



ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-1950

03 DEC 2008

MEMORANDUM FOR FOIA PUBLIC LIAISONS

SUBJECT: OPEN Government Act of 2007

References: (a) Public Law 110-175, "OPEN Government Act of 2007,"
December 31, 2007
(b) DoD 5400.7-R, "DoD Freedom of Information Act (FOIA) Program,"
September 4, 1998

This attachment to this memorandum provides critical guidance pertaining to changes to the DoD FOIA Program as necessitated by Reference (a) and supplements Reference (b). Except for the paragraphs noted in the attachment, this guidance is effective immediately and will be incorporated into the new DoD 5400.07-M, which will replace Reference (b).

Should you have any questions, please contact Mr. Jim Hogan (703) 588-6820.

A handwritten signature in black ink that reads "Will Kammer".

Will Kammer
Chief, Freedom of Information Division

Attachment:
As stated



ATTACHMENT

CHANGES TO DOD FOIA PROCESSING
DUE TO THE OPEN GOVERNMENT ACT OF 2007

1. INDICATING EXEMPTIONS ON PARTIALLY WITHHELD DOCUMENTS.

a. When a DoD Component withholds information within a partially releasable document, the exemption under which a withholding is made shall be indicated on the document. This indication of the exemption shall be located within the redacted portion or next to it.

b. The examples in paragraphs 1.b.(1) through 1.b.(3) demonstrate several possible approaches to marking documents to specify the exemption being asserted.

(1) One of the clearest ways to do that is to insert a notation as to the exemption being asserted within the space that remains after the information has been excised.

Example 1

On 11/15/57, [REDACTED] 7(C) [REDACTED] advised IC [REDACTED] 7(C) [REDACTED] that the records of [REDACTED] 7(C) [REDACTED] reflect only [REDACTED] 7(C) [REDACTED] inquiries concerning [REDACTED] 7(C) [REDACTED] during 6/56 and 6/57, which confirm [REDACTED] 7(C) [REDACTED] local address and employment.

(2) When an entire paragraph is withheld, the exemption(s) used to protect the information in the paragraph may similarly be noted within the marked-out space.

Example 2

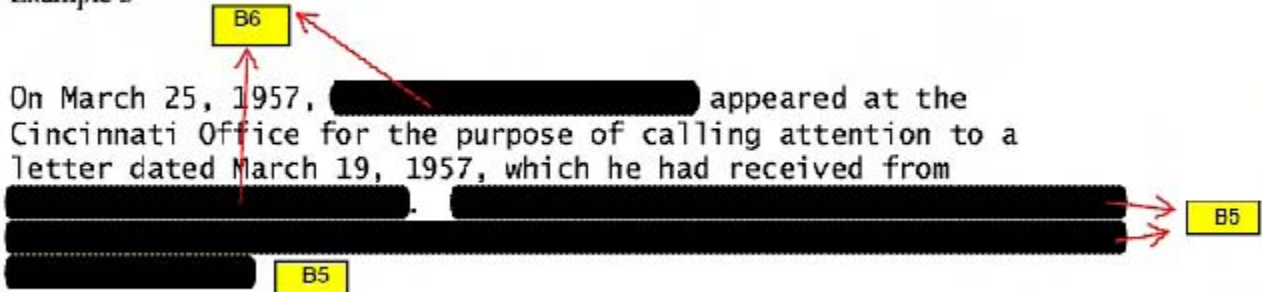
[REDACTED]

EXEMPTIONS B2/7E

[REDACTED]

(3) DoD Components may use an arrow or a line to connect a particular redaction to the annotation indicating the applicable exemption(s), or to include the exemption notation at the end of the line where the excision occurs.

Example 3



c. These examples are illustrative and are not intended to be exclusive. DoD Components will likely employ a variety of techniques to mark documents depending on the nature of the documents at issue and the redaction capabilities of the DoD Component. The key requirement for DoD Components when marking documents that will be released in part is to comply with the overall purpose of the segregation provision, which is to readily reveal to a requester the amount of information being withheld in a document, its location within that document, and the exemption asserted for the redaction.

d. An exception to this requirement pertains to those instances where revealing the amount and location of the redacted information would harm an interest protected by the asserted exemption(s). This exception includes the situation where revealing the exemption itself on the face of the released-in-part document would harm an interest protected by the exemption. In such rare circumstances, the DoD Components need not mark the released portion of the document in such a way that by doing so would cause harm to an interest protected by the exemption being asserted.

2. REPRESENTATIVES OF THE NEWS MEDIA. The DoD Components must carefully consider a number of factors when determining the fee status of requesters who claim to be representatives of the news media. Essentially, a representative of the news media is a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. A person or entity that merely disseminates documents that it receives under the FOIA to an audience would not qualify because this in this case the person or entity is not using editorial skills to turn raw materials into a distinct work. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of “news”) who make their products available for purchase or subscription by the general public. These examples are not

meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services and the Internet), DoD Components shall include such alternative media in this category.

3. REQUESTS AND STATUS INFORMATION.

a. Each DoD FOIA Requester Service Center (RSC) shall have a Web site, complete with an electronic reading room, that serves to educate the public on the FOIA process and enable requesters to inquire about the status of their request. At a minimum, each Web site shall have the mailing address, telephone number, facsimile number and a web form or e-mail address by which FOIA requests can be sent; a link to the DoD Component's FOIA handbook or guide; a description of the types of records that can be requested; the name and contact information of the DoD Component's FOIA Public Liaison; and information on how a requester can obtain the status of a request (either by telephone or through the RSCs Web site).

b. (APPLICABLE TO FOIA REQUESTS FILED ON OR AFTER DECEMBER 31, 2008). When a DoD FOIA office receives a status request, it shall provide the requester the date the FOIA office originally received the request and an estimated date on which the FOIA request is expected to be completed.

4. FOIA REFERRAL PROCEDURES AND TIME LIMITS FOR DOD COMPONENTS TO ACT ON REQUESTS.

(APPLICABLE TO FOIA REQUESTS FILED ON OR AFTER DECEMBER 31, 2008)

a. A misdirected FOIA request occurs when a requester sends a request to a DoD FOIA office that does not have responsibility for the requested records. When this occurs, the DoD FOIA office that originally received the request shall refer the request to the correct DoD FOIA office and advise the receiving DoD FOIA office of the date the request was originally received. The requester will be notified of the referral by the receiving FOIA office if the processing of the request will take longer than the statutory 20 days. This notification will include as a minimum the date on which the 20 day statutory period starts (see paragraph 5.a.(2) for computation of this date), the tracking number, and contact information for the FOIA office.

(1) This routing requirement only applies to those requests directed to a DoD FOIA office that are asking for documents for which the Department of Defense is responsible. If responsibility for the requested records rests with a non-DoD agency (e.g., State Department), DoD Components need only advise the requester to submit the request to the proper agency.

(2) Prior to referring a request to another DoD FOIA office outside of the DoD Component that received the request, the DoD FOIA office possessing the initial request

shall consult with the other DoD Component's FOIA office to determine if that DoD Component's association with the subject of the request is protected by an exemption. The request shall not be referred until after the appropriate FOIA office is contacted and agrees to receive the request. This is particularly true if the other DoD Component is a member of the Intelligence Community. If the association is exempt, the DoD FOIA office possessing the initial request shall follow the instructions from the protected DoD Component on how to respond to the requester. This may require that the DoD FOIA office protect the association and any exempt information without revealing the identity of the protected agency. The protected DoD Component shall be responsible for submitting the justifications required in any litigation.

(3) Usually the statutory time period to make a release determination on a FOIA request begins on the date when the DoD FOIA office responsible for the requested records receives the request. For all FOIA requests initially received after December 31, 2008, if the request was originally misdirected, the statutory time period begins on the day the appropriate DoD FOIA office receives the request or ten working days after it was originally received by the referring DoD office, whichever is sooner.

(4) Sometimes a non-DoD agency (e.g. the Department of State) will refer a FOIA request to a DoD FOIA office. When this is the case, the statutory time period does not begin when the non-DoD agency received the request; it begins when it is received by the DoD, subject to the conditions in paragraph 5.a.(2).

b. The twenty working day statutory period for responding to a FOIA request begins only when a perfected request is received. If a request is not perfected (does not reasonably describe the records sought or does not comply with other requirements of DoD 5400.7-R), then the DoD FOIA office receiving the FOIA request shall work with the requester on perfecting of the request. Once it is perfected, then the statutory time period begins. After this time, a DoD FOIA office may toll the statutory time period for only two reasons. In both situations, the requester's response to the agency's request ends the tolling period.

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

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

c. DoD Components shall not assess search fees or, in the case of educational, noncommercial scientific institution, or representative of the news media requesters, duplication fees, if the DoD Components fails to comply with the statutory time limit. Exceptions to this rule exist if unusual or exceptional circumstances apply to the processing of the request.

(1) Unusual circumstances occur when:

(a) The responsive documents are located at a facility geographically separated from the FOIA office processing the FOIA request.

(b) The responsive documents are voluminous.

(c) One or more other agencies or DoD Components have a substantial interest in either the determination or the subject matter of the request, requiring the DoD FOIA office processing the request to consult with the other agencies or DoD Components.

(2) Exceptional circumstances are not affirmatively defined in the FOIA; however, a predictable agency workload of requests may be considered an exceptional circumstance if the DoD Component can demonstrate reasonable progress in reducing its backlog of pending requests.

d. When DoD FOIA offices determine a requester must still pay all assessable fees because unusual or exceptional circumstances exist, the requester shall be advised of this as early as possible during the processing of the request.