems Management College
 Defense Technology Security Administration
 DoD Counterintelligence Field Activity
 DoD Human Resources Activity
 Joint Professional Military Education Colleges
 Missile Defense Agency
 National Defense University
 Pentagon Force Protection Agency (PFPA)
 Uniformed Services University of the Health Sciences
 Washington Headquarters Services (WHS)
 White House Military Office
 September 30, 2008.

Patricia L. Toppings,

*OSD Federal Register Liaison Officer,
 Department of Defense.*

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 325

[DOD-2008-OS-0067]

RIN 0790-AI30

Defense Contract Management Agency (DCMA) Privacy Program

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This part provides policies and procedures for the Defense Contract Management Agency's (DCMA) implementation of a Privacy Program under the Privacy Act of 1974, as amended.

DATES: Comments must be received by December 8, 2008.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

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

- Mail: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this

¹ Available at <http://www.dtic.mil/whs/directives/corres/pdf/520001r.pdf>.

² Available at <http://www.dtic.mil/whs/directives/corres/pdf/891001m.pdf>.