

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

To

THE DEPARTMENT OF DEFENSE

DoD Freedom of Information Act (FOIA) Program

[DoD-2007-OS-0086; 0790-AI24]

November 3, 2014

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By notice published on September 3, 2014, the Department of Defense (“DoD”) has proposed to revise the agency regulations that implement the Freedom of Information Act (“FOIA”).<sup>1</sup> Pursuant to the notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to address the substantial risks to open government and agency accountability that the proposed regulatory changes raise.

EPIC is a public interest research center in Washington, D.C.<sup>2</sup> It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC engages in extensive Freedom of Information Act litigation, including matters before the agency that would be subject to the proposed regulations. EPIC has provided extensive comments on proposed agency FOIA regulations in other similar rulemakings. The DoD Defense Logistics Agency, Privacy and Civil Liberties Oversight Board, Federal Trade Commission, and Interior Department have all incorporated EPIC’s recommendations<sup>3</sup> into final agency FOIA regulations.<sup>4</sup> EPIC submitted

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<sup>1</sup> Freedom of Information Act Program, 79 Fed. Reg. 52499 (proposed Sept. 3, 2014) (to be codified at 32 C.F.R. pt. 286).

<sup>2</sup> These comments were prepared with the assistance of the Georgetown University Law Center students in the Fall 2014 course “The Law of Open Government: Litigation Under the Freedom of Information Act.”

<sup>3</sup> EPIC, Comments of the Elec. Privacy Info. Ctr. to the Privacy and Civil Liberties Oversight Bd. on Freedom of Information, Privacy Act, and Government in the Sunshine Act Procedures (July 15, 2013) (RIN 0311-AA01), *available at* [http://epic.org/open\\_gov/EPIC-PCLOB-FOIA.pdf](http://epic.org/open_gov/EPIC-PCLOB-FOIA.pdf); EPIC, Comments of the Elec. Privacy Info. Ctr. to the Fed. Trade Comm’n on Freedom of Information Act Fee Schedule Rulemaking (Mar. 29, 2013) (16 C.F.R. Part

extensive comments to the Department of Justice on its proposed changes to its FOIA regulations.<sup>5</sup> Those final FOIA rules are still pending. EPIC engages in extensive Freedom of Information Act litigation.<sup>6</sup> EPIC and a coalition of open government organizations also recently asked the Office of Government Information Services (“OGIS”) to launch an investigation of impermissible closures of FOIA requests by certain federal agencies.<sup>7</sup>

### **The Scope of the Proposed Changes to DoD’s FOIA Regulations**

The Department of Defense has proposed extensive changes to the agency’s FOIA regulations. Some of these changes, such as encouraging proactive disclosure and improved communication with requesters, are positive. Other proposed changes, including provisions that would allow the agency to refer requests without informing the requester which agency the request is being referred to, undercut FOIA’s goals of transparency and accountability. Some changes, such as the proposed provision that allows the agency to close a request instead of referring it if the request pertains to documents outside of the agency, put an unnecessary burden on requesters and make the FOIA process more onerous. EPIC urges the agency to withdraw or

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4.8, Project No. P122102), *available at* [http://epic.org/open\\_gov/EPIC-FTC-FOIA-Fee-Regs.pdf](http://epic.org/open_gov/EPIC-FTC-FOIA-Fee-Regs.pdf); EPIC, Comments of the Elec. Privacy Info. Ctr. to the Dep’t of the Interior on Proposed Freedom of Information Act Regulations (Nov. 13, 2012) (RIN 1093-AA15), *available at* [http://epic.org/open\\_gov/EPIC-DOI-FOIA-Regs-Cmts.pdf](http://epic.org/open_gov/EPIC-DOI-FOIA-Regs-Cmts.pdf); EPIC, Comments of the Elec. Privacy Info. Ctr. to the Defense Logistics Agency of the Dep’t of Defense on the Proposed Rule Amending the Freedom of Information Act Program (Dec. 5, 2012) (RIN 0790-AI87), *available at* [https://www.epic.org/open\\_gov/EPIC-DLA-FOIA-Regs-Cmts.pdf](https://www.epic.org/open_gov/EPIC-DLA-FOIA-Regs-Cmts.pdf); EPIC, Comments of the Elec. Privacy Info. Ctr. to the Dep’t of Commerce on Public Information, Freedom of Information Act and Privacy Act Regulations (Mar. 31, 2014) (RIN 0605-AA33), *available at* [http://epic.org/open\\_gov/EPIC-Dept-of-Commerce-FOIA-Cmts.pdf](http://epic.org/open_gov/EPIC-Dept-of-Commerce-FOIA-Cmts.pdf).

<sup>4</sup>Procedures for Disclosure of Records Under the Freedom of Information Act, 6 C.F.R. § 1001 (2013); Freedom of Information Act; Miscellaneous Rules, 16 C.F.R. § 4 (2014); Freedom of Information Act Regulations, 43 C.F.R. § 2 (2013); Defense Logistics Agency Freedom of Information Act Program, 32 C.F.R. Part 300 (2014);

<sup>5</sup>Comments of the Elec. Privacy Info. Ctr. to the Dep’t of Justice on Proposed Freedom of Information Act Regulations (Oct. 18, 2011) (RIN 1105-AB27), *available at* <http://epic.org/foia/EPIC-DOJ-FOIA-Comments-FINAL.pdf>.

<sup>6</sup> *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003); *Litigation Docket*, EPIC, <http://epic.org/privacy/litigation/>.

<sup>7</sup> Letter from EPIC et al., to Miriam Nisbet, Director, Office of Government Information Services (OGIS), (Oct. 30, 2014), *available at* [http://foia.rocks/OGIS\\_Letter\\_final.pdf](http://foia.rocks/OGIS_Letter_final.pdf).

revise the provisions that are unfavorable to requesters in accordance with the FOIA's mandate of openness.

### **Proposed Regulation, 32 C.F.R. § 286.3 Definitions**

#### "Administrative Appeal," 32 C.F.R. § 286.3

Under the current regulation<sup>8</sup> "Administrative Appeal" is defined as:

A request by a member of the general public, made under the FOIA, asking the appellate authority of a DOD Component to reverse a decision: to withhold all or part of a requested record; to deny a fee category claim by a requester, to deny a request for waiver or reduction of fees; to deny a request to review an initial fee estimate; to deny a request for expedited processing due to demonstrated compelling need under §286.4(d)(3) of this part; to confirm that no records were located during the initial search. Requesters also may appeal the failure to receive a response determination within the statutory time limits, and any determination that the requester believes is adverse in nature.<sup>9</sup>

Under the proposed regulation<sup>10</sup> "Administrative Appeal would be defined as:"

A request by a member of the public, made pursuant to the FOIA, asking the appellate authority of a DoD Component to reverse any adverse determination by an initial denial authority (IDA).<sup>11</sup>

Under the proposed regulation "Adverse Determination is further defined as:"

A decision by an IDA to withhold all or part of a requested record pursuant to an exemption, deny a fee category claim by a FOIA requester, deny a request for waiver or reduction of fees, deny a request to review an initial fee estimate, deny a request for expedited processing, confirm that no records were located during the initial search, or make any determination that a FOIA requester believes is adverse in nature.<sup>12</sup>

The proposed regulation separates the current definition of "Administrative Appeal" into two terms—Administrative Appeal and Adverse Determination.<sup>13</sup> The revised definition provides helpful clarification about the agency's procedures. However, the revised definition

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<sup>8</sup> 32 C.F.R. § 286 (2002).

<sup>9</sup> 32 C.F.R. § 286.3 (2002).

<sup>10</sup> Freedom of Information Act Program, 79 Fed. Reg. 52499 (proposed Sept. 3, 2014) (to be codified at 32 C.F.R. pt. 286).

<sup>11</sup> *Id.* at 52501.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

removes, "[r]equesters also may appeal the failure to receive a response determination within the statutory limits."<sup>14</sup>

EPIC recommends that the agency retain the original language. EPIC further recommends that proposed regulation for "Administrative Appeal" should be revised as follows:

A request by a member of the public, made pursuant to the FOIA, asking the appellate authority of a DoD Component to reverse any adverse determination by an initial denial authority (IDA). *Requesters also may appeal the failure to receive a response determination within the statutory limits.*

"FOIA Request," 32 C.F.R. § 286.3

Under the current regulation, a "FOIA Request" is a:

A written request for DoD records that reasonably describes the record(s) sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), 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, DoD Directive 5400.7, this part, or DoD Component supplementing regulations or instructions. Requesters should also indicate a willingness to pay fees associated with the processing of their request or, in the alternative, why a waiver of fees may be appropriate. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically. Requests received by facsimile or electronically must have a postal mailing address included since it may be practical to provide a substantive response electrically. The request is considered properly received, or perfected, when the above conditions have been met and the request arrives at the FOIA office of the Component in possession of the records.<sup>15</sup>

Under the proposed regulation, the definition of a "FOIA Request" would be:

A written request for DoD records that reasonably describes the record(s) sought, enabling a DoD Component employee familiar with the files to locate the record(s) with a reasonable amount of effort.

(1) A commercial requester asking for contract-related documents must indicate a willingness to pay fees equal to or greater than the minimum fees established by the DoD Component for commercial requesters.

(2) Written FOIA requests may be submitted by U.S. Postal Service or other commercial delivery means, by facsimile, or electronically, to an address provided for submission of FOIA requests and must include the FOIA requester's postal mailing address.

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<sup>14</sup> 32 C.F.R. § 286.3 (2002).

<sup>15</sup> 32 C.F.R. § 286.3 (2002).

Commercial delivery is acceptable; however, due to security concerns, the DoD Components may refuse to accept commercial delivery of FOIA requests.<sup>16</sup>

The proposed definition modifies “[r]easonably describes record(s) sought” to include, “enabling a DoD Component employee familiar with the files to locate the record(s) with a reasonable amount of effort.”<sup>17</sup> This change does not provide a definition for what is “reasonable.” It also presumes that the FOIA requester has sufficient knowledge to direct this request to the specific component person who would have this familiarity. Such a presumption is highly problematic given the complex structure of the agency and the likelihood that a FOIA requester could, with a reasonable effort, determine the correct component to receive the FOIA request. EPIC recommends the removal of this language,

The proposed definition removes language that requesters “should also indicate a willingness to pay fees associated.”<sup>18</sup> EPIC supports this change because the expectation of fee payments would be narrowed to only include commercial requesters. But language requiring all requesters, including noncommercial requesters, to indicate their willingness to pay fees still remains in § 286.33, which adds this language for all FOIA requests. For clarity’s sake, section 286.33 should be revised to clarify that only commercial requesters should indicate their willingness to pay fees.

Removing the language regarding a “properly received” or “perfected” FOIA request from the “FOIA Request” definition is favorable to requesters and consistent with the purpose of the FOIA.<sup>19</sup> EPIC supports this change.

“Individual Primarily Engaged in Disseminating Information,” 32 C.F.R. § 286.4(d)(3)(ii)

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<sup>16</sup> 79 Fed. Reg. at 52502.

<sup>17</sup> *Id.*

<sup>18</sup> 32 C.F.R. § 286.3 (2002).

<sup>19</sup> *Id.*; 32 C.F.S. § 286.3 (2002).

Under the current regulation, 286.4(d)(3)(ii), states:

. . . An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media (see §286.28(e)) would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.<sup>20</sup>

Under the proposed regulation, an "Individual primarily engaged in disseminating information" would be:

A person or entity whose primary activity involves publishing or otherwise disseminating information to the public. To qualify, a person or entity must establish that information dissemination is their principal professional activity or occupation, and not an incidental or secondary activity.<sup>21</sup>

The proposed regulation removes the presumption of representatives of the news media as qualifying individuals. It also changes the requirement for other persons from "demonstrate that their primary activity *involves* publishing or otherwise disseminating . . ." to "must establish that information dissemination *is* their principal professional activity or occupation, *and not an incidental or secondary activity.*" (emphasis added).<sup>22</sup> The existing language does not reflect such stringent requirements. The change from "involves" to "is" narrows the ability of requesters to qualify for a favorable fee determination. Removal of "news media" and adding the qualifying language to "primary activity" unreasonably limit those who can qualify for "individual primarily engaged in disseminating information" status. These changes should be removed. EPIC recommends that the agency should retain the original language. "Individual primarily engaged in disseminating information" should be defined as:

A person or entity whose primary activity involves publishing or otherwise disseminating information to the public.<sup>23</sup> Representatives of the news media (see §286.33(b)(3)(ii)(C))

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<sup>20</sup> 32 C.F.R. § 286.4(d)(3)(ii) (2002).

<sup>21</sup> 79 Fed. Reg. at 52502.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public.<sup>24</sup>

“Public Interest,” 32 C.F.R. § 286.3

Under the current regulation, "Public interest" means:

The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing. That statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or official's own conduct.<sup>25</sup>

Under the proposed regulation, "Public interest" is:

The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about government activities.<sup>26</sup>

The proposed definition keeps most of the original language, but removes, “[t]hat statutory purpose, however, is not fostered by disclosure of information about private citizens accumulated in various governmental files that reveals nothing about an agency's or officials own conduct.”<sup>27</sup>

This language is consistent with the purposes of Exemptions (b)(6) and (b)(7)(C), to safeguard personal privacy, and appropriate here to clarify the purpose of the Public Interest determination.

The proposed change is positive and should be accepted.

However, the word “official” should be dropped from the definition. It appears nowhere in the statute and unnecessarily and impermissibly narrows the scope of the Public Interest determination. Similarly, the phrase “performance of its statutory duties” unnecessarily and impermissibly narrows the scope of the term when for example, questions arise as to the agency’s conduct beyond its statutory authority. Finally, the characterization of the underlying

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<sup>24</sup> 32 C.F.R. § 286.4(d)(3)(ii) (2002).

<sup>25</sup> 32 C.F.R. § 286.3 (2002).

<sup>26</sup> 79 Fed. Reg. at 52502.

<sup>27</sup> 32 C.F.R. § 286.3 (2002).

law implies a purpose more narrow than necessary as all agency records are presumptively subject to disclosure under the FOIA.

For these reasons, EPIC proposed the following definition:

The interest in obtaining information that sheds light on an agency's conduct because the information advances the purpose of the FOIA, which is to inform citizens about government activities.<sup>28</sup>

### **Proposed Regulation, 32 C.F.R. § 286.4 Policy**

The Policy now incorporates a presumption of disclosure and relocates the language of § 286.4 to §§ 286.7-19. Adding language “. . . adopting a presumption in favor of disclosure in all decisions . . .” elevates the entire FOIA before DoD personnel.<sup>29</sup> Such a presumption strengthens a central tenant of the FOIA— “to promote government transparency and accountability.”<sup>30</sup>

EPIC supports this change which are reflected in the following text:

It is DoD policy, pursuant to 32 CFR part 285, to promote government transparency and accountability by adopting a presumption in favor of disclosure in all decisions involving the FOIA and responding promptly to FOIA requests in a spirit of cooperation.<sup>31</sup>

The relocation of the elements within § 286.4 makes these subjects more accessible and user friendly. The relocation also places the emphasis on the presumption of disclosure, rather than specific logistical FOIA policies. EPIC favors this modification. These changes should be kept.

### **Proposed Regulation, 32 C.F.R. § 286.6 Public Access to DoD Information**

The new section 286.6(a)(2), and by extension § 286.24(b), states more clearly that DoD components “will make discretionary disclosures of exempt information, if appropriate.”<sup>32</sup>

However, the language “does not preclude” is less favorable to FOIA requesters than the

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<sup>28</sup> 79 Fed. Reg. at 52502.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> 79 Fed. Reg. at 52503.

<sup>32</sup> 79 Fed. Reg. 52506.



previous “shall make discretionary disclosures”.<sup>33</sup> The prior language established a presumption that DoD Components should disclose possibly exempt information when possible, whereas the new language places more emphasis on discretion. EPIC opposes this change. Such a change will likely lead to less disclosure. The structural changes should be kept, but “does not preclude” should be replaced with the original language of “shall make discretionary.”<sup>34</sup>

**Proposed Regulation, 32 C.F.R. § 286.7 FOIA Requester Service Center and § 286.8 FOIA Public Liaisons**

EPIC favors these changes. Both of these additions are improvements that should be kept because they clearly establish the expectations for these FOIA providers.

**Proposed Regulation, 32 C.F.R. § 286.12 Security clearances and access:**

The proposed regulation states:

FOIA personnel require access to all records requested through their respective activities, regardless of the sensitivity or classification of the information due to the nature of their duties and responsibilities. The DoD Components must ensure that FOIA personnel have the appropriate clearances and accesses to perform their duties.<sup>35</sup>

This language has no counterpart in the prior regulation, and is an important addition. The DoD cannot possibly perform its FOIA duties adequately if FOIA personnel do not have the required security clearances to access and evaluate the documents requested. EPIC favors this change.

The DoD should keep this language in its final regulation.

**Proposed Regulation, 32 C.F.R. § 286.13(b) Use of contractors in FOIA administration:**

Under the proposed regulation:

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<sup>33</sup> *Id.*; 32 C.F.R. § 286.2(a)(1) (2002).

<sup>34</sup> *Id.*

<sup>35</sup> 79 Fed. Reg. 52504.

Examples of FOIA functions and duties that contractors may perform (this list is not all inclusive)...<sup>36</sup>

While this section is an improvement over the prior regulation in that it provides contours as to what the public can expect may be performed by contractors rather than government actors,<sup>37</sup> the fact that the list is not all inclusive is troublesome. There may be functions and duties in addition to the *inherently governmental* duties listed that should not be performed by a contractor, but under the proposed regulation a requester would not be able to determine whether a contractor was authorized to, and had, performed them.

The DoD should state that “When, in the processing of a FOIA request, a contractor has performed a function or duty other than those listed, the FOIA requester shall receive notice from DoD of this fact. The notice shall describe generally the duty or function performed by the contractor.” This would ensure that DoD is aware of the actions that its contractors are taking, and that the public has notice as well.

**Proposed Regulation, 32 C.F.R. § 286.16(b) Non-responsive information:**

The proposed regulation states:

Additionally, non-responsive information will not be redacted on less than a page-by-page basis. That is, a non-responsive paragraph within an otherwise responsive page will not be redacted as non-responsive.<sup>38</sup>

EPIC favors this change. This new language in the proposed regulation will likely result in the disclosure of FOIA documents that have fewer redactions and are thus more easily understood. For example, redacting a paragraph, simply because it is “non-responsive” to the request in a document that would otherwise not be redacted would often result in obscuring the meaning of

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<sup>36</sup> *Id.*

<sup>37</sup> The current regulation provides an hourly rate for contractors performing search and review functions, but does not include any description of what exactly a contractor may or may not do. *See* 32 C.F.R. § 286.29(b)(1), (d) (2002).

<sup>38</sup> *Id.*

the document disclosed. Allowing requesters to receive non-responsive information that improves the overall clarity of the documents they receive is a favorable change that supports FOIA's purposes.

**Proposed Regulation, 32 C.F.R. § 286.19 Dispute resolution and the Office of Government Information Services (OGIS).**

EPIC supports the inclusion of this provision concerning the Office of Government Information Services. Requiring the agency FOIA officers to work with requesters and OGIS to resolve disputes will help facilitate the processing of FOIA requests. It is also likely that resolving FOIA disputes through mediation rather than administrative appeals or litigation will lower the transaction costs for both DoD and requesters.

Earlier this year, EPIC, Citizens for Responsibility and Ethics in Washington ("CREW"), and the National Security Archive crafted Model FOIA Regulations as a "benchmark for transparency."<sup>39</sup> The Model FOIA Regulations include a provision encouraging agencies to work with OGIS to resolve FOIA disputes.<sup>40</sup>

**Proposed Regulation, 32 C.F.R. § 286.20(b)(4) Requirements:**

Under the proposed provision concerning "Frequently Requested documents," the agency states:

Frequently requested documents. Section (a)(2)(D) of the FOIA requires agencies to make available to the public records that are or are likely to become the subject of frequent (three or more) FOIA requests. Each DoD Component FOIA library will post documents meeting this requirement.<sup>41</sup>

EPIC favors this change. FOIA requires DoD to perform this function even if it is not a part of the regulation. Including this language serves the purpose of providing notice (or a reminder) both to requesters and DoD staff who may not otherwise be aware of this requirement. Once

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<sup>39</sup> *Intro: Model FOIA Regulations*, [www.modelfoiaregs.org](http://www.modelfoiaregs.org).

<sup>40</sup> Model FOIA Regulations, §1001.7(e).

<sup>41</sup> 79 Fed. Reg. at 52506.

requesters are on notice, they can look to FOIA library before making a request, saving the resources of both the requester and the DoD. In addition, setting the number of requests that qualifies a document as being frequently requested at three is low enough that it should result in a substantial number of documents being posted in DoD's FOIA library, making documents accessible to citizens who may not otherwise have the financial or time resources available to complete the FOIA process.

**Proposed Regulation, 32 C.F. R. § 286. 21 Record Availability:**

Under the proposed regulation:

The DoD Components should consider enhancing their FOIA libraries with search engines and document categories to provide the public easier access.<sup>42</sup>

EPIC supports this proposed change. This is an excellent addition and common sense use of modern technology to improve agency performance. This fosters greater accessibility and transparency for the public. However, to further advance these values, DoD should remove the word "consider," so that the phrase reads "should enhance their FOIA libraries." The Central Intelligence Agency, another federal agency that holds many classified documents that relate to national security, has added this feature to their electronic reading room, and DoD should do the same.<sup>43</sup> The Model FOIA Regulations also encourage agencies to make information publically available on their websites.<sup>44</sup>

**Proposed Section 286.24(b) Exemptions ("General Provisions"):**

DoD's current policy on discretionary disclosures states:

It is DoD policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. It is DoD policy that DoD

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<sup>42</sup> *Id.*

<sup>43</sup> Freedom of Information Act Electronic Reading Room, CENTRAL INTELLIGENCE AGENCY, <http://www.foia.cia.gov/>, (last visited Oct. 14, 2014).

<sup>44</sup> Model FOIA Regulations, § 1001.3 (e).

Components shall make discretionary releases whenever possible; however, a discretionary release is normally not appropriate for records clearly exempt under exemptions 1, 3, 4, 6, 7(C) and 7(F) (see subpart C of this part). Exemptions 2, 5, and 7(A)(B)(D) and (E) (see subpart C of this part) are discretionary in nature, and DoD Components are encouraged to exercise discretionary releases whenever possible. Exemptions 4, 6 and 7(C) cannot be claimed when the requester is the submitter of the information.<sup>45</sup>

Under the proposed regulation, 28 CFR § 286.24(b), the agency states:

The DoD Components will make discretionary disclosures of exempt information, if appropriate. A discretionary release is not appropriate for information determined to be exempt pursuant to Exemptions 1, 3, 4, 6, 7(C), and 7(F) of the FOIA as set out in § 286.25(a), (c), (d), (f), and (g)(1)(iii) and (vi). As for the other exemptions, which primarily protect governmental interests, a discretionary release is appropriate unless the DoD Component can reasonably identify a foreseeable harm that would result from release of the information. In making this determination, the DoD Components will consider the sensitivity of the document's content and its age.<sup>46</sup>

The proposed change clarifies the agency's understanding of FOIA exemptions. The provision makes clear which FOIA exemptions are subject to discretionary release and which ones are not. Further, the section provides FOIA requesters with the Agency's standard in determining when discretionary release is not appropriate, which is only when "the DoD Component can reasonably identify a foreseeable harm that would result from release of the information."<sup>47</sup> EPIC supports this change.<sup>48</sup>

The Agency should be commended on its efforts in proposing a provision that would help both FOIA requesters and Agency personnel alike, who seek to comply with FOIA and DoD regulations, with a clear understanding of the types of exemptions that are subject to discretionary release. No such provision exists in the current regulation, and it leaves up to the interested party to tediously navigate through each of the nine types of exemptions to determine

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<sup>45</sup> 32 C.F.R. § 286.4 (e).

<sup>46</sup> 79 Fed. Reg. at 52506.

<sup>47</sup> *Id.*

<sup>48</sup> See also Letter from FOIA Coalition to President Barack Obama (Oct. 23, 2014), *available at* [http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/10-23-14\\_Obama\\_FOIA\\_Reform\\_Letter.pdf](http://www.citizensforethics.org/page/-/PDFs/Legal/Letters/10-23-14_Obama_FOIA_Reform_Letter.pdf).

whether the regulations allows for discretionary release. Therefore, proposed section 286.24(b) makes it easier for the interested party to ascertain exemptions that are subject to discretionary release.

**Proposed Regulation 286.25(d) Exemption (“Exemption 4”):**

Under Exemption 4, the Agency is permitted to withhold information pertaining to non-governmental financial information, which includes trade secrets, commercial and financial information, and information considered privileged or confidential. Under the proposed regulations, the agency proposed to add:

When the DoD Components receive FOIA requests for information that could be protected by this exemption, they will notify the submitter of the information (see § 286.28(f)(1) for notification procedures.) Submitters having any objections to disclosure must submit a detailed written statement that specifies all grounds for withholding any portion of the information pursuant to Exemption 4 under this paragraph (d). This statement must explain why the information is a trade secret or commercial or financial information that is privileged or confidential (e.g. how release would cause substantial competitive harm).<sup>49</sup>

EPIC supports this change. Under this provision, the Agency will notify the submitter, or the entity that submitted the information, to provide in writing reasons why the Agency should withhold the confidential information and how the information is considered to fall within the scope of Exemption 4. This practice is fair in a sense that it gives the submitter an opportunity to object disclosure of the submitter’s information, however, subjects it to the presumption of disclosure. If the submitter cannot sufficiently provide such reasoning, the Agency will likely disclose the information to the requester.

However, the Agency could do more to further this policy. The Agency should inform the submitter of the time frame for which the submitter must respond.<sup>50</sup> EPIC recommends that the

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<sup>49</sup> *Id.* at 52508.

<sup>50</sup> § 10001.9 *Business* information, Model FOIA Regulations (Jul. 15, 2014), [www.modelfoiaregs.org](http://www.modelfoiaregs.org)

submitter be given ten business days to respond to the notice with reasons for withholding disclosure.<sup>51</sup> If the submitter fails to respond within the allotted ten days, the Agency must conclude that the submitter has no objection to disclosure of the requested information.<sup>52</sup>

Additionally, upon submission of confidential information by the submitter to the Agency, the Agency should require the submitter to designate with good-faith effort any portions of the submission the submitter considers to be exempt under Exemption 4.<sup>53</sup> A good-faith effort designation can be useful because it allows the Agency to work with information submitted beforehand that would help in its determination on whether to disclose information submitted by the submitter. EPIC suggests that the submitter's designation expire ten years after the date of submission unless the submitter requests, and provides justification for, a longer designation period.<sup>54</sup> The proposed section should be added as follows:

*Designation of confidential business information.* In the event a FOIA request is made for confidential business information previously submitted to the Government by a commercial entity or on behalf of it (referred to as a 'submitter'), the regulations in this section apply. When submitting confidential business information, the submitter must use a good-faith effort to designate, by use of appropriate markings, at the time of submission or at a reasonable time thereafter (generally, within 30 days), any portions of the submitter's submission the submitter considers to be exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). The submitter's designation will expire ten years after the date of submission unless the submitter requests, and provides justification for, a longer designation period.<sup>55</sup>

Section 286.12(g) makes clear that the (b)(7) exemption is *discretionary* except where the records at issue contain "[i]nformation obtained in confidence, expressed or implied, in the course of a criminal investigation by a criminal law enforcement agency or office within a DoD Component, or a lawful national security intelligence investigation conducted by an authorized

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

agency or office with a DoD Component.” The proposed regulation at § 286.25(g) overstates the withholding authority:

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 paragraphs (g)(1)(i) through (vi) of this section.<sup>56</sup>

EPIC recommends that this text be revised as follows:

Pursuant to section (b)(7) of the FOIA, records or information compiled for law enforcement purposes are exempt from disclosure *only* upon the identification of one of the six conditions delineated in paragraphs (g)(1)(i) through (vi) of this section.<sup>57</sup>

### **Proposed Regulation 286.26 “Exclusions”:**

This proposed addition to the Department’s regulations on FOIA compliance provides that when a record compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement proceedings (*i.e.*, a record that falls under Exemption (b)(7) in the FOIA), the DoD may make a misrepresentation regarding the actual existence of records to the requester. The proposed provision states:

Because of the possibility of the existence of excluded records, DoD law enforcement components will respond to all FOIA requests when no records are located or when located records fall within an exclusion by stating that no records responsive to the FOIA were found.<sup>58</sup>

The justification the proposed regulation provides for misrepresentation — “the possibility of the existence of excluded records” — is insufficient.<sup>59</sup> The FOIA contemplates a need for non-disclosure in cases of records the release of which could threaten the efficacy of law enforcement, but in no way does it countenance lying to requesters. Law enforcement may reasonably demand flexibility in the principles of open government that the FOIA seeks to

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<sup>56</sup> 79 Fed. Reg. at 52510.

<sup>57</sup> 79 Fed. Reg. at 52510.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*



advance, but it cannot require complete abdication of those principles. It is also unclear from the proposed regulations whether, were § 286.26 to take effect, the DoD would believe itself authorized to make misrepresentations to Legislatures as to the existence of (b)(7) records.

EPIC opposed the proposed rule change. EPIC recommends instead that the agency follow the approach set out in the Department of Justice's guidelines regarding exclusions.<sup>60</sup> The agency should have internal accountability mechanisms to ensure that exclusions are not overused. It should also include language in all FOIA responses informing the requester of the existence of exclusions and should also post information about exclusions on its public website. Additionally, the agency should report publicly on the number of times exclusions are asserted.

#### **Proposed Regulation 286.27 Request Processing Rules (“General provisions”):**

Under the current regulation, the Agency's regulations set out affirmative guidance in favor of disclosure:

Since the policy of the Department of Defense is to make the maximum amount of information available to the public consistent with its other responsibilities, written requests for a DoD record made under the provisions of 5 U.S.C. 552(a)(3) of the FOIA may be denied only when:

- (i) Disclosure would result in a foreseeable harm to an interest protected by a FOIA exemption, and the record is subject to one or more of the exemptions of FOIA.
- (ii) The record has not been described well enough to enable the DoD Component to locate it with a reasonable amount of effort by an employee familiar with the files.
- (iii) The requester has failed to comply with the procedural requirements, including the written agreement to pay or payment of any required fee imposed by the instructions of the DoD Component concerned. When personally identifiable information in a record is requested by the subject of the record or the subject's attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally,

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<sup>60</sup> Department of Justice, *Implementing FOIA's Statutory Exclusion Provisions*, <http://www.justice.gov/oip/blog/foia-guidance-6>

written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.<sup>61</sup>

The proposed regulation, at § 286.27, excludes affirmative language in favor of explicit restrictions and opaque references to other DoD regulations. For example, § 286.22(a)(1)(iii) (the current regulation) provides:

When personally identifiable information in a record is requested by the subject of the record or the subject's attorney, notarization of the request, or a statement certifying under the penalty of perjury that their identity is true and correct may be required. Additionally, written consent of the subject of the record is required for disclosure from a Privacy Act System of records, even to the subject's attorney.<sup>62</sup>

But the new § 286.27(a)(2) provides instead:

The DoD Components must comply with 32 CFR part 310 to confirm the identity of the requester.<sup>63</sup>

The DoD Privacy Program is governed by 32 C.F.R. § 310. The section consists of twelve subparts and eight appendices. Without further guidance, it is impossible to determine which elements of part 310 that apply to the Department's FOIA policies. Such non-transparency is a detriment to the FOIA requester who seeks to learn what he must do to comply with the Department's regulations in order to obtain records — but it is also a detriment to members of the Department who seek to comply with both the FOIA and DoD policy, because it is unclear what one must do to meet the Privacy Program requirements. This is likely to lead to under-disclosure to private parties of records whose disclosure is required under the FOIA. Accordingly, DoD should not adopt its proposal, and instead the agency should keep the current regulation.

Additionally, § 286.22(2)(b) currently provides:

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<sup>61</sup> 32 C.F.R. § 286.22(a)(1).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

Requests from private persons will be made in writing, and should clearly show all other addressees within the Federal Government to which the request was also sent. This procedure will reduce processing time requirements, and ensure better inter- and intra-agency coordination. However, if the requester does not show all other addressees to which the request was also sent, DoD Components shall still process the request.

No such instruction exists in the proposed regulations.

The Department is to be commended for clarifying restrictions on release of records to government entities (currently contained in § 286.22(2)(c)) by splitting those provisions into subsections (§ 286.27(b) and (3)–(6)), making it easier for requesters to find provisions that apply to them. However, ease of access for the *government* is not the primary purpose of the FOIA, and the Department’s proposed regulations would significantly undercut the Act’s objective of increasing the *public’s* access to Agency records.

The proposed elimination of the affirmative requirement that DoD Components release information pursuant to a court order, along with a description of the restrictions on that information’s release, should be removed.<sup>64</sup> A future requester should not be required to traverse the FOIA process to obtain records a judge has already determined should be made public.

Still more troubling is the proposed creation of a new absolute exclusion from public access under the FOIA of a class of records that reflects some of the Government’s least transparent activities. § 286.27(b)(2) provides:

The FOIA does not apply to the records of a DoD Component that is an element of the Intelligence Community as defined in 50 U.S.C. 401a(4) if the FOIA request is from a non-U.S. government entity or representative.<sup>65</sup>

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<sup>64</sup> 32 C.F.R. § 286.22(2)(d)(iii).

<sup>65</sup> 79 Fed. Reg. at 52511.

The FOIA already provides an exception to its disclosure standard for records the release of which could harm national security. The DoD need not — and may not — exclude this entire segment of its records from public access. EPIC opposes the inclusion of these provisions

### **Prompt Action on FOIA Requests [286.28(b)]**

EPIC provides the following comments on proposed changes to the regulations in order to foster prompt action on FOIA requests.

### **Proposed Regulation 286.28(b)(1)(i) Unusual Circumstances**

Under the current regulations, as it appears in 32 C.F.R. § 286.23(f):

In unusual circumstances, when additional time is needed to respond to the initial request, the DoD Component shall acknowledge the request in writing within the 20-day period, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days.

Under the proposed regulations:

When unusual or exceptional circumstances prevent a FOIA Requester Service Centers from making a final response determination within the statutory time period, it will advise the FOIA requester in writing and provide the FOIA requester an opportunity to narrow the scope of the FOIA request or arrange for an alternative timeframe. FOIA Requester Service Centers will, as a matter of good practice, be available to assist requesters in the formulating of requests.<sup>66</sup>

EPIC objects to the exclusion of the 10 additional working day limit on a substantive response as contrary to law under 5 U.S.C. §552(a)(6)(B)(i). The proposed regulations would eliminate the presumption of completion within the 10 working day extension. Under the clear words of the statute, if the 10 working day extension deadline cannot be met, only then may the agency notify the requester that the request cannot be processed within the time limit specified, provide them an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request

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<sup>66</sup> *Id.*

or a modified request. Eliminating the 10 working day extension presumption thus unnecessarily conflates two different terms in the FOIA, “unusual circumstances” and “exceptional circumstances.” Such a change may frustrate the clear purposes of this section of the statute and regulation, to provide for prompt action on FOIA requests.

### **Exceptional Circumstances [286.28(b)(1)(ii)]**

The current regulations define exceptional circumstances with regard to predictable component backlogs in the following manner:

Exceptional circumstances do not include a delay that results from predictable component backlogs, unless the DoD Component demonstrates reasonable progress in reducing its backlog.<sup>67</sup>

The proposed regulations have been reworded:

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 Components can demonstrate reasonable progress in reducing its backlog of pending requests.<sup>68</sup>

Although the substance of this rule is unchanged, the proposed regulation obfuscates the underlying assumption that predictable agency workload is not to be assumed to be an exceptional circumstance. At minimum, the regulation ought to retain the original wording so as to reflect this, and to align more cleanly with the language in the FOIA statute, 5 U.S.C. § 552 (a)(6)(B)(ii). However, predictable agency workload should not be included as an exceptional circumstance at all, so as to encourage swift determinations and necessary infrastructural changes that would aid the efficiency of the system as a whole. EPIC recommends the following text in place of the proposed provision:

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<sup>67</sup> 32 C.F.R. § 286.23(f)(2) (2002).

<sup>68</sup> 79 Fed. Reg. at 52511.

Exceptional circumstances do not include a delay that results from predictable component backlogs, unless the DoD Component demonstrates *substantial* progress in reducing its backlog.<sup>69</sup>

### **Misdirected FOIA Requests [286.28(b)(2)]**

Under the current regulations, 32 C.F.R. § 286.23(g):

Misdirected requests shall be forwarded promptly to the DoD Component or other Federal Agency with the responsibility for the records requested.

Under the proposed rule, Section 286.28(b)(2), the agency provides that:

DoD Components receiving a misdirected FOIA request for records originating with another DoD Component will refer the FOIA request to the correct DoD Component and inform the receiving DoD Component of the date the FOIA request was originally received. Additionally, it will advise the FOIA requester of this transfer. This routing requirement only applies to those FOIA requests directed to a DoD Component that seek documents for which the DoD is responsible. If responsibility for the requested records rests with a non-DoD agency (e.g., Department of State), then the DoD Component need only advise the FOIA requester to submit the FOIA request to the proper agency. Misdirected FOIA requests will not be transferred to a law enforcement or Intelligence Community agency or DoD Component. Instead, the FOIA Requester Service Center receiving the request will contact the [*sic*] for guidance if there is reason to believe that the law enforcement or Intelligence Community agency or DoD Component would have responsive records.<sup>70</sup>

For at least two reasons, EPIC recommends that DoD not adopt this proposal. First, the proposed rule appears on its face to be internally inconsistent. The first sentence above states:

DoD Components receiving a misdirected FOIA request for records originating with another DoD Component will refer the FOIA request to the correct DoD Component and inform the receiving DoD Component of the date the FOIA request was originally received.

That sentence is consistent with current DoD regulations regarding inter-component transfer of misdirected requests. In direct contradiction with that sentence, however, a later provision provides that “Misdirected FOIA requests will not be transferred to a . . . DoD Component.”<sup>71</sup>

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<sup>69</sup> 32 C.F.R. § 286.23(f)(2) (2002).

<sup>70</sup> *Id.*

<sup>71</sup> Section 286.28 (b)(2).

The final rule should clarify that DoD components receiving a misdirected FOIA request for records originating with another DoD component will refer the FOIA request to the correct DoD component. The final rule thus should eliminate the contradictory statement. Finding otherwise would frustrate the purposes of the Freedom of Information Act by effectively ending FOIA requests accidentally sent to the wrong component. The public is often uncertain about where to send a FOIA request, especially at a level of detail beyond the proper agency. The problem is compounded in large, complex agencies such as the Department of Defense. Preventing inter-component transfer of misdirected FOIA requests would frustrate the purposes of the Act by improperly denying legitimate requests for records within the possession of the agency.

Second, the proposed rule changes adversely impacts FOIA requesters. Under current DoD FOIA regulations where another federal agency has responsibility for the records requested, DoD will forward the request to that agency. The proposed rule, however, requires the DoD to merely inform the requester of the proper agency to which the requester should submit her request. This policy change similarly forecloses valid FOIA requests where a requester holds a good faith belief that the DoD possesses certain records and those records in fact are controlled by another agency, such as the Department of State. In the absence of evidence to support this change, DoD should keep its current regulation. The proposed change places a burden on the requester to re-submit a valid request.

The final rule should maintain current DoD policy to refer misdirected requests to the proper federal agency. In addition, the final rule should provide that when a component within the DoD transfers responsibility for responding to a request to another component or agency, the

component originally in receipt of the request will notify a requester of the referral. The notice will identify the part of the request that has been referred and the name of each component or agency to which the request, or part of the request, has been referred, together with a point of contact for the referral agency or department. This modification will better allow requesters to track their own requests and provide for greater accountability.

### **Proposed Regulation 286.23(b)(3) Interim responses**

The current regulations read as follows:

If a significant number of requests, or the complexity of the requests prevent a final response determination within the statutory time period, DoD Components shall advise the requester of this fact, and explain how the request will be responded to within its multitrack processing system (see § 286.4(d)(2)). A final response determination is notification to the requester that the records are released, or will be released on a certain date, or the records are denied under the appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons in § 286.23(b). Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA.<sup>72</sup>

Whenever possible, initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 20 working days after receipt of the request by the official designated to respond. When a DoD Component has a significant number of pending requests which prevent a response determination within the 20 working day period, the requester shall be so notified in an interim response, and advised whether their request qualifies for the fast track or slow track within the DoD Components' multitrack processing system. Requesters who do not meet the criteria for fast track processing shall be given the opportunity to limit the scope of their request in order to qualify for fast track processing. See also § 286.4(d)(2), for greater detail on multitrack processing and compelling need meriting expedited processing.<sup>73</sup>

The proposed regulation regarding interim responses read as follows:

DoD Components will provide interim responses when they are unable to make a final determination within 20 working days and are encouraged to further 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

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<sup>72</sup> 32 C.F.R. § 286.4(1).

<sup>73</sup> 32 C.F.R. § 286.23(c)(1).



requester concerning the scope of the FOIA request, the response timeframe, and fee agreement. However, such communications do not constitute a final response determination. The initial interim response will include as a minimum:

- The date the 20-day statutory time period started for the FOIA request.
- The tracking number for the FOIA request.
- Contact information on how the FOIA requester can obtain information about the processing of the FOIA request.<sup>74</sup>

It is unclear if there is any significance with the shift from “shall advise the requester” to “will provide interim responses.” As such, EPIC recommends a clarification. The permissible agency communication, which is encouraged under the current regulation, should be compulsory, including receipt notification and negotiations regarding scope of the request.

#### **Proposed Regulation 286.28(b)(4) Statutory Time Period**

This new section details when the statutory time period begins if the request was originally misdirected. New to this section is the inclusion of a maximum number of days that a request can be delayed due to misdirection. The current regulation regarding when the statutory time begins reads:

Generally, when a member of the public complies with the procedures established in this part and DoD Component regulations or instructions for obtaining DoD records, and after the request is received by the official designated to respond, DoD Components shall endeavor to provide a final response determination within the statutory 20 working days.<sup>75</sup>

The proposed regulation reads:

The statutory time period to make a release determination on a FOIA request usually begins on the date when the FOIA Requester Service Center responsible for the requested records receives the FOIA request. However, if the FOIA request was originally misdirected to another FOIA Requester Service Center within the same Component, the statutory time period begins on the day the appropriate DoD Component FOIA Requester Service Center receives the FOIA request, or 10 working days after it was received by the FOIA Requester Service Center originally receiving the FOIA request, whichever date is earlier. When a FOIA request is sent directly to a DoD Component office not designated

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<sup>74</sup> 79 Fed. Reg. at 52511.

<sup>75</sup> 32 C.F.R. § 286.4(d).

to receive FOIA requests, the statutory time period does not begin until it is received by a FOIA Requester Service Center.<sup>76</sup>

EPIC supports the inclusion of the “time period begins on the day the appropriate DoD Component FOIA requester Service Center receives the FOIA request, or 10 working days after it was received by the FOIA Requester Service Center originally receiving the FOIA requester, whichever date is earlier.” This language aids in cabining the effects of a larger agency and proliferation of departments and offices within the DoD on FOIA requesters, by setting an outer limit of 10 days for requests to be transferred before their statutory clocks must start to run.

### **Proposed Regulation 286.28(b)(5) Tolling of Statutory Time Period**

This new provision of the regulations discusses tolling explicitly. Both the current and proposed regulations hold that the 20-working-day statutory period for responding to a FOIA request begins when a perfected FOIA request is received. However, the proposed regulations add:

After this time, a DoD Component FOIA Requester Service Center may toll the statutory time period for only two reasons. In both situations, the FOIA requester’s response to the agency’s request ends the tolling period.<sup>77</sup>

The proposed regulations also propose tolling in cases where the request does not reasonably describe the requested record:

The time period may be tolled one time when the FOIA Requester Service Center goes back to the FOIA requester and reasonably asks for additional information (not connected to the assessment of fees).<sup>78</sup>

DoD should cap the number of days that could be tolled regarding the days between receipt of the request and going back to the requester for clarifying information. Additionally, the number

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<sup>76</sup> 79 Fed. Reg. at 52511.

<sup>77</sup> 79 Fed. Reg. at 52512.

<sup>78</sup> *Id.*

of times that could be tolled to go back for clarification should be limited to just one. The proposed regulations also include entirely new language regarding tolling surrounding fee assessments. The proposed regulation reads:

The time period may be tolled if it is necessary for the FOIA Requester Service Center to clarify issues regarding fee assessment with the FOIA requester. There is no limit given for the number of items an agency may go back to a FOIA requester to clarify fee assessment issues, which sometimes may need to be done in stages as the records are located and processed.<sup>79</sup>

EPIC objects to the inclusion of tolling the processing of the request for a fee assessment determination, and further opposes the endless opportunities the agency may go to the FOIA requester to clarify fee assessment issues. Although fee assessments are sometimes complex and subject to the type and amount of material found, this proposed change opens the door to abuse by stopping the clock every time an issue regarding fee assessments come into question. This would encourage the use of fee assessment clarification as a pretext for delaying responses. This practice is contrary to the text and purpose of the FOIA. Thus, EPIC recommends that this section should be omitted entirely.

### **Proposed Regulation 286.28(c) Estimated Completion Date**

Under this section, the proposed regulations have added a requirement that a FOIA Requester Service Center must provide a requester with an estimated date when the FOIA request is expected to be complete, when the requester inquires regarding the status of a request.

EPIC favors this change because it compels feedback and information regarding requests, giving requesters information so that they may plan accordingly. However, there is not an accountability measure listed to ensure that dates given are given in good faith.

### **Proposed Regulation 286.28(e) Expedited processing**

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<sup>79</sup> *Id.*

Most of the proposed changes for this regulation are largely organizational in nature. The DoD also explicitly mentions the elements of the other cases determined by the agency to require expedited processing: imminent loss of due process rights and humanitarian need. However, separating the definition of compelling need from this section seems organizationally unsound, and may confuse requesters as to what constitutes a compelling need pursuant to 5 U.S.C. § 552(a)(6)(E)(v). EPIC recommends that the full definition should be included here.

### **Proposed Regulation 286.28(j)(2) Business as Usual Approach**

The business as usual approach contained in both the current and proposed regulations has no foundation in law, and obfuscates the true reasonableness standard for electronic searches set out in 5 U.S.C. § 552(a)(3)(C). It should be eliminated. The proposed regulation reads:

A “business as usual” approach exists when the DoD Component has the capability to process a FOIA request for electronic records without a significant expenditure of monetary or personnel resources. DoD Components are not required to conduct a search that does not meet this business as usual criterion.<sup>80</sup>

Compare that language to the section of the FOIA statute, described above:

...an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.<sup>81</sup>

Aside from the obfuscation of the reasonableness standard by the introduction of the “business as usual” text, problems are also likely emerge in the lacuna between “reasonable” and “business as usual.” The proposed provision encourages a race to the bottom, as the agency is allowed to adopt subpar search practices, despite the plain text of the Act that requires “reasonable efforts” to provide records in electronic form. EPIC opposes this change.

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<sup>80</sup> 79 Fed. Reg. at 52514.

<sup>81</sup> 5 U.S.C. § 552(a)(3)(C) (2002).

## **Proposed Regulation 286.28(k) CISI and MFOQA Data Files**

This section regarding Critical Infrastructure Security Information, as defined in 10 U.S.C. § 130e(c), and Military Flight Operations Quality Assurance, as defined 10 U.S.C. 2254(a)(2), is a new one that has no corollary in the current regulations. Including this information in the text of the regulation is an improvement, as it consolidates the exemption with the regulation. This allows those seeking such information to be aware of the statutory authority that may exempt it from the FOIA.

EPIC favors this change. This provision sets out the precise procedure for how such determinations are to be made, and affords an opportunity for the requester to participate in the decision by providing a statement as to the public interest involved in the records sought. EPIC also supports the online posting of the factors used to determine whether the request should be denied, along with a statement of the basis for the determination. Such steps should be taken more broadly, as it would reduce redundant requests and provide insight into decision-making mechanisms.

## **Proposed Section 286.29 Initial Determinations 286.29(b)(10) Reasons for Denying a FOIA Request Other Than Exemptions (“Other”)**

Under the current regulations, 32 C.F.R. 286.23(b)(9), a FOIA request can be denied for “[a]ny other reason a requester does not comply with published rules other than those outlined in paragraphs b(1) through (b)(8) of this section.”<sup>82</sup>

The proposed regulations provide that a FOIA agency can be denied for “[a]ny other reason why requested records are not provided other than those outlined in paragraphs (b)(1)

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<sup>82</sup> 32 C.F.R. § 286.23(b)(9)

through (b)(9) of this section.”<sup>83</sup> Whereas the current regulations provide a catchall reason for denying a FOIA request based on failure of the *requester* to follow DoD procedures, the proposed regulations provide a catchall reason for denying a FOIA request based on *any other reason* whatsoever. This broad provision appears to license a denial of a FOIA request based on any reason. Such a proposition violates the FOIA and should be removed.

The weaknesses described above are not remedied by the following section of the proposed regulations, which provides that the reasons the DoD components will use in utilizing the “Other” reason for rejecting FOIA requests are:

- (i) Misdirected request.
- (ii) *Records Publicly available*. Records are available on a U.S. government Web site (for FOIA requesters with Internet access) or at some other government agency (e.g., the Government Printing Office or the National Technical Information Service).
- (iii) *Litigation*. The FOIA request is administratively closed because the FOIA requester has filed a complaint in federal court. If this is the case, the DoD Component FOIA Requester Service Center should consult legal counsel to determine whether they should consider processing the FOIA request.<sup>84</sup>

The three “Other” reasons are all ambiguous and quite broad—rendering the “Other” category nearly identical to a catchall justification for rejecting FOIA requests. It appears possible, if not likely, that the majority of FOIA requests could be considered either misdirected, already publicly available, or off limits due to litigation. As discussed above, the public is often uncertain about where to send a FOIA request, especially at a level of detail beyond the proper agency. Empowering DoD components to deny FOIA requests on the basis of being misdirected will foreclose many valid requests where the requester was simply confused about where to submit her request. Moreover, allowing denial of a request based on availability of records publicly on a U.S. government Web site may discriminate against requesters who do not have Internet access. At the very least, the agency can readily respond to the request by providing the information to

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<sup>83</sup> 79 Fed. Reg. at 52515.

<sup>84</sup> *Id.*

the requester the agency routinely makes available to the public. The backup option, the availability of the documents at another agency, does nothing to provide the requester with the documents that the FOIA should help her corral. Finally, the presence of litigation should not serve as a reason for *denying* FOIA requests. Litigation under the Act is meant to increase access to information, not serve as a means of denying valid requests.

EPIC recommends that the current language be retained. Such language at least places the onus on a requester, and does not provide a DoD component with a catchall reason to deny valid requests. If the DoD adopts the proposed regulations, it should at the very least require a component, denying a request for the “Other” reason of a misdirected request, to forward that misdirected request to the valid DoD component or government agency. It also should require a component, denying a request for the “Other” reason of “Records Publicly Available,” to provide the requester with the exact URL where the record is available online, or the exact contact address at which she can obtain the record.

### **Proposed Regulation 286.30 (a) Referrals**

Under the current regulation 32 C.F.R. § 286.4(i)(1):

The DoD FOIA referral policy is based upon the concept of the originator of a record making a release determination on its information. If a DoD Component receives a request for records originated by another DoD Component, it should contact the DoD Component to determine if it also received the request, and if not, obtain concurrence from the other DoD Component to refer the request.<sup>85</sup>

Under the proposed regulation 32 C.F.R. § 286.30(a):

(1) DoD Components locating responsive documents originating with another DoD Component or agency outside the DoD will refer the documents, along with a copy of the FOIA request, to the originator for response directly to the FOIA requester. The DoD Components referring FOIA requests will include point of contact's name, telephone number, and an email address in the cover memorandum.<sup>86</sup>

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<sup>85</sup> 32 C.F.R. § 286.4(i)(1).

<sup>86</sup> 79 Fed. Reg. at 52516.

The proposed regulation simplifies the procedure of referrals by cancelling the obligation of contacting the originator of information to inquire whether they also received the FOIA request at issue before referral. Similarly, the changes eliminate the requirement of receiving the originator's concurrence for referral. This is a positive change, as it may speed up the FOIA process for the requester. EPIC supports this change.

### **Proposed Regulation 286.31(a) "Appeals" (General)**

Under the current regulation, 32 CFR § 286.31(a):

If the official designated DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision *may* be appealed by the requester, in writing, to a designated appellate authority. (Emphasis added).<sup>87</sup>

Under the proposed regulation, 32 CFR §286.31(a):

When an IDA makes an adverse determination, the DoD Components *must* advise the FOIA requester that the decision may be appealed in writing to a designated appellate authority. (Emphasis added).<sup>88</sup>

The proposed rule change will help in making the FOIA requester aware of his or her appeal rights. EPIC supports this change.

Under the current regulation, 32 CFR § 286.31(c)(1):

Records that are denied shall be retained for a period of six years to meet the statute of limitations requirement.<sup>89</sup>

Under the proposed change, the current language has been eliminated. This is concerning because some documents may be relevant for future FOIA requests. EPIC opposes this change. The current text should be retained.

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<sup>87</sup> 32 C.F.R. § 286.31(a).

<sup>88</sup> 79 Fed. Reg. at 52517.

<sup>89</sup> 32 C.F.R. § 286.31(c)(1).



### **Proposed Regulation 286.31(c) “Appeals” (Time of Receipt)**

Under the current regulation 32 C.F.R. § 286.24(b):

A FOIA appeal has been received by a DoD Component when it reaches the office of an appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.<sup>90</sup>

Under the proposed regulation 32 C.F.R. § 286.31(c):

A FOIA appeal has been received by the DoD Component when it reaches the office of the appellate authority having jurisdiction. Misdirected appeals should be referred to the proper appellate authority.<sup>91</sup>

There is no compelling reason for removing the word “expeditiously” in the sentence dealing with misdirected appeals. Agency personnel should be reminded that the FOIA process was intended to be fast and results-oriented. Therefore, EPIC recommends that the current text be retained.

### **Proposed Regulation 286.31(d)(1) “Appeals” (Time Limits)**

Under the current regulation 32 C.F.R. 286.24(c)(1):

The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the appeal is postmarked after the conclusion of this 60-day period, the appeal may be considered closed.<sup>92</sup>

Under the proposed regulation 32 C.F.R. 286.31(d)(1):

If the FOIA requester submits an appeal after the conclusion of the 30-day time period established by the date of the initial denial letter, the appeal may be considered untimely and closed for that reason.<sup>93</sup>

FOIA was enacted to ensure the right of people to information regarding government activities.

This right is exercised through the mechanism of FOIA requests, which was designed for use by

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<sup>90</sup> 32 C.F.R. § 286.24(b).

<sup>91</sup> 79 Fed. Reg. at 52517.

<sup>92</sup> 32 C.F.R. 286.24(c)(1).

<sup>93</sup> 79 Fed. Reg. at 52517.

regular people without the help of legal professionals. Limiting the time of filing an appeal from 60 to 30 days will discourage FOIA requesters from appealing adverse determinations or cause FOIA requesters to be unable to comply within the narrower time frame. The DOD should leave the current regulation in place without changes.

### **Proposed Regulation 286.31(e) “Appeals” (Delay in Response)**

Under the current regulation 32 C.F.R. 286.24(d)(2):

If a determination cannot be made and the requester notified within 20 working days, the appellate authority shall acknowledge to the requester, in writing, the date of receipt of the appeal, the circumstances surrounding the delay, and the anticipated date for substantive response.<sup>94</sup>

The proposed regulation 32 C.F.R. 286.31(e) provides:

If a determination cannot be made within 20 working days, the appellate authority or the appellate authority's representative will acknowledge to the FOIA requester, in writing, the date of receipt of the appeal and the circumstances surrounding the delay.<sup>95</sup>

Under the proposed regulation, a FOIA requester will no longer be provided with an anticipated date for a substantive response. Without an anticipated date for response a requester may end up waiting for a response on his appeal for a much longer time than FOIA allows.

Under the current regulation, 32 CFR § 286.31(d)(2):

Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in §286.23(f), they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. The DoD component shall continue to process the case expeditiously.<sup>96</sup>

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<sup>94</sup> 32 C.F.R. 286.24(d)(2).

<sup>95</sup> 79 Fed. Reg. at 52517.

<sup>96</sup> 32 C.F.R. § 286.31(d)(2).

Under the proposed change, this language has been eliminated. The elimination of this language erodes the FOIA requestor's specific rights and the language should stay the same. EPIC opposes the changes.

### **Proposed Regulation 286.31(f)(2) "Appeals" (Denial)**

The current regulation 286.24(e)(2) states in part:

- (v) When the denial is based upon an exemption 3 statute (subpart C of this part), the response, in addition to citing the statute relied upon to deny the information, shall state whether a court has upheld the decision to withhold the information under the statute, and shall contain a concise description of the scope of the information withheld.
- (vi) The response shall advise the requester of the right to judicial review.<sup>97</sup>

Under the proposed regulation 32 C.F.R. 286.31(f)(2):

Final denial of an appeal must be made in writing and signed by the appellate authority. The response must include:

- (i) The basis for the denial, to include an explanation of the applicable statutory exemption or exemptions invoked pursuant to the FOIA, and of other appeal matters set forth in § 286.19.
- (ii) A determination that the denied information meets the cited criteria and rationale of the governing Executive order if the final refusal is based in whole or in part on Exemption 1 of the FOIA as set out in § 286.25(a).
- (iii) A statement that the information being denied does not contain meaningful portions that are reasonably segregable in the case of appeals for total denial of records.
- (iv) The FOIA requester's right to judicial review.<sup>98</sup>

The proposed regulation omits language detailing consequences of denying a FOIA request on the basis of exemption 3 statutes. However, by simply citing to this exemption without specifying the statute, the agency does not provide FOIA requesters with enough information about the reasons for the denial of their requests. Therefore, the text of the current regulation is beneficial for FOIA requesters, as it provides them with more information on the basis for the denial of their requests, which helps them in making informed decisions regarding appeals. Therefore, the current language should remain the same.

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<sup>97</sup> 32 C.F.R. § 286.24(e)(2).

<sup>98</sup> 32 C.F.R. 286.31(f)(2).

### **Proposed Regulation 286.32(a) “FOIA Litigation” (General):**

The current regulation 32 C.F.R. § 286.25(a)(2) provides:

A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component or an appellate designee or when the DoD Component has failed to respond with the time limits prescribed by the FOIA and in this part.<sup>99</sup>

The proposed regulation 32 C.F.R. 286.32(a) provides:

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 Component has failed to respond within the time limits prescribed by the FOIA. The U.S. Department of Justice, “Freedom of Information Act Guide” provides more detailed guidance on FOIA litigation.

(1) If a DoD Component is served a complaint for a FOIA request that is still open, the DoD Component will administratively close the FOIA request.

(2) 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.<sup>100</sup>

The first paragraph of the proposed regulation does not contain any substantive changes as compared to its current version. The revised provision directs FOIA requesters to the Department of Justice’s “FOIA Guide” for more detailed guidance. EPIC supports this addition. The DOJ guide is one of several useful resources for FOIA requesters.<sup>101</sup> A URL for this resource should be included to assist FOIA requesters.

The proposed regulation also states that the DoD component will administratively close pending FOIA requests. This authority is not present in the current regulation and creates unnecessary ambiguity, which the agency can use in its favor. Without this provision, the DoD has an opportunity to release the documents to the requester shortly after being served with the complaint. After doing so, agencies typically argue in court that they satisfied the request

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<sup>99</sup> 32 C.F.R. § 286.25(a)(2).

<sup>100</sup> 79 Fed. Reg. at 52518.

<sup>101</sup> See, e.g., [www.foia.gov](http://www.foia.gov); [www.foia.rocks](http://www.foia.rocks); and [www.nfoic.org](http://www.nfoic.org).

demands and that there is no basis for litigation. Although, in this scenario the requester receives the requested records, the agency's FOIA violations are left unrecognized. Additionally, by preventing litigation this practice may also impede the establishment of important FOIA precedents. The proposed regulation also contains guidance for FOIA employees regarding consultation with legal counsel, which is not present in the current regulation. By requiring conferral with legal counsel or DOJ attorneys in cases of FOIA litigation, the proposed regulation promotes uniformity in DoD responses and generally results in better-informed decisions. EPIC supports this change.

### **Proposed Regulation Subpart F Fee Schedule § 286.33**

Under the current regulations, 32 CFR §286.28(e)(i)(6):

To be eligible for inclusion in these categories, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but in furtherance of scholarly (from an educational institution) or scientific (from a non-commercial scientific institution) research.<sup>102</sup>

Under the proposed change, 32 C.F.R. § 286.33(b)(3)(ii)(A):

A FOIA request made by a faculty or staff member or a student of an educational institution that serves an individual research goal and not a scholarly research goal of the institution would not qualify for this fee category.<sup>103</sup>

The proposed change completely reverses the language of the current regulations. The current language should stand as it gives members of educational institutions further opportunities to pursue FOIA requests.

Under the current regulations, § 286.26(d)(2):

When assessable costs for a FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category.<sup>104</sup>

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<sup>102</sup> 32 C.F.R. §286.28(e)(i)(6).

<sup>103</sup> 79 Fed. Reg. at 52518.

<sup>104</sup> 32 C.F.R. § 286.26(d)(2).

Under the proposed change, 32 C.F.R. 286.33(c)(1):

No fees may be charged by any DoD Component if the total assessable fees are less than or equal to \$25.<sup>105</sup>

The proposed change increases the fee ceiling for a waiver of fees. This is good because it lessens the burden on the FOIA requestor by potentially reducing the FOIA requester's costs. EPIC favors this change.

Under the proposed change in 32 C.F.R. §286.33 Table 1—FOIA HOURLY PROCESSING FEES, the categories are collapsed into three sections from the current regulations in 32 CFR 286.29(b)(1). Also, Table 1 and Table 2 in the proposed regulations in 32 C.F.R. §286.33 increase the hourly rates and costs respectively for FOIA requests. It is debatable whether the prices should have increased.

Under current regulations, § 286.28 (d)(5)(ii):

A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g. \$15.00-\$30.00).<sup>106</sup>

Under the proposed change, § 286.33 (d)(B)(3)(ii):

A previous denial of records is reversed in total, or in part, and the assessable costs are not substantial (e.g., \$25 to \$50).<sup>107</sup>

It is arguable whether the price increases in the examples are necessary. EPIC favors retaining the original text.

### **Proposed Regulation Subpart G Education and Training Proposed Regulation 286.36 “Purpose”**

Under the current regulation 32 C.F.R. § 286.36(b):

The purpose of the educational and training programs is to promote a positive attitude among DoD personnel and raise the level of understanding and appreciation of the DoD

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<sup>105</sup> 79 Fed. Reg. at 52520.

<sup>106</sup> 32 C.F.R. § 286.28 (d)(5)(ii).

<sup>107</sup> 79 Fed. Reg. at 52522.

FOIA Program, thereby improving the interaction with members of the public and improving the public trust in the DoD.<sup>108</sup>

Under the proposed regulation 32 C.F.R. § 286.36:

The purpose of the DoD FOIA educational and training programs is to promote a positive attitude among DoD personnel and raise the level of understanding and appreciation of the DoD FOIA Program. Fulfilling this purpose will improve customer service to members of the public and improve the public trust in the Department of Defense.<sup>109</sup>

The proposed text of the agency regulations emphasizes the final goal of educational and training programs: improving customer service to the public and improving public trust in the Department of Defense. Although this goal is also stated in the current regulations, the proposed regulations state it in a separate sentence, which acknowledges its importance.

### **Proposed Regulation 286.38 “Scope and Principles”**

The current regulation 32 C.F.R. § 286.36(c) states in part that each component FOIA educational and training program will be designed to:

- (1) Familiarize personnel with the requirements of the FOIA and its implementation by this part.
- (2) Instruct personnel, who act in FOIA matters, concerning the provisions of this part, advising them of the legal hazards involved and the strict prohibition against arbitrary and capricious withholding of information.
- (3) Provide for the procedural and legal guidance and instruction, as may be required, in the discharge of the responsibilities of initial denial and appellate authorities.
- (4) Advise personnel of the penalties for noncompliance with the FOIA.<sup>110</sup>

Under the proposed regulation 32 C.F.R. § 286.38:

Each DoD Component designs its FOIA educational and training programs to fit the particular requirements of its personnel, dependent upon their degree of involvement in implementing this part. These programs will reach for two target audiences: those personnel who are involved in the day-to-day processing of FOIA requests, and those staff personnel who provide search or review staff-support to the DoD Component FOIA process. The programs will:

- (a) Familiarize personnel with the requirements of the FOIA and its implementation by this part and respective DoD Component issuances.

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<sup>108</sup> 32 C.F.R. § 286.36(b).

<sup>109</sup> 79 Fed. Reg. at 52523.

<sup>110</sup> 32 C.F.R. § 286.36(c).

- (b) Instruct personnel who act in FOIA matters on the provisions of this part; advise them of the legal hazards involved 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.
- (d) Emphasize that the processing of FOIA requests must be citizen-centered and results-oriented.
- (e) Advise personnel of the penalties for noncompliance with the FOIA.<sup>111</sup>

EPIC favors the revisions. The proposed regulation generally provides more specific instructions regarding the scope of educational and training programs. For example, the proposed regulation specifies categories of people who should primarily be targeted by educational and training programs. This should help DoD components to prepare more useful educational and training programs. Additionally, under the proposed regulation, personnel will not only be familiarized with the FOIA, but also with relevant DoD issuances, which will improve employees' understanding of their FOIA-related responsibilities. Also, the proposed regulation contains highly desirable new language stating that educational and training programs will "emphasize that the processing of FOIA requests must be citizen-centered and results-oriented." This should be an important component of education and training for employees involved in the FOIA process. The agency will increase the quality of its customer service for the public if its employees understand that disclosure is the default. The text of the proposed regulation contains several significant improvements, which altogether will ensure improvement of DoD FOIA-related educational and training programs.

## **Conclusion**

As stated above, EPIC supports the proposed changes in the agency's FOIA regulations that favor FOIA requesters and that advance the purposes of the Act. Regarding those proposed changes that discourage use of the FOIA or frustrate the intent of the Act, EPIC recommends that

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<sup>111</sup> 79 Fed. Reg. at 52523.



the Department of Defense withdraw or revise the provisions, remove the barriers to access to government information, and incorporate procedures that facilitate the ability of the public to learn about the activities of its government.

Respectfully submitted,

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