



Directorate of Administration and Management

ADMINISTRATIVE INSTRUCTION

NUMBER 108
September 29, 2008

OFOI/WHIS

SUBJECT: Office of the Secretary of Defense and Joint Staff (JS) Freedom of Information Act (FOIA) Program

References: See Enclosure 1

1. PURPOSE. This Administrative Instruction (AI):

a. Establishes OSD policy, assigns responsibilities, and prescribes procedures for the effective administration of the FOIA Program in OSD and the Joint Staff in accordance with the guidance in DoD Directive (DoDD) 5400.07 (Reference (a)) and the authority in DoDD 5105.53 (Reference (b)).

b. Supersedes DoD Instruction 5400.10 (Reference (c)).

2. APPLICABILITY. This AI applies to OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and the Defense Agencies and DoD Field Activities listed in Enclosure 2. They will hereafter be referred to collectively as the "OSD and JS Components."

3. DEFINITIONS. The following terms and their definitions are for the purposes of this AI only:

a. appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority to reverse an initial denial authority (IDA) decision to withhold all or part of a requested record or to deny a request for a fee waiver, reduction of fees, a non-response, or expedited processing.

b. FOIA request. A written request for records, made by a person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA.

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

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

4. POLICY. It is OSD policy that OSD and JS Components shall promote the public trust by making the maximum amount of information available to the public on the operation and activities of the Department of Defense, consistent with the Department's responsibility to ensure national security (Reference (a)).

5. RESPONSIBILITIES. See Enclosure 3.

6. PROCEDURES. See Enclosure 4.

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

8. RELEASABILITY. UNLIMITED. This AI is approved for public release. Copies may be obtained through the Internet from the DoD Issuances Web Site at <http://www.dtic.mil/whs/directives>.

9. EFFECTIVE DATE. This AI is effective immediately.



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Enclosures

1. References
2. Defense Agencies, DoD Field Activities, and Other Defense Organizations Serviced by the Freedom of Information Division
3. Responsibilities
4. Procedures

ENCLOSURE 1

REFERENCES

- (a) DoD Directive 5400.07, "DoD Freedom of Information Act (FOIA) Program," January 2, 2008
- (b) DoD Directive 5105.53, "Director of Administration and Management (DA&M)," February 26, 2008
- (c) DoD Instruction 5400.10, "OSD Implementation of the DoD "Freedom of Information Act" (FOIA) Program," January 24, 1991 (hereby canceled)
- (d) DoD 8910.1-M, "Department of Defense Procedures for Management of Information Requirements," June 30, 1998
- (e) DoD 5400.7-R, "DoD Freedom of Information Act Program," September 4, 1998
- (f) Section 552 of title 5, United States Code
- (g) DA&M Memorandum, "Appointment of Personnel to the Defense Freedom of Information Policy Office," January 31, 2006
- (h) DoD 5200.1-R, "Information Security Program," January 14, 1997
- (i) Executive Order 12958, as amended, "Classified National Security Information," March 25, 2003

ENCLOSURE 2

DEFENSE AGENCIES, DoD FIELD ACTIVITIES, AND OTHER DEFENSE ORGANIZATIONS SERVICED BY THE FREEDOM OF INFORMATION DIVISION

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

ENCLOSURE 3

RESPONSIBILITIES

1. CHIEF, FREEDOM OF INFORMATION DIVISION (FOID), EXECUTIVE SERVICES DIRECTORATE, WHS. The Chief, FOID, shall organize, direct, and manage the Office of Freedom of Information (OFOI), the Defense Freedom of Information Policy Office (DFOIPO), and the OSD/JS Privacy Office, and ensure their mutually supported functions are integrated to promote maximum efficiency. Additionally, the Chief, FOID, shall:

- a. Direct and administer the DoD FOIA Program within the OSD and JS Components.
- b. Execute policies and establish procedures to ensure compliance with Reference (a) and DoD 5400.7-R (Reference (e)).
- c. Maintain the OSD/JS FOIA Requester Service Center (RSC).
- d. Serve as the central point of contact (POC) within the OSD and JS Components for the receipt of all FOIA initial requests for records of the OSD Components.
- e. Forward FOIA and Privacy Act requests for records from the public to the OSD and JS Components having possession, control, and/or equities in the requested record.
- f. Respond to FOIA and Privacy Act requesters based on release determinations provided by the OSD and JS and other Federal Components.
- g. Maintain a document management system of FOIA and Privacy Act requests.
- h. Conduct educational training for the OSD and JS Components on the requirements and implementation of the FOIA (section 552 of title 5, United States Code (Reference (f))) in accordance with Reference (e).
- i. Administer the OSD/JS FOIA RSC Web Site. This includes OSD and JS compliance with paragraph (a)(2) of Reference (f).
- j. Receive processing fees for deposit in the U.S. Treasury FOIA.
- k. When serving concurrently as Chief, DFOIPO, in accordance with DA&M memorandum, "Appointment of Personnel to the Defense Freedom of Information Policy Office" (Reference (g)):
 - (1) Receive, process, and review all FOIA appeals for the OSD and JS Components and the Combatant Commands and make recommendations to the appellate authority for final adjudication of these FOIA appeals.

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

2. GENERAL COUNSEL (GC), WHS. The GC, WHS, shall provide assistance and advice to PFPA and WHS components in the processing of initial denials of requested PFPA and WHS records.

3. GC, DoD. The GC, DoD, shall:

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

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

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

4. HEADS OF THE OSD AND JS COMPONENTS. The Heads of OSD and JS Components shall:

a. Process FOIA requests received from the OFOI in accordance with this AI and Reference (e).

b. Serve as the IDA, who is authorized to deny initial requests for records under Reference (f). This responsibility may be delegated to a representative authorized to deny information on their behalf.

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

d. If necessary, coordinate with legal counsel on proposed denials of records. This legal coordination is not mandatory.

e. Provide OFOI with a statutory justification for the denial of access to responsive records, in whole or in part, identifying the specific exemption(s) claimed.

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

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

h. Establish procedures to mark record copies and to notify holders of classified records that have been downgraded, declassified, or reclassified, in accordance with DoDD 5200.1-R (Reference (h)), as a result of a review under Reference (f).

i. Provide instructions to employees who administer FOIA matters under this AI and References (a) and (e).

j. Include a FOIA link to the OSD/JS FOIA RSC (<http://www.dod.mil/pubs/foi/>) on the principal Component Web Site and at other major entry points to assist requesters in properly directing their FOIA requests to the correct office for processing.

ENCLOSURE 4

PROCEDURES

1. GENERAL. A request for access to information under the provisions of Reference (e) may be denied only upon the determination that:

- a. The requested information is exempt under Reference (f).
- b. The requester has failed to comply with the procedural requirements imposed by References (a) and (e).

2. PROCESSING FOIA CASES WITHIN THE OSD AND JS COMPONENTS

a. OFOI receives two types of FOIA requests: direct requests from a member of the public asking for access to DoD, OSD, or JS information; and referrals or consultations from other DoD and non-DoD agencies that contain OSD or JS documents or other agency documents with OSD or JS equities. In each case, OFOI shall forward the FOIA request (and responsive documents if a referral or consultation) to the OSD or JS Component having responsibility for the requested information. Any FOIA request received by an OSD or JS Component out of channels from a source other than OFOI shall be directed to OFOI without delay for formal entry into the case tracking system. The OSD or JS Component should commence work on the request, pending its return from the OFOI.

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

c. A FOIA request forwarded to an OSD or JS Component by OFOI may not be declined, except when responsibility for the information sought is challenged. In that case, the OSD or JS Component's IDA will explain on the SD Form 472 why the OSD or JS Component is not the appropriate office and identify the specific component or other agency of the Government that is likely to have responsibility for the information.

d. OFOI shall assign a suspense date to each request tasked to the OSD and JS Components. The tasked Components shall meet the suspense by replying to OFOI with a decision to grant the

request in whole or in part; to fully deny the request; or by a notification from the OSD or JS Component stating the specific number of additional days required to complete the action and the reasons for the delay. Requests for extensions shall be made to OFOI at least 3 working days before the suspense date. Extensions of time shall be granted on a case-by-case basis depending on the reasons that may justify “unusual circumstances.”

e. When a request requires a search by an OSD or JS Component and the requested record is released in full or denied in its entirety, one copy of the requested record, a completed SD Form 472, and DD Form 2086 shall be delivered to OFOI. If the located record is denied in part, two copies shall be delivered to OFOI. One copy will indicate the denied information with red pencil brackets, and the other copy will be “clean,” with no brackets. Alternatively, those Components using electronic redaction software may indicate denied information by electronic brackets or highlights. OFOI will redact the document electronically and prepare it for release to the requester.

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

g. The OSD and JS Components should be aware that Reference (f) requires the release of segregable information not otherwise exempt. At a minimum, review for segregability shall be at the paragraph level. If OFOI determines that the information is not properly segregated, it will be returned to the OSD or JS Component for further review.

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

i. A classified document containing unclassified information may not be denied in total under exemption 1 of Reference (f) unless the unclassified information, when taken in aggregate, would reveal classified information. This determination must be made in accordance with section 1.7 of Reference (i). Denial of unclassified information not meeting that standard may be accomplished only by exerting one or more of exemptions 2 through 9 of Reference (f).

j. All documents, regardless of classification (i.e., unclassified, Confidential, Secret, Top Secret), that are responsive to a FOIA request must be provided to OFOI for processing. This includes Sensitive Compartmented Information records. When in doubt, OSD and JS Components may contact the OFOI Security Manager to verify access level.

k. When an OSD and JS Component cannot locate a requested record and a “no record” determination is made, the explanation on the SD Form 472 shall so state and be signed by the

IDA. Complete copies of the SD Form 472 and DD Form 2086 shall be returned with the packet.

3. PROCESSING FOIA APPEALS WITHIN THE OSD AND JS COMPONENTS

a. When an appeal involves documents denied by an OSD or JS Component IDA, DFOIPO shall review the entire case file of the initial action to determine if the information was properly denied in accordance with References (e) and (f). If the initial action is deemed proper, then DFOIPO may recommend to the appellate authority that the initial action be upheld. However, DFOIPO shall make a new release recommendation to the OSD or JS Component and return the denied information for reconsideration when it determines that the initial denial should not be upheld on appeal. Documents will be processed and returned to OFOI in accordance with the processing procedures outlined in section 2 of this Enclosure.

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

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

d. Requesters may appeal the lack of a final determination by DFOIPO within 20 days of receipt of the request. When DFOIPO receives this type of appeal, it shall inform the requester that it is remanding the case back to the appropriate FOIA RSC for continued administrative processing.

e. Whenever the final determination by DFOIPO involves a full grant of the appeal, the Chief, FOID, or designee can provide that determination to the requester without consulting the appellate authority.