



## DoD MANUAL 5400.07

### DoD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

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<b>Originating Component:</b>	Office of the Deputy Chief Management Officer of the Department of Defense
<b>Effective:</b>	January 25, 2017
<b>Releasability:</b>	Cleared for public release. Available on the DoD Issuances Website at <a href="http://www.dtic.mil/whs/directives">http://www.dtic.mil/whs/directives</a> .
<b>Incorporates and Cancels:</b>	DoD 5400.7-R, "DoD Freedom of Information Act (FOIA) Program," September 4, 1998
<b>Approved by:</b>	David Tillotson III, Assistant Deputy Chief Management Officer

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**Purpose:** This issuance:

- Implements the DoD FOIA Program pursuant to DoD Directive (DoDD) 5400.07, in accordance with the authority in DoDD 5105.53, DoDD 5105.82, and the July 11, 2014, Deputy Secretary of Defense Memorandum.
- Supplements Part 286 of Title 32, Code of Federal Regulations (CFR).
- Incorporates the provisions of the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016.
- Promotes uniformity in the DoD FOIA Program by taking precedence over all DoD Component issuances that supplement and implement the DoD FOIA Program.

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## **SECTION 1: GENERAL ISSUANCE INFORMATION**

**1.1. APPLICABILITY.** This issuance applies to 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 issuance as the “DoD Components”).

**1.2. INFORMATION COLLECTIONS.** The DoD Annual FOIA Report to the U.S. Attorney General, referred to in Paragraphs 3.13., 6.2.a.(1)(b), and 6.3.b., has been assigned report control symbol DD-DCMO(A)1365 in accordance with the procedures in Volume 1 of DoD Manual (DoDM) 8910.01.

## **SECTION 2: RESPONSIBILITIES**

The DoD Component heads implement the procedures prescribed in this issuance and ensure that any supplemental guidance and procedures are in accordance with Part 286 of Title 32, CFR, and DoDD 5400.07.

## SECTION 3: GENERAL PROVISIONS

### 3.1. PUBLIC ACCESS TO DOD INFORMATION.

a. Pursuant to the FOIA, the public has the right to access agency records concerning U.S. Government activities. An agency record requested by a member of the public in accordance with Part 286 of Title 32, CFR, and this issuance must not be withheld in whole or in part unless the FOIA exempts the record, or parts of it, from disclosure.

b. The Directorate for Oversight and Compliance (DO&C), Office of the Deputy Chief Management Officer, maintains a DoD FOIA Handbook for the public to use in obtaining information from the DoD, as required by the FOIA. This handbook is a short, simple explanation of the FOIA and how the public can use it to access agency records. This handbook is posted on the FOIA section of the DoD Open Government Website at <http://open.defense.gov/Transparency/FOIA/FOIAHandbook.aspx>.

c. Individuals seeking DoD records should address their FOIA requests to a FOIA Requester Service Center (RSC) listed in Paragraph 3.2.a. or 3.2.b.. Addresses and contact information for the FOIA RSCs are available at the FOIA.gov Website, <http://www.foia.gov/report-makerequest.html>.

**3.2. DOD COMPONENTS.** The DoD Components listed in Paragraph 3.2.a. and 3.2.b. are referred to in this issuance as “DoD FOIA Program Components.”

a. The following DoD Components have their own FOIA programs, including a FOIA appellate authority.

- (1) Office of the Secretary of Defense/Joint Staff (OSD/JS).
- (2) Department of the Army.
- (3) Department of the Navy.
- (4) Department of the Air Force.
- (5) Defense Commissary Agency.
- (6) Defense Contract Audit Agency.
- (7) Defense Contract Management Agency.
- (8) Defense Finance and Accounting Service.
- (9) Defense Health Agency.
- (10) Defense Information Systems Agency.

- (11) Defense Intelligence Agency.
- (12) Defense Logistics Agency.
- (13) Defense Security Service.
- (14) Defense Threat Reduction Agency.
- (15) DoD Education Activity.
- (16) National Geospatial-Intelligence Agency.
- (17) National Reconnaissance Office.
- (18) National Security Agency/Central Security Service.
- (19) Office of the Inspector General of the Department of Defense.

b. The following DoD Components have their own FOIA programs; however, their FOIA appellate authority is the FOIA appellate authority for the OSD/JS as assigned in DoDD 5400.07.

- (1) Armed Services Board of Contract Appeals.
- (2) Defense Technical Information Center.
- (3) Joint Personnel Recovery Agency.
- (4) National Guard Bureau.
- (5) United States Africa Command.
- (6) United States European Command.
- (7) United States Central Command.
- (8) United States Northern Command.
- (9) United States Pacific Command.
- (10) United States Special Operations Command.
- (11) United States Southern Command.
- (12) United States Strategic Command.
- (13) United States Transportation Command.

c. The OSD/JS FOIA RSC processes requests for the following DoD Components:

- (1) Defense Acquisition University.

- (2) Defense Advanced Research Projects Agency.
- (3) Defense Equal Opportunity Management Institute.
- (4) Defense Legal Services Agency.
- (5) Defense Microelectronics Activity.
- (6) Defense Media Activity.
- (7) Defense POW/MIA Accounting Agency.
- (8) Defense Security Cooperation Agency.
- (9) Defense Technology Security Administration.
- (10) Defense Travel Management Office.
- (11) DoD Human Resources Activity.
- (12) DoD Test Resource Management Center.
- (13) Joint Improvised-Threat Defeat Agency.
- (14) Missile Defense Agency.
- (15) National Defense University.
- (16) Office of Economic Adjustment.
- (17) Office of Military Commissions.
- (18) Pentagon Force Protection Agency.
- (19) Uniform Services University of the Health Sciences.
- (20) Washington Headquarters Services.
- (21) White House Military Office.

### **3.3. FOIA RSCS.**

a. Each DoD FOIA Program Component listed in Paragraphs 3.2.a. and 3.2.b. of this issuance must establish one or more FOIA RSCs.

b. Each FOIA RSC will have a website that serves to educate the public on the FOIA process. These websites will comply with DoD Instruction (DoDI) 8550.01. At a minimum, each website will provide:



(1) The address, telephone number, facsimile number, and organizational e-mail address to which the public can send FOIA requests.

(2) Name of the DoD FOIA Program Component's FOIA point of contact.

(3) A link to the DoD FOIA Handbook.

(4) A description of the types of records that can be requested from the DoD FOIA Program Component.

(5) The name and contact information for each of the DoD FOIA Program Component's FOIA Public Liaisons.

(6) Information on how a FOIA requester can obtain the status of their FOIA request (either by telephone or through the FOIA RSC website).

(7) A FOIA library as described in Section 4 or a link to the DoD FOIA Program Component's FOIA library, if the library is centralized.

c. The websites of DoD FOIA Program Component headquarters FOIA RSCs will link to the websites of the other FOIA RSCs within their Components.

d. The Internet home page of every DoD Component will link to the FOIA RSC for that DoD Component.

**3.4. FOIA PUBLIC LIAISONS.** The DoD Components listed in Paragraph 3.2.a. will submit to the DO&C the names of personnel to serve as FOIA Public Liaisons. Each DoD FOIA Program Component will have at least one FOIA Public Liaison.

a. The FOIA Public Liaisons will:

(1) Ensure that the FOIA RSCs' websites comply with the requirements in Paragraph 3.3.b.

(2) Assist in the reduction of any delays in responding to requests.

(3) Increase transparency and understanding of request statuses.

(4) Assist in dispute resolution.

b. The FOIA Public Liaison for the DoD Components listed in Paragraph 3.2.b., the OSD/JS, and the Armed Services Board of Contract Appeals is in the DO&C.

**3.5. UNOFFICIAL RELEASE OF DOD RECORDS.** Records are considered part of the public domain when released to the public in response to a FOIA request or under circumstances in which a DoD official with the appropriate authority has authorized their release (e.g., a release under the DoD Mandatory Declassification Review Program, pursuant to DoD 5230.30-M). The

disclosure of exempt records, without authorization by an appropriate DoD official, is not an official release of information. Such a release does not waive the authority of the DoD to assert FOIA exemptions to withhold the same records in response to a FOIA request.

**3.6. DESCRIPTION OF REQUESTED RECORD.** The requester is responsible for providing a reasonable description of the desired record that will enable the DoD Component to locate the record with a reasonable amount of effort.

a. A reasonable description contains sufficient information to permit an organized, non-random search for the record based on the DoD Component's filing arrangements and existing retrieval systems. If filing arrangement details are unknown, then the requester should provide sufficient event-related details, to include the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers, to permit a person familiar with the DoD Component's filing arrangements to reasonably identify where such records would be located. The DoD Component's decision on the reasonableness of the description must be based on knowledge of its files, not on the potential volume of records that may be located and the concurrent review effort to determine releasability.

b. The fact that a FOIA request appears broad or burdensome (e.g., contains a large volume of potentially responsive information) does not, by itself, entitle the DoD Component to deny the FOIA request on the grounds that it does not reasonably describe the record sought.

**3.7. COMBATANT COMMANDS.** The Combatant Commands' FOIA programs are placed under OSD jurisdiction instead of the administering Military Department or the Chairman of the Joint Chiefs of Staff. This is an exception to DoDD 5100.03 in that it authorizes and requires the Combatant Commands to process FOIA requests in accordance with Part 286 of Title 32, CFR, and this issuance.

a. Documents originated by the Military Service components of the Combatant Commands while acting in a headquarters capacity for joint exercises or operations under Combatant Command authority are joint in nature and are under the cognizance of the Combatant Commands.

b. Documents created for a Combatant Command, yet located within a Defense Criminal Investigative Organization or Military Department Counterintelligence Organization or accident investigation file at the Military Service component, are Military Service records and the release, initial denial, and appellate authorities remain with the Military Service. However, the Military Service component will consult with the responsible Combatant Command during the review process.

c. Documents created by the Military Service components of the Combatant Commands below the headquarters level are considered Military Service records. Examples would include base support, personnel, and logistical records.

**3.8. SECURITY CLEARANCES AND ACCESS.** Due to the nature of their duties and responsibilities, FOIA personnel require access to all records requested through their respective activities, regardless of the sensitivity or classification of the information. The DoD Components must ensure that FOIA personnel have the appropriate clearances and access to perform their duties and are provided the appropriate electronic equipment to process and transmit classified records.

### **3.9. RELATIONSHIP BETWEEN THE FOIA AND THE PRIVACY ACT.**

a. Requesters seeking records about themselves contained only in a Privacy Act system of records will have their requests processed pursuant to Section 552a of Title 5, U.S.C. (also known as the “Privacy Act of 1974,” as amended, and referred to as the “Privacy Act” in this issuance) and implemented within the DoD by DoD 5400.11-R.

(1) If the Privacy Act system of records is exempt from the access provisions of Section (d)(1) of the Privacy Act, and if the records or any portion thereof are exempt pursuant to FOIA, the DoD Component will advise of the appropriate Privacy Act and FOIA exemption(s) in its response. Appeals must be processed pursuant to both the FOIA and the Privacy Act.

(2) If the Privacy Act system of records is not exempt from the access provisions of Section (d)(1) of the Privacy Act, a DoD Component cannot claim a FOIA exemption on the information and must release all information to the first-party requester. However, the DoD Component may withhold from such requester privacy-related information about another individual within the requester’s Privacy Act file. When this is the case, the DoD Component will advise the first-party requester that information was withheld because “a portion of the record you requested contains privacy-related information about a party other than yourself.”

b. Requesters seeking records about themselves not in a Privacy Act system of records who cite or imply the Privacy Act will have their requests processed pursuant to the FOIA, since the Privacy Act does not apply to these records. Appeals must be processed pursuant to the FOIA.

c. Requesters seeking records about themselves in a Privacy Act system of records and outside a Privacy Act system of records will have their requests processed pursuant to both the Privacy Act and the FOIA.

d. DoD Components will advise first-party requesters in the final response letter which Privacy Act and FOIA statutory authorities were used, inclusive of appeal rights.

**3.10. USE OF CONTRACTORS IN FOIA ADMINISTRATION.** Pursuant to DoDI 1100.22, Office of Management and Budget Circular No. A-76, and Office of Federal Procurement Policy Letter 11-01, DoD Components may not use contract support for certain functions known as “inherently governmental activities” (e.g., “governmental FOIA functions”).

a. Inherently governmental FOIA functions include:

(1) Formulating or approving FOIA policies and procedures.

(2) Making final determinations regarding whether to treat an incoming correspondence as a FOIA or Privacy Act request.

(3) Making denial or release determinations of information requested pursuant to the FOIA.

(4) Deciding any issues regarding the scope or interpretation of a FOIA request.

(5) Determining the appropriateness of claimed exemptions.

(6) Approving the approach taken in negotiations or discussions with the FOIA requester.

(7) Deciding administrative appeals.

(8) Conducting a final review of all outgoing final determination correspondence, memoranda, and release packages.

(9) Making final determinations on requests for expedited processing, fee category, and fee waivers.

(10) Executing documents for filing in litigation pursuant to the FOIA if the documents assert an official position of the DoD, any DoD Components, or any other federal agencies. Contractors may prepare and execute documents describing their own actions while processing FOIA requests.

b. Office of Federal Procurement Policy Letter 11-01 identifies the preparation of responses to FOIA requests as a function closely associated with inherently governmental functions. Examples of FOIA functions and duties that contractors may perform in the preparation of responses to FOIA requests include, but are not limited to:

(1) Making redactions to documents under the direction of an initial denial authority (IDA).

(2) Preparing correspondence for signature by a U.S. Government official.

(3) Communicating with a FOIA requester concerning the status of the FOIA request.

(4) Recommending information to be denied.

(5) Entering relevant information into the DoD Component's FOIA tracking system.

**3.11. NON-RESPONSIVE INFORMATION.** It is not uncommon for a DoD Component, when processing records in response to a FOIA request, to locate records that deal with multiple subjects, and only one of these subjects pertain to the FOIA request. In most of these cases the DoD Components should release non-responsive information that is not exempt from the FOIA. However, if it is determined that processing the non-responsive information may cause a burden to the DoD Component or is not in the best interests of the FOIA requester, the DoD Component

will consult with the FOIA requester and seek their concurrence to the redaction of the non-responsive information without a FOIA exemption. If the FOIA requester agrees, the responsive record will contain the annotation “non-responsive” at this redaction, and this concurrence will be documented in the response letter. For further information, consult the Department of Justice guidance on this topic at <https://www.justice.gov/oip/blog/foia-update-oip-guidance-determining-scope-foia-request>

### **3.12. HONORING FORM OR FORMAT REQUESTS.**

a. The DoD Components will make reasonable efforts to:

(1) Provide the record in any form or format requested if the record is readily reproducible in that form or format in the Component’s automated system.

(2) Provide records in a form that is reasonably usable.

(3) Maintain records in forms and formats that are reproducible.

b. A record is not considered readily reproducible if the DoD Component does not have the reproduction capability or if significant resources must be expended to reproduce it into the requested format. In responding to FOIA requests for records, the DoD Components will make reasonable efforts to search for records in electronic form or format if maintained in automated systems, except when such efforts would significantly interfere with the operation of the automated systems. The DoD Components will make such determinations on a case-by-case basis.

**3.13. FOIA ANNUAL REPORT.** The DoD FOIA Annual Report to the United States Attorney General and the Director of Office of Government Information Services is mandated by Section (e)(1) of the FOIA and completed on a fiscal-year basis. Due to the magnitude of the requested statistics and the need for accuracy, the DoD FOIA Program Components will track the annual report data as FOIA requests are processed. This facilitates accurate compilation of the statistics in completing the report. Each September, the DO&C provides instructions to the DoD FOIA Program Components concerning Component input for the annual report. Using the current edition of DD Form 2564, “Annual Freedom of Information Act Report,” the DoD Components will forward their reports to the DO&C no later than October 31. In turn, the DO&C submits a consolidated report to the Attorney General by February 1 of each year, and places a copy of this report in the FOIA section of the DoD Open Government Website.

**3.14. SIGNIFICANT FOIA REQUESTS.** DoD FOIA Program Components receiving a FOIA request for records, the release of which may be of interest to DoD leadership, will contact DO&C for further guidance. DO&C will coordinate expeditiously the responses with DoD leadership; however, it will not act as the IDA for any denial of information.

## SECTION 4: FOIA LIBRARIES

### 4.1. REQUIREMENTS.

**a. General.** The FOIA requires agency records described in Section (a)(2) of the FOIA and created on or after November 1, 1996, to be available for public inspection in an electronic format. To meet this requirement, each DoD FOIA Program Component will maintain an online FOIA library. In addition to these records, the DoD FOIA Program Components may elect to place other agency records of public interest in their FOIA libraries.

**b. DoD FOIA Program Component FOIA Libraries.** Each DoD Component will establish one or more FOIA libraries. The DoD Components that have only one FOIA RSC will meet this requirement by having a FOIA library on its FOIA website. The DoD Components with more than one FOIA RSC will meet this requirement by either having one FOIA library on its primary FOIA website or having a FOIA library on each FOIA RSC website.

(1) **Final Opinions.** Section (a)(2)(A) of the FOIA requires agencies to make final opinions available to the public. This requirement can be met by the public availability of DoD Component websites such as the Defense Office of Hearings and Appeals and Armed Services Board of Contract Appeals. DoD FOIA Program Components are not required to also post or link to these otherwise publically available documents in their FOIA libraries.

(2) **Statements of Policy.** Section (a)(2)(B) of the FOIA requires agencies to make statements of policy and interpretations that have been adopted by the agencies and are not published in the Federal Register available to the public. This requirement can be met by the publication of DoD issuances on the DoD Issuances Website. DoD FOIA Program Components are not required to post or link to these documents in their FOIA libraries.

(3) **Administrative Staff Manuals or Instructions.** Section (a)(2)(C) of the FOIA requires agencies to make administrative staff manuals and instructions that establish policy or interpretations that affect the public available to the public. Each DoD FOIA Program Component FOIA library must link to its respective Component's publicly available issuance publication web page. For example, the Air Force FOIA Website will link to the Air Force e-Publishing Website, and the OSD/Joint Staff FOIA RSC will link to the DoD Issuances Website.

#### (4) Frequently Requested Records.

(a) Each FOIA Program DoD Component FOIA library must meet the requirements of Section (a)(2)(D) of the FOIA by making available to the public records that:

1. Have been released under the FOIA; and
2. Are or are likely to become the subject of subsequent FOIA requests; or
3. Have been requested three or more times.

(b) These types of documents will not be posted in FOIA Libraries.

1. Documents requested by a person that would be exempt from release to any other requester pursuant to Exemptions 6 or 7(C) because they contain personally identifiable information about the requester. This commonly occurs when a requester makes a first party request for their own information; however, it could arise in other situations.

2. Documents requested by a commercial entity that would be exempt from release to any other requester pursuant to Exemption 4 because they contain trade secrets or commercial or financial information concerning the requester.

**(5) Index.** Section (a)(2)(E) of the FOIA requires the libraries to provide an index of the documents posted in accordance with Section (a)(2)(D). DoD FOIA Program Components can meet this requirement by arranging these documents in their FOIA libraries by topical or descriptive words, rather than by case name or numbering system, so that the public can readily locate material. Case name and numbering arrangements may also be included for DoD FOIA Program Component convenience.

**(6) Proactive Releases.** DoD FOIA Program Components may post other documents in their FOIA libraries, such as proactive releases, documents released in accordance with the Mandatory Declassification Review program, and other documents released in accordance with the FOIA. This section also may contain links to other DoD FOIA Program Component offices proactively releasing documents. DoD Components must not proactively release documents that are contained within a Privacy Act system of records unless the published system of records notice specifically allows for proactive releases in the routine uses section.

**c. Exemptions.** DoD FOIA Program Components will redact from all records in FOIA libraries all information that qualifies for withholding pursuant to one or more of the FOIA exemptions described in Section 5.

**4.2. RECORD AVAILABILITY.** The DoD FOIA Program Components should consider enhancing their FOIA libraries with search engines and document categories to provide the public easier access.

**4.3. INDEXES.** Sections (g)(1) and (2) of the FOIA require agencies to make available for public inspection in an electronic format an index of all major information systems and a description of major information and record locator systems publicly available.

**a. Major Information System.** The FOIA section of the DoD Open Government Website satisfies this requirement for the DoD. The DoD FOIA Program Components are not required to post or link to this index in their FOIA libraries.

**b. Record Locator System.** The FOIA section of the DoD Open Government Website satisfies this requirement for the DoD. The FOIA Program DoD Components are not required to post or link to this index in their FOIA libraries.

#### **4.4. FOIA SECTION (A)(1) RECORDS.**

a. Although FOIA Section (a)(1) records need not be made available in response to FOIA requests or in FOIA libraries, they must be made publicly available. Examples of (a)(1) records include:

(1) Descriptions of an agency's central and field organization and, to the extent they affect the public, rules of procedure.

(2) Descriptions of forms available.

(3) Instructions as to the scope and contents of papers, reports, or examinations.

(4) Any amendments, revisions, or reports of the aforementioned records.

b. In accordance with Section (a)(1) of the FOIA, each DoD Component will disclose, through publication in the Federal Register, information describing its organization, functions, procedures, substantive rules, and statements of general policy.



## SECTION 5: EXEMPTIONS

### 5.1. GENERAL PROVISIONS.

a. This section is not a thorough or exhaustive explanation of the applicability of the FOIA exemptions. For more detailed explanations, the DoD Components may consult the Department of Justice Guide to the Freedom of Information Act (available at <http://www.usdoj.gov/oip/foia-guide.html>).

b. Information responsive to a FOIA request will be withheld only if the DoD Component reasonably foresees that disclosure would harm an interest protected by one or more of the FOIA exemptions, or disclosure is prohibited by law. Under this standard, the content of a particular record should be reviewed and a determination made as to whether the DoD Component reasonably foresees that disclosing it, given its age, content, and character, would harm an interest protected by the applicable exemption. Mere speculative or abstract fears, or fear of embarrassment, are an insufficient basis for withholding information.

c. As described in this section, nine types of exempt information in records may be withheld, in whole or in part, from public disclosure unless otherwise prescribed by law. In general, a release of a record to one FOIA requester prevents the withholding of the same record pursuant to a FOIA exemption if the record is later requested by someone else.

d. In applying exemptions, the identity of the FOIA requester and the purpose for the FOIA request are irrelevant; however, an exemption may not be invoked when the particular interest to be protected is the FOIA requester's interest. For example, privacy information concerning an individual would not be withheld from that individual if they were to request it under the FOIA unless another FOIA exemption applies.

e. When a DoD Component determines that information contained within a record is exempt from release, it will consider whether a partial release of the record is possible by taking reasonable steps to conduct a line-by-line review to segregate and release nonexempt information contained within the record.

f. If admitting the fact of the existence or nonexistence of a record responsive to a FOIA request would itself reveal information protected from release by one of the nine exemptions, the DoD Components must neither confirm nor deny the existence or nonexistence of the requested record.

(1) This is commonly called a "Glomar" response (for detailed guidance on using this type of response, see the Department of Justice Guide to the Freedom of Information Act), and the appropriate exemption must be cited by the DoD Component in the response. This situation most commonly arises with Exemptions 1, 6, and 7(C); however, it could arise with other exemptions.

(2) A "refusal to confirm or deny" response must be used consistently by the DoD Components, not only when a record exists, but also when a record does not exist. If not used

consistently, the pattern of a “no record” response when a record does not exist, and a “refusal to confirm or deny” when a record does exist, risks disclosing exempt information.

**5.2. APPLYING THE FOIA EXEMPTIONS.** This paragraph describes the nine types of exempt information in records and the procedures for applying them.

**a. Exemption 1.** Pursuant to section (b)(1) of the FOIA, records properly and currently classified in the interest of national defense or foreign policy, pursuant to an existing Executive order, are exempt from disclosure. If the responsive information is not marked as classified when the FOIA request is submitted, the DoD Component may undertake a classification review in accordance with Volume 1 of DoDM 5200.01 to determine whether the information should be classified. The FOIA requester will be advised as to which sections of an Executive order apply in determining that the information is classified. Exemption 1 also is invoked when:

(1) Individual items of unclassified information, when compiled, reveal additional associations or relationships that meet the standard for classification pursuant to an existing Executive order and Volume 1 of DoDM 5200.01, and are not otherwise revealed in the individual items of information. This is known as the “mosaic” or “compilation” approach.

(2) The fact of the existence or nonexistence of a responsive record would itself reveal information containing classified information. In this situation, the DoD Components must provide a Glomar response and cite Exemption 1.

**b. Exemption 2.** Pursuant to section (b)(2) of the FOIA, records related solely to the internal personnel rules and practices of the DoD or any of the DoD Components are exempt from disclosure.

**c. Exemption 3.** Pursuant to section (b)(3) of the FOIA, records concerning matters that another statute specifically establishes criteria for withholding are exempt from disclosure.

(1) This exemption allows for the withholding of information because its release is prohibited by another statute only if one of two disjunctive requirements concerning the statute is met:

(a) The statute requires that the information be withheld from the public in such a manner as to leave no discretion on the issue; or

(b) The statute establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(2) For any statute enacted after October 28, 2009, in order to qualify as an Exemption 3 statute under this paragraph, it must cite to section (b)(3) of the FOIA. The DO&C maintains a list of Exemption 3 information and statutes used within the DoD on the FOIA section of the DoD Open Government Website, including, but not limited to:

(a) **Personally Identifying Information of DoD Personnel.** Section 130b of Title 10, U.S.C., authorizes the withholding of names, ranks, duty addresses, official titles, and pay

information of DoD personnel (civilian and military) in overseas, sensitive, or routinely deployable units when this information is requested pursuant to the FOIA. The United States Special Operations Command and the United States Cyber Command and their components qualify as sensitive units pursuant to Section 130b of Title 10, U.S.C. Information withheld pursuant to Exemption 3 and this statute also should be withheld pursuant to Exemption 6.

1. The DoD Components may make discretionary releases of names and duty information of personnel in overseas, sensitive, or routinely deployable units who, by the nature of their position and duties, frequently interact with the public. Officials whose identities may be released include general and flag officers, public affairs officers, other personnel designated as official command spokespersons, and other senior officials whose identities are known to the public through the performance of their duties.

2. The provision in Paragraph 5.2.c.(2)(a), does not change DoD issuances for public affairs officers and the rules used by public affairs offices to release information to the general public and the media. Public affairs offices should continue to release information in accordance with current DoD issuances, Privacy Act restrictions, and security classifications.

**(b) Sensitive Information of Foreign Governments and International Organizations.** Section 130c of Title 10, U.S.C., authorizes the withholding of unclassified sensitive information of a foreign government or international organization (e.g., the North Atlantic Treaty Organization, the United Nations, the North American Aerospace Defense Command, the Inter-American Defense Board, or the International Committee of the Red Cross). DoD Component IDAs must withhold this information pursuant to Exemption 3 (for procedural instructions, see Paragraph 6.2.f.(2)) when they make all three of these determinations concerning the requested information:

1. The information was provided to the DoD by (or produced in cooperation with) a foreign government or international organization.

2. The information is withheld from public disclosure by the foreign government or international organization and the foreign government or international organization has made this representation in writing.

3. Any of these three conditions are met:

a. The foreign government or international organization requests, in writing, that the information be withheld.

b. The foreign government or international organization provides the information to the U.S. Government on the condition that it is not released to the public.

c. DoD regulations specify the release of the requested information would have an adverse effect on the ability of the U.S. Government to obtain the same or similar information in the future.

**(c) Critical Infrastructure Security Information (CISI).** In accordance with Section 130e of Title 10, U.S.C., the Secretary of Defense and the Director of Administration (DA),

Office of the Deputy Chief Management Officer, may exempt CISI from release under the FOIA. The IDAs asserting the exemption must obtain a written determination from the DA in accordance with the procedures in Paragraph 6.2.j. before withholding CISI from a FOIA requester. If the IDA asserting the exemption is from a consulted DoD Component, that DoD Component must obtain the written DA determination before responding to an closing the consultation.

(d) **Military Flight Operations Quality Assurance (MFOQA) System Data File.** In accordance with Section 2254a of Title 10, U.S.C., the Secretary of Defense and the DA may exempt MFOQA system data files from release under the FOIA. The IDAs asserting the exemption must obtain a written determination from the DA in accordance with the procedures in Paragraph 6.2.j. before withholding MFOQA system data file information from a FOIA requester.

**d. Exemption 4.** Pursuant to Section (b)(4) of the FOIA, certain non-government financial information is exempt from disclosure.

(1) This exemption protects:

(a) Trade secrets; or

(b) Information that is:

1. Commercial or financial;

2. Obtained from a person or entity outside of the U.S. Government; and

3. Privileged or confidential.

(2) Commercial or financial information that is voluntarily submitted to the U.S. Government, absent any exercised authority prescribing criteria for submission, may be categorically protected, provided it is not customarily disclosed to the public by the submitter. Examples of exercised authorities prescribing criteria for submission include statutes, Executive orders, regulations, invitations for bids, requests for proposals, and contracts. DoD Components should analyze submission of information pursuant to these authorities in accordance with Part 286 of Title 32, CFR.

(3) Commercial or financial information that is not voluntarily provided to the U.S. Government is considered “confidential” for Exemption 4 if its disclosure is likely to:

(a) Impair the U.S. Government’s ability to obtain necessary information in the future (known as the “impairment prong”);

(b) Harm an identifiable private or governmental interest; or

(c) Cause substantial harm to the competitive position of the person providing the information.

(4) Examples of information that may be protected by Exemption 4 include:

(a) Commercial or financial information received in connection with loans, bids, contracts, or proposals.

(b) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures.

(c) Personal statements given during inspections, investigations, or audits.

(d) Financial data provided by private employers in connection with locality wage surveys that are used to fix and adjust pay schedules applicable to the prevailing wage rate of DoD employees.

(e) Scientific and manufacturing processes or developments concerning technical or scientific data or other information submitted with applications for research grants or with a report while research is in progress.

(f) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, or developed in part with federal funds and in part at private expense. The contractor or subcontractor must retain legitimate proprietary interests in such data, in accordance with Sections 2320 and 2321 of Title 10, U.S.C., and Parts 227.71 and 227.72 of Title 48, CFR. Technical data developed exclusively with federal funds may be withheld pursuant to Exemption 3 if it meets the criteria of Section 130 of Title 10, U.S.C., and Parts 227.71 and 227.72 of Title 48, CFR.

(g) Information copyrighted pursuant to Section 106 of Title 17, U.S.C., if release of copyrighted material otherwise meets the standards of Exemption 4.

(5) When the DoD Components receive FOIA requests for information that could be protected by this exemption, they will notify the submitter of the information in accordance with the procedures in Subpart 286.10 of Title 32, CFR.

**e. Exemption 5.** Pursuant to Section (b)(5) of the FOIA, inter- or intra-agency memoranda or letters containing information considered privileged in civil litigation are exempt from disclosure. Merely being an internal record is an insufficient basis for withholding pursuant to this exemption. To qualify as exempt pursuant to Exemption 5, the document must meet a particular threshold and must be privileged in the civil discovery context.

(1) **Threshold.** A document must meet the threshold requirement of being an inter- or intra-agency document before the proper privilege can be identified in any given case. Because the U.S. Government may seek expert advice from external entities (or consultants) in many instances, it is possible that an external entity may qualify as an “agency” for this exemption. See the Department of Justice Guide to the Freedom of Information Act for further discussion on this subject.

(2) **Privileges.** The privileges and types of information protected by Exemption 5 include, but are not limited to:

(a) Deliberative Process Privilege.

1. To qualify for this privilege, the information must be deliberative and pre-decisional. DoD Components cannot withhold factual information from a FOIA requester pursuant to this privilege, except when:

a. The author of a document deliberately selects specific facts out of a larger group of facts and uses only this subset of facts to make a decision, thereby revealing the author's internal thought processes; or

b. The factual information is so inextricably connected to the deliberative material that its disclosure would expose or cause harm to the agency's deliberations.

2. A direction or order from a superior to a subordinate usually does not qualify as a deliberative process document if it constitutes guidance on a departmental policy or a decision. However, correspondence from a superior to a subordinate may qualify if it discusses preliminary matters or requests information or advice relied upon in the decision-making process.

3. An agency's final decision and post-decisional documents related to the decision cannot be withheld pursuant to the deliberative process privilege.

4. Examples of deliberative process documents include:

a. Staff papers, including after-action reports, inspection reports, lessons learned, and situation reports containing staff evaluations, advice, opinions, or suggestions.

b. Advice, suggestions, or evaluations prepared on behalf of the DoD by individual consultants or by internal boards, committees, councils, groups, panels, conferences, commissions, task forces, or other similar groups that are formed for obtaining advice and recommendations.

c. Drafts of final records.

d. Information of a speculative, tentative, or evaluative nature, or such matters as proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, when such information would provide undue or unfair competitive advantage to private personal interests or would impede legitimate U.S. Government functions.

e. Agency documents underlying the President's budget decisions, as described in Office of Management and Budget Circular No. A-11. This includes planning, programming, and budgetary information that is involved in the defense planning and resource allocation process and out-year discretionary data.

5. The deliberative process privilege does not apply to records created 25 years or more prior to the date of the FOIA request.

(b) **Attorney-Client Privilege.** This privilege protects confidential communications between an attorney and a client (or multiple clients that share a common interest) relating to legal matters for which the client has sought professional advice. The information that the client supplies to the attorney, the legal advice that the attorney gives to the client in return, and communications between attorneys that involve client-supplied information are protected by this privilege. Unlike the deliberative process privilege, the attorney-client privilege mandates the withholding of all the information, including the facts, unless the client waives the privilege.

(c) **Attorney Work Product Privilege.** This privilege protects documents prepared by an attorney or at an attorney's direction in reasonable anticipation of litigation. Unlike the deliberative process privilege, the attorney work product privilege mandates the withholding of all the information, including the facts. This privilege still can be used after the litigation is complete.

(d) **Government Trade Secret Privilege.** This privilege protects trade secrets or other confidential research, development, or commercial information owned by the U.S. Government, premature release of which is likely to affect the U.S. Government's negotiating position or other commercial interest.

(e) **Safety Investigation Privilege.** This privilege protects privileged safety information, as defined in DoDI 6055.07.

(f) **Presidential Communications Privilege.** This privilege protects communications among the President and Presidential advisors created to assist the President in the exercise of non-delegable constitutional duties.

**f. Exemption 6.** Pursuant to Section (b)(6) of the FOIA, information in personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, is exempt from disclosure. If the information qualifies as Exemption 6 information, there is no discretion in its release.

(1) When considering applying this exemption, the DoD Component must balance the public interest in disclosure against the individual's privacy interest. When there is no public interest in the requested information, the DoD Component may withhold the information even if there is only a negligible privacy interest. In determining the public interest, the DoD Component should only consider whether the information sheds light on the operations or activities of the U.S. Government. The FOIA requester has the burden of showing a public interest in disclosure.

(2) A privacy interest may exist in personal information even though the information was previously disclosed but may no longer be in the public's eye and has faded from memory. This is known as the concept of "practical obscurity." In this case, the privacy interest in this type of situation may have increased over time and the public interest may have decreased over time; therefore, the DoD Component should now withhold the once-public information, if the balance of interests has shifted in favor of privacy.

(3) This exemption usually protects home addresses, telephone numbers, and private e-mail addresses. This includes home addresses and military quarters addresses not associated with the occupants' names.

(4) This exemption must not be used in an attempt to protect the privacy of a deceased person. It may be used to protect the privacy of the deceased person's surviving family members if disclosure would rekindle grief, anguish, pain, embarrassment, or result in a disruption of their peace of mind.

(5) This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal information containing a privacy interest, and the public interest in disclosure does not outweigh the privacy interest. In this situation, the DoD Components must provide a Glomar response and cite Exemption 6.

(6) If a FOIA requester requests information that is about that FOIA requester, Exemption 6 may not be used to deny privacy information about that individual. However, if another FOIA requester requests the same information, it should be denied under Exemption 6.

**g. Exemption 7.** Pursuant to Section (b)(7) of the FOIA, records or information compiled for law enforcement purposes are exempt from disclosure upon the identification of one of the six conditions delineated in this paragraph. Law enforcement purposes include civil, criminal, military, and regulatory/administrative purposes, including the implementation of Executive orders or regulations issued pursuant to law. A DoD Component may invoke this exemption to prevent disclosure of documents not originally created, but later gathered, for law enforcement purposes.

#### (1) Conditions Where Exemption 7 Applies.

(a) **Exemption 7(A).** Section (b)(7)(A) of the FOIA applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to interfere with enforcement proceedings. Determining the applicability of Exemption 7(A) requires a two-step analysis.

1. DoD Components must identify an ongoing, pending, or prospective law enforcement proceeding. This would include any subsequent or pending proceedings resulting from the original proceeding. This exemption cannot be used if an investigation is terminated or complete.

2. DoD Components must determine whether release of the information could cause some articulable harm to the law enforcement proceeding. In order to satisfy the "articulable harm" requirement of Exemption 7(A), there must be some distinct harm that could reasonably be expected to result if the record or information requested were disclosed.

(b) **Exemption 7(B).** Section (b)(7)(B) of the FOIA applies to records compiled for law enforcement purposes when disclosure would deprive a person of the right to a fair trial or to an impartial adjudication.



(c) **Exemption 7(C)**. Section (b)(7)(C) of the FOIA applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to constitute an unwarranted invasion of the personal privacy of a living person, including surviving family members of an individual identified in such a record. This exemption also applies when the fact of the existence or nonexistence of a responsive record would itself reveal information containing a privacy interest, and the public interest in disclosure does not outweigh the privacy interest. In this situation, the DoD Components must provide a Glomar response and cite Exemption 6.

(d) **Exemption 7(D)**. Section (b)(7)(D) of the FOIA applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to disclose:

1. The identity of a confidential source, including:
  - a. A source within the DoD;
  - b. A State, local, or foreign agency or authority; or
  - c. Any private institution that furnishes the information on a confidential basis.
2. Information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

(e) **Exemption 7(E)**. Section (b)(7)(E) of the FOIA applies to records compiled for law enforcement purposes when disclosure would reveal:

1. Non-obvious techniques and procedures for law enforcement investigations or prosecutions; or
2. Guidelines for law enforcement investigations or prosecutions, if such disclosure could reasonably be expected to risk circumvention of the law.

(f) **Exemption 7(F)**. Section (b)(7)(F) of the FOIA applies to records compiled for law enforcement purposes when disclosure could reasonably be expected to endanger the life or physical safety of any individual.

## (2) Examples of Exemption 7 Applications.

(a) Statements of witnesses and other material developed during the course of an investigation and all materials prepared in connection with related government litigation or adjudicative proceedings may be exempt from disclosure pursuant to Exemptions 7(A), 7(C), and 7(D).

(b) The identity of firms or individuals being investigated for alleged irregularities in contracting with the DoD, when the United States has obtained no indictment or filed any civil action against them, may be exempt from disclosure pursuant to Exemptions 7(A) and 7(C).

(c) Information obtained in confidence, expressed or implied, during a criminal investigation by a criminal law enforcement activity or a lawful national security intelligence investigation may be exempt from disclosure pursuant to Exemptions 7(A), 7(C), and 7(D). National security intelligence investigations include background security investigations and those investigations conducted to obtain affirmative or counterintelligence information.

(d) Emergency action plans, guidelines for response to terrorist attacks, analyses of security procedures, and other sensitive information that could prove deadly if obtained by those seeking to do harm to the public on a large scale may be exempt from disclosure pursuant to Exemptions 7(E) and 7(F).

**h. Exemption 8.** Pursuant to Section (b)(8) of the FOIA, records in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions are exempt from disclosure.

**i. Exemption 9.** Pursuant to Section (b)(9) of the FOIA, records containing geological and geophysical information and data (including maps) concerning wells are exempt from disclosure.

## SECTION 6: FOIA REQUEST PROCESSING

### 6.1. GENERAL PROVISIONS.

**a. Requests From Private Parties.** A FOIA request may be made by any person. It may not be used by federal agencies seeking official information.

**b. Requests From Local or State Government Officials, Congress, and Foreign Governments.**

(1) Local or State government officials, foreign officials requesting on behalf of their governments, foreign individuals, or foreign organizations requesting DoD Component records pursuant to the FOIA are treated the same as any other FOIA requester.

(2) The FOIA does not apply to the records of a DoD Component that is an element of the intelligence community, as defined in Section 401a(4) of Title 50, U.S.C., if the FOIA request is from an entity or representative of a foreign government.

(3) Requests from members of Congress who are not seeking records on behalf of a congressional committee or subcommittee, or on behalf of the House of Representatives or the Senate sitting as a whole, are not FOIA requests and should not be processed through FOIA channels. However, any release of information will be consistent with a release to any individual pursuant to the FOIA and its withholding exemptions. In these cases, the member will not be provided with FOIA appeal rights.

(4) Requests submitted by members of Congress on behalf of a congressional committee or subcommittee, or on behalf of the House of Representatives or the Senate sitting as a whole, that are received by a FOIA RSC are referred to the appropriate office that handles legislative inquiries for processing pursuant to DoDI 5400.04 or supplementing DoD Component issuances. Such requests are not processed pursuant to the FOIA and withholding exemptions may not apply.

(5) If a member of Congress chooses to request records pursuant to the FOIA, then the provisions of Part 286 of Title 32, CFR, and this issuance apply.

(6) Constituent requests for records that are forwarded by members of Congress are processed as FOIA or Privacy Act requests, as applicable. The member forwarding the request will be advised of these circumstances.

(7) Requests from officials of foreign governments that do not invoke the FOIA are referred by the FOIA RSC to the appropriate office authorized to disclose official DoD information to foreign governments, and the requester is so notified.

### 6.2. PROCESSING PROCEDURES.

**a. Receipt and Control.**

(1) When a FOIA RSC receives a FOIA request, it must open a file in a formal control system. The formal control system:

(a) Must be designed for accountability and compliance with the FOIA.

(b) Should include the data elements necessary to compile the statistics required by the annual report.

(2) Each request must be assigned a unique tracking number, which will be included in all correspondence with the requester.

#### **b. Prompt Action on FOIA Requests.**

(1) When unusual or exceptional circumstances prevent a FOIA RSC from making a final response determination within the statutory time period, it will advise the FOIA requester in writing and provide the requester an opportunity to narrow the scope of the request. FOIA RSCs will be available, as a matter of good practice, to assist requesters in the formulating of requests.

(a) The FOIA describes unusual circumstances as:

1. The need to search for and collect the requested records responsive from field offices or other establishments that are separate from the office processing the FOIA request.

2. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records.

3. The need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more DoD Components having substantial subject-matter interest in the records.

(b) The FOIA does not affirmatively explain “exceptional circumstances;” however, exceptional circumstances do not include a delay that results from predictable component backlogs, unless the DoD FOIA Program Component demonstrates reasonable progress in reducing its backlog.

(2) DoD Components receiving a misdirected FOIA request will follow the procedures in Subpart 286.7 of Title 32, CFR.

(3) DoD FOIA Program Components will provide interim responses when they are unable to make a final determination within the statutory 20 working days, and should communicate with the FOIA requester before the final response, if appropriate. These communications may include acknowledging receipt of the FOIA request and negotiating with the FOIA requester concerning the scope of the FOIA request, the response timeframe, and the fee agreement. However, such communications do not constitute a final response determination. The initial interim response will include, at a minimum:

(a) The date the 20-working-day statutory time period started for the FOIA request.

(b) The tracking number for the FOIA request.

(c) Contact information concerning how the FOIA requester can obtain information about the processing of the FOIA request.

(4) The statutory time period to make a release determination on a FOIA request usually begins on the date when the FOIA RSC responsible for the requested records receives the FOIA request. However, if the FOIA request was originally misdirected to another FOIA RSC, the timing provisions of Subpart 286.6 of Title 32, CFR, for misdirected requests apply.

(5) The 20-working-day statutory period for responding to a FOIA request begins only when a perfected FOIA request is received. After this time, a FOIA RSC may toll the statutory time period for only two reasons. In both situations, the FOIA requester's response to the DoD Component's request ends the tolling period.

(a) The time period may be tolled one time when the FOIA RSC goes back to the FOIA requester and reasonably asks for additional information (not connected to the assessment of fees).

(b) The time period may be tolled if it is necessary for the FOIA RSC to clarify issues regarding fee assessment with the FOIA requester. There is no limit to the number of times a DoD Component may go back to a FOIA requester to clarify fee assessment issues, which sometimes may be done in stages as the records are located and processed.

**c. Estimated Completion Date.** See Subpart 286.9 of Title 32, CFR.

**d. Multi-Track Processing.** See Subpart 286.8 of Title 32, CFR.

**e. Expedited Processing.** See Subpart 286.8 of Title 32, CFR.

**f. Responsive Documents Originated by a Non-government Source.**

(1) **Commercial or Financial Information.** See Subpart 286.10 of Title 32, CFR.

(2) **Foreign Government or International Organization Information.** The coordination provisions of this paragraph apply to the release of responsive information received from foreign governments or international organizations.

(a) DoD Components should coordinate directly with their foreign government counterparts when processing foreign government information responsive to a FOIA request. Coordination also may be made through the Department of State or the specific foreign embassy.

(b) When the DoD Components locate North American Aerospace Defense Command documents in their files responsive to a FOIA request, they will refer the documents to the United States Northern Command FOIA RSC, which will consult with the North American Aerospace Defense Command.

(c) Coordination with most international organizations may be made directly with those organizations.

(d) When a foreign government or international organization asks the DoD to withhold classified information originating with that foreign government or international organization, it is withheld pursuant to Exemption 1 of the FOIA.

(e) If the DoD Component is asked to withhold sensitive unclassified information originated by an international organization or foreign government, then the DoD Component withholds it pursuant to Exemption 3 and references the relevant statute as Section 130c of Title 10, U.S.C. To qualify for withholding, the information must meet these criteria:

1. If the information came into the DoD's possession or control prior to October 30, 2000, and more than 25 years prior to receipt of the FOIA request, the DoD Component notifies the foreign government or international organization of the request for disclosure. The information then qualifies for withholding only if the foreign government or international organization requests in writing that the information not be disclosed for a specific period of time. This date can be extended with a later request by the foreign government or international organization.

2. If the information came into possession or control of the DoD on or after October 30, 2000, the information cannot be withheld after the release date specified by the foreign government or international organization. When one or more foreign governments or international organizations provided the information, the latest date specified by any of them will be used. If no release date was specified, and the information came into the possession of the DoD Component more than 10 years prior to receipt of the FOIA request, the procedures set forth in Paragraph 6.2.f.(2)(e)1. apply.

**g. Processing the Receipt of FOIA Fees.** The Treasurer of the United States has established an account for FOIA receipts, Receipt Account 3210. When depositing the receipts, the appropriate disbursing office 2-digit prefix must precede the account number. This account will be used for depositing all FOIA receipts except for those of working capital and non-appropriated funded activities. Those activities must establish their own procedures for depositing FOIA receipts to the applicable fund. All checks or money orders remitting FOIA fees should be made payable to the U.S. Treasurer.

**h. Creating a Record.** To be subject to the FOIA, a record must exist and be in DoD possession and control when the DoD Component searches for it. The DoD Components are not obligated to create, compile, or answer questions to satisfy a FOIA request.

(1) However, in order to provide quality customer service, the DoD Components may compile a new record when doing so would result in a more useful response to the FOIA requester and would be less burdensome to the DoD Component than providing existing records. This could be the case when a FOIA requester wants, for example, a list of all travel locations for a single senior official. Instead of processing the large number of travel documents, the DoD Component may wish to compile a list of travel locations extracted from the documents.

(2) Prior to the creation of the document, any such compilation should be coordinated with and approved by the FOIA requester. The cost of creating or compiling such a record may not be charged to the FOIA requester unless the fee for creating the record is equal to or less than the fee that would be charged for providing the existing record. Fee assessments must be in accordance with Subparts 286.12 and 286.13 of Title 32, CFR.

**i. Electronic Records and Searches.**

(1) **Significant Interference.** Section (a)(3)(C) of the FOIA requires DoD Components to make reasonable efforts to conduct electronic searches for responsive documents, except when the searches would cause significant interference with the operation of the DoD Components' automated information systems.

(a) If extensive monetary or personnel resources are needed to conduct an electronic search, DoD Components should take this into account when determining whether they are making reasonable efforts to search for electronic records.

(b) Creating a computer program that produces specific requested fields or records contained within a well-defined database structure usually constitutes a "reasonable effort." However, creating a computer program to merge files with disparate data formats and extract specific elements from the resultant file is considered a special service rather than a reasonable effort.

(2) **Data Links.** The DoD Components are not required to expend DoD funds to establish data links that provide real-time or near-real-time data to a FOIA requester.

**j. CISI and MFOQA Data Files.** IDAs may deny CISI and MFOQA system data files from release under Exemption 3 of the FOIA after the DA has made a written determination that the information is exempt.

(1) When DoD Components have reason to believe that information responsive to a FOIA request is CISI or MFOQA system data file information, they will submit a package to the DA, through the DO&C, recommending exemption of the requested information. If the information believed to be CISI or MFOQA is the subject of a consultation, and the consulted DoD Component wishes to assert the exemption, the consulted component will submit the package for approval before responding to the consultation. The package will contain, at a minimum:

(a) A cover memorandum from a DoD Component official.

(b) A copy of the initial FOIA request.

(c) A copy of the documents in electronic format, with only the CISI or MFOQA system data file information marked. Do not indicate information that will be denied under any other exemption.

(d) Details on how the information recommended for exemption meets the threshold of qualifying as CISI or MFOQA system data file.

(e) A thorough explanation of the harm that could reasonably be expected to result if the information is released. This explanation must be as specific as possible to allow the DA to make a fully informed determination; however, it should contain only publicly releasable information since the DA's determination, accompanied by a statement of the basis for determination, will be made available on the FOIA section of the DoD Open Government Website.

(f) Any documentation of the public interest in the release of the information. This could be provided to the DoD Component by the FOIA requester or other interested parties supporting the FOIA request.

(g) A draft of the DA determination and statement of the basis for determination.

(2) The DO&C will provide the DA determination and the statement of the basis for the determination and post it in the FOIA section of the DoD Open Government Website.

(3) The DoD Component IDA will deny the exempt information and provide a copy of the determination to the FOIA requester. If the DoD Component denying the information is a consulted component, the DoD Component that received and is processing the request will make all necessary notifications to the requester. The FOIA requester will be advised of the right to appeal to the DoD Component's appellate authority.

### **6.3. INITIAL DETERMINATIONS.**

#### **a. Denials of Information.**

(1) An IDA must make a determination of whether to withhold information responsive to a FOIA request. The IDA will review the withheld information to determine whether it meets the criteria for withholding pursuant to one or more of the FOIA exemptions. This determination may be made upon the recommendation of a review official.

(2) IDAs and review officials will not use the existence of classification markings or distribution limiting statements, such as "For Official Use Only" markings, as justification to withhold information. Information so marked must be reviewed after the receipt of a FOIA request to determine if a FOIA exemption allows the withholding of the information.

(3) To deny information in a requested record that is in the possession and control of the DoD Component, the IDA must determine that one or more of the FOIA exemptions justify withholding all or part of the record.

(4) A Glomar response constitutes a total denial.

**b. Reasons for Denying a FOIA Request Other than Exemptions.** The following are reasons, other than using one or more exemptions, for denying a FOIA request. The DoD FOIA Program Components will track each reason in its control system database for ease of retrieval and for its input to the annual report.



(1) **No Records.** A reasonable search of files failed to identify responsive records, or no search was undertaken because the DoD Component determined that it would not locate records responsive to the request.

(2) **Referral.** The DoD Component has transferred all responsive records to another DoD Component or federal agency.

(3) **Request Withdrawn.** The FOIA requester withdraws the FOIA request. Additionally, when a FOIA RSC sends a communication to ask if a requester still has interest in the request and the requester does not respond, the FOIA RSC will consider the request as withdrawn.

(4) **Fee-related Reason.** The FOIA requester is unwilling to pay fees associated with a FOIA request; the FOIA requester is past due in the payment of fees from a previous FOIA request; or the FOIA requester disagrees with the fee estimate.

(5) **Records not Reasonably Described.** A record has not been described with sufficient particularity to enable the DoD Component to locate it by conducting a reasonable search.

(6) **Not a Proper FOIA Request for Some Other Reason.** The FOIA requester has failed unreasonably to comply with procedural requirements, other than fee-related requirements, imposed by this issuance.

(7) **Not an Agency Record.** The information requested is not a record within the meaning of the FOIA.

(8) **Duplicate Request.** A duplicate request occurs when the FOIA requester asks for the same information requested in a prior request. If a search for documents responsive to the new request finds documents created since the search was accomplished for the previous request, then it is not considered duplicative. This includes identical requests received from the same requester for the same information through different means (e.g., e-mail, facsimile, mail, courier) at the same or different times.

(9) **Other.** The DoD Components may use the following additional reasons for denying FOIA requests:

(a) **Directed Requester to Another Agency.** The FOIA request is for another federal agency's records (e.g., the Department of State), and the FOIA RSC directs the requester to send a FOIA request to the appropriate agency. This would include a request for another agency's records that are already publicly available.

(b) **Litigation.** The FOIA request is administratively closed because the FOIA requester has filed a complaint in federal court. In this case, the FOIA RSC should consult legal counsel to determine whether to continue processing the FOIA request.

(c) **Misdirected Request.** A misdirected request will not be counted as a request received or processed for annual report purposes.

(d) **Unable to Contact Requester.** The FOIA RSC is unable to contact the FOIA requester after several attempts.

**c. Responding to FOIA Requesters.** All correspondence with FOIA requesters must include the FOIA request tracking number and the date of the FOIA request.

(1) **Grant.** When a DoD Component decides to release a record, the FOIA RSC should make a copy available promptly to the FOIA requester. Directing a FOIA requester on how to electronically obtain a publicly available DoD record (e.g., a record released under the FOIA and available in a DoD FOIA Program Component's FOIA Library) is considered a grant.

(2) **Adverse Determination.** When a DoD Component provides an adverse determination in response to a FOIA request, the official designated to respond will comply with the procedures in Subpart 286.9 of Title 32, CFR.

**d. Providing Documents to FOIA Requesters.** See Subpart 286.9 of Title 32, CFR.

**e. Commercial Delivery Services.** A FOIA RSC may use a commercial delivery service to deliver the requested information in a timelier manner if the FOIA requester asks for the service and pays directly for the service.

#### **6.4. CONSULTATIONS, REFERRALS, AND COORDINATIONS.**

**a. General Provisions.** See Subpart 286.7 of Title 32, CFR.

**b. White House Information.** DoD FOIA Program Components locating records originating with or containing White House equities, to include the National Security Council Staff, will forward the records as a consultation to the Office of Freedom of Information, which is the FOIA RSC for the OSD/JS. The Office of Freedom of Information will coordinate with the National Security Council Staff and then return the records to the DoD Component for response to the FOIA requester.

**c. Government Accountability Office (GAO) Information.** The GAO is outside the Executive Branch and not subject to the FOIA. FOIA requests for GAO documents within DoD files will be processed pursuant to the FOIA. If necessary, the DoD Components will consult with the GAO on the releasability of the requested information. The DoD Component will make the final response.

**6.5. APPEALS.** See Subpart 286.11 of Title 32, CFR.

**6.6. FEE SCHEDULE.** See Subparts 286.12 and 286.13 of Title 32, CFR.

## **6.7. FOIA LITIGATION.**

a. FOIA requesters may seek an order from a U.S. District Court to compel release of information after administrative remedies have been exhausted (e.g., when the FOIA requester has filed an administrative appeal of an adverse action or when the DoD FOIA Program Component has failed to respond within the time limits prescribed by the FOIA). The Department of Justice “Freedom of Information Act Guide” provides more detailed guidance on FOIA litigation.

b. If a DoD Component is served with a complaint concerning a FOIA request that is still open, it will administratively close the FOIA request after consultation with legal counsel.

c. FOIA officers should confer with legal counsel or Department of Justice attorneys on whether administrative processing should continue and whether it is appropriate to communicate directly with the FOIA requester or requester’s counsel.

## SECTION 7: EDUCATION AND TRAINING

**7.1. GENERAL.** In accordance with Section (j)(2)(F) of the FOIA, the purpose of the DoD FOIA educational and training programs is to provide DoD personnel who have FOIA responsibilities as one of their primary duties, and DoD attorneys, with the knowledge and skills necessary to ensure compliance with the FOIA. Fulfilling this purpose will improve customer service to members of the public and improve the public trust in the DoD.

### 7.2. PROCEDURES.

a. The DO&C establishes a DoD FOIA educational and training program to provide personnel involved in the day-to-day processing of FOIA requests with a thorough understanding of the provisions and requirements of Part 286 of Title 32, CFR, the FOIA, and this issuance.

b. Each DoD FOIA Program Component designs its FOIA educational and training programs to fit the particular requirements of its personnel, dependent upon their degrees of involvement in implementing the FOIA. These programs will service two target audiences.

(1) Personnel who are involved in the day-to-day processing of FOIA requests.

(2) Staff personnel who provide search or review staff-support to the DoD FOIA Program Component FOIA process.

### 7.3. SCOPE AND PRINCIPLES.

The programs will:

a. Familiarize personnel with the requirements of the FOIA and its implementation by Part 286 of Title 32, this issuance, and respective DoD FOIA Program Component issuances.

b. Instruct personnel who act in FOIA matters on the provisions of Part 286 of Title 32 and this issuance, and advise them of the legal hazards involved in and the strict prohibition against arbitrary and capricious withholding of information.

c. Provide procedural and legal guidance and instruction to initial denial and appellate authorities concerning the discharge of their responsibilities.

**7.4. IMPLEMENTATION.** To ensure uniformity of interpretation, the DoD FOIA Program Components will coordinate their educational and training programs with the DO&C.

## GLOSSARY

### G.1. ACRONYMS.

CFR	Code of Federal Regulations
CISI	Critical Infrastructure Security Information
DA	Director of Administration
DO&C	Directorate for Oversight and Compliance
DoDD	DoD directive
DoDI	DoD instruction
DoDM	DoD manual
FOIA	Freedom of Information Act
GAO	Government Accountability Office
IDA	initial denial authority
MFOQA	military flight operations quality assurance
OGIS	Office of Government Information Services
RSC	Requester Service Center
U.S.C.	United States Code

**G.2. DEFINITIONS.** Unless otherwise noted, these terms and their definitions are for the purpose of this issuance.

**administrative appeal.** A request by a member of the public, made pursuant to the FOIA, asking the appellate authority of a DoD Component to reverse, modify, or reconsider any adverse determination.

**adverse determination.** Defined in Subpart 286.9 of Title 32, CFR.

**agency record.** Includes all documents or records created or obtained by a U.S. Government agency that are in the agency's possession and control at the time a FOIA request is received. Four factors determine an agency's control:

The intent of the creator of the document to retain control over the record.

The ability of the agency to use and dispose of the record as it sees fit.

The extent to which agency personnel have read or relied upon the document.

The degree to which the document was integrated into the agency's record systems or files. Records maintained by a government contractor for records management purposes are considered in the DoD Component's possession. Records created by an agency employee during employment, including e-mails, may be either agency records or personal files.

Examples of agency records include:

Research data produced during the performance of a federal grant used by the U.S. Government in developing an agency action that has the force and effect of law, in accordance with Office of Management and Budget Circular No. A-110.

All recorded information, regardless of form or characteristics. "Form or characteristics" refers to physical media type or transmission mode desired by the FOIA requester (e.g., computer disk, computer tape, file transfer protocol, photographs, videotape, and microfiche).

Examples of agency records do **not** include:

Objects or articles such as structures, furniture, vehicles, and equipment, whatever their historical value or value as evidence.

Anything that is not a tangible or documentary record, such as an individual's memory or oral communication.

Personal files.

The definition of an agency record under the FOIA is more expansive than the definition of a federal record. For example, documents such as drafts and working files are not considered official records, but are still agency records responsive to FOIA requests.

**appellate authority.** The DoD FOIA Program Component head, or designee, having jurisdiction to review and possibly reverse, remand, or amend any adverse determination.

**CISI.** Defined in Section 130e(c) of Title 10, U.S.C.

**consultation.** The process whereby, in certain situations, a federal agency transfers a FOIA responsive document to another federal agency or non-government entity to obtain recommendations on the releasability of the document. After review, the document is returned to the original agency for response to the FOIA requester or further review.

**Defense Criminal Investigative Organization.** A DoD Component that conducts criminal investigations. These are the U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, Air Force Office of Special Investigations, and Defense Criminal Investigative Service.

**deliberative.** Having the function of deliberating.

**electronic records.** Records (including e-mail) created, stored, and retrievable by electronic means.

**federal agency.** Defined in Section 552(f)(1) of Title 5, U.S.C.

**first-party requester.** A FOIA requester that is requesting information that is about themselves.

**FOIA Public Liaison.** A supervisory official to whom a FOIA requester can raise concerns about the service the FOIA requester receives from a FOIA RSC and who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

**FOIA request.** A written request for agency records that reasonably describes the records sought, enabling a DoD Component employee familiar with the files to locate the records with a reasonable amount of effort.

**FOIA requester.** Any person, including a partnership, corporation, association, State or State agency, foreign government, foreign national, or a lawyer or other representative acting on behalf of any person who submits a FOIA request. This definition specifically excludes agencies within the Executive Branch of the U.S. Government.

**FOIA RSC.** A DoD Component office that receives FOIA requests from and responds directly to the public on the status of their request.

**form.** The storage media that hold content in digital form on which responsive information is provided to FOIA requesters. Examples are electronic documents, audiovisual material on tape, and all storage media that hold content in digital form and that are written and read by a laser (e.g., all the various compact disk and digital video disk variations).

**format.** A layout for data.

**Glomar response.** A response to a FOIA request where the DoD Component neither confirms nor denies the existence or nonexistence of records responsive to the FOIA request.

**IDA.** An official who has been granted authority by a DoD Component head to withhold information requested pursuant to the FOIA for one or more of the nine categories of records exempt from mandatory disclosure, as described in Section 5.

**inherently governmental activity.** A function that is so intimately related to the public interest as to require performance by U.S. Government personnel because it requires the exercise of discretion in applying government authority or the making of value judgments in making decisions for the U.S. Government.

**international organization.** Defined in Section 130c(h)(3) of Title 5, U.S.C.

**MFOQA system data file.** Defined in Section 2254(a)(2) of Title 10, U.S.C.

**Military Department counterintelligence organization.** An element within a Military Department that is authorized to conduct counterintelligence investigations. They are Army Counterintelligence, Naval Criminal Investigative Service, and the Air Force Office of Special Investigations.

**misdirected FOIA request.** A FOIA request for DoD records that is addressed to FOIA RSC that is not itself the FOIA RSC to process the request. For example, a FOIA requester sends a request for an Air Force contract to the Navy.

**neutral.** An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.

**non-responsive.** Information or records not requested by a FOIA requester.

**perfected FOIA request.** A FOIA request that arrives at the FOIA RSC of the DoD Component in possession of the records. The statutory time limit for responding to a FOIA request does not begin until it is perfected.

**person.** Defined in Section 551(2) of Title 5, U.S.C.

**personal file.** Documents unrelated to the conduct of agency business or indirectly related to agency business but outside the scope of agency records. A personal file is not subject to the FOIA. FOIA case law predominantly refers to personal files as personal records. Examples include:

Business or professional files created before entering U.S. Government service; files created during or relating to previously held positions, political materials, and reference files.

Private files brought into, created, or received in the office; family and personal correspondence; and materials documenting professional activities and outside business or political pursuits, including manuscripts and drafts for articles and books and volunteer and community service records that are considered personal, even if created or received while in office, because they do not relate to agency business.

Work-related personal files, including e-mails, diaries, journals, notes, and personal calendars and appointment schedules. Though work-related, these files may be personal if they are used only as reminders and personal observations on work-related topics and not for the transaction of government business.

**pre-decisional information.** Information created before the decision maker reached a final decision.

**Privacy Act request.** Defined in DoD 5400.11-R.

**Privacy Act system of records.** Defined in DoD 5400.11-R.

**referral.** The process whereby a DoD FOIA Program Component receiving a FOIA request locates documents originating with another DoD Component or federal agency. Accordingly, the FOIA request and documents are transferred to the originating DoD Component or federal agency for response directly to the FOIA requester.

**responsive.** Information or agency records requested by a FOIA requester.



**toll.** To delay, suspend, or hold off the effects of a statute.

## REFERENCES

- Code of Federal Regulations, Title 32, Part 286
- Code of Federal Regulations, Title 48
- Department of Justice “Guide to the Freedom of Information Act,” current edition<sup>1</sup>
- Department of Justice, Office of Information Policy, FOIA Update, Vol. XVI, No. 3, “Determining the Scope of a FOIA Request,” January 1, 1995
- Deputy Secretary of Defense Memorandum, “Reorganization of the Office of the Deputy Chief Management Officer,” July 11, 2014
- DoD 5230.30-M, “DoD Mandatory Declassification Review (MDR) Program,” December 22, 2011
- DoD 5400.11-R, “Department of Defense Privacy Program,” May 14, 2007
- DoD Directive 5100.03, “Support of the Headquarters of Combatant and Subordinate Unified Commands,” February 9, 2011
- DoD Directive 5105.53, “Director of Administration and Management (DA&M),” February 26, 2008
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- DoD Instruction 5400.04, “Provision of Information to Congress,” March 17, 2009
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- DoD Manual 5200.01, Volume 1, “DoD Information Security Program: Overview, Classification, and Declassification,” February 24, 2012
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- Office of Management and Budget Circular No. A-76, “Performance of Commercial Activities,” May 29, 2003
- Office of Management and Budget Circular No. A-110, “Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Non-profit Organizations,” September 20, 1999
- United States Code, Title 5
- United States Code, Title 10

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<sup>1</sup> Available at: <https://www.justice.gov/oip/doj-guide-freedom-information-act>

United States Code, Title 17, Section 106

United States Code, Title 50, Section 401a(4)