

related costs and to ensure that the use of the platform will not interfere with the government's mission;

(j) Appropriate provisions governing the disposition of any space platforms owned or operated by the licensee, including at a minimum sufficient advance notification to the Administrator of such disposition to allow review and approval of the procedures proposed;

(k) The conditions that require an amendment of the license including any change:

(1) In ownership of the licensee;

(2) In citizenship of: The president, proprietor, or other chief executive officer of the licensee and, if the licensee is a corporation, the chairman of the board of directors, or if the licensee is a partnership, a general partner;

(3) In the operations of the licensee that would result in sensing activities outside the range of orbits and altitudes, the range of spatial resolution or instantaneous field of vision, or the spectral bands approved under paragraph (c) of this section, except in case of an emergency posing an imminent and substantial threat of harm to human life, property, the environment or the remote-sensing space system itself, in which cases the licensee shall attempt to obtain oral approval from the Administrator;

(l) That the licensee will notify the Administrator of any value-added activities that will be conducted by the licensee or by a subsidiary or affiliate.

Subpart C—Enforcement Procedures

§ 960.13 General.

Section 403(a) of the act authorizes the Administrator to take actions adverse to a licensee if the licensee fails to comply with the Act, these regulations, or any terms, conditions, or restrictions in the license. These adverse actions are:

(a) License sanctions, including modification, suspension, and termination of any licensee;

(b) Civil penalties not to exceed \$10,000 for each day of operation in violation of a license, regulation, or the Act; and

(c) Seizure of any object, record, or report if there is probable cause to believe that such object, record, or report is being or is likely to be used to commit a violation.

This subpart establishes uniform rules and procedures for these adverse actions.

§ 960.14 License sanctions.

(a) If the Administrator determines, on the basis of available information, that

the licensee is not in compliance with any applicable provision of the Act, any regulation, or any license condition or restriction, the Administrator may issue the licensee a Notice of License Sanction (NOLS) proposing to:

(1) Terminate the license;

(2) Suspend the license for a specified period of time or until certain stated requirements are met, or both; or

(3) Modify the license, to aid future enforcement efforts.

(b) The NOLS will contain:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provisions of the Act, regulation, or license allegedly violated;

(3) The nature and duration of the proposed sanction; and

(4) The effective date of the sanction, which is 30 days after the date of the NOLS unless the Administrator requires immediate termination of some or all licensed activities under paragraph (e) of this section or unless the licensee requests a hearing under paragraph (d) of this section.

(c) The NOLS also may propose to assess a civil penalty in accordance with § 960.15.

(d) Within 30 days after receipt of the NOLS, the licensee may request a hearing by serving a written request on the Administrator either in person or by certified or registered mail, return receipt requested, at the address specified in the NOLS. Such hearing shall be held in accordance with the procedures set forth at 15 CFR Part 904, Subpart C.

(e) If the Administrator determines that the licensee has substantially failed to comply with any provision of the Act, these regulations, or with any term, condition, or restriction of the license, the NOLS will include a finding to this effect and may require immediate termination of some or all licensed operations. For purposes of this section, "substantially fails to comply" means:

(1) Any failure to comply with a material term or condition of a license or of the Act or these regulations, which the Administrator has reasonable basis to believe is willful or intentional;

(2) Any failure to comply after notice by the Administrator;

(3) Any failure to comply with a material term or condition of a license which the Secretary of Defense determines clearly poses a threat to the national security or which the Secretary of State determines clearly poses a threat to international obligations of the United States.

(f) Any request for a hearing under paragraph (d) of this section will not delay immediate termination under this

paragraph and the licensee is entitled to treat the finding as final agency action for purposes of judicial review.

§ 960.15 Civil penalties.

Section 403(a)(3) of the Act authorizes the Administrator to assess civil penalties of up to \$10,000 for any violation of any requirement of the Act, these regulations or any term or condition of a license. Each day of operation in violation constitutes a separate violation. Such penalties will be assessed in accordance with the procedures set forth at 15 CFR Part 904, Subpart B.

§ 960.16 Seizure.

(a) If the Administrator determines that there is probable cause to believe that any object, record, or report was used, is being used or is likely to be used in violation of the Act, these regulations or the requirements of any license, the Administrator may seize any such item and issue the licensee a Notice of Seizure (NOS) containing:

(1) A description of the object, record, or report seized;

(2) A concise statement of the facts believed to show use or possible use in a violation; and

(3) A specific reference to the provisions of the Act, regulation, or license allegedly violated.

(b) Within 30 days after receipt of a NOS, the licensee may request a hearing by serving a written and dated request on the Administrator either in person or by certified or registered mail, return receipt requested, at the address specified in the notice. Such hearing shall be held in accordance with the procedures set forth at 15 CFR Part 904, Subpart C. For good cause shown, the Administrator may in his or her sole discretion return the seized item pending the outcome of the hearing.

[FR Doc. 87-15577 Filed 7-9-87; 9:52 am]

BILLING CODE 3510-08-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 184

[Docket No. 82N-0239]

Enzyme-Modified Fats; Affirmation of GRAS Status

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is affirming that

enzyme-modified milk powder, enzyme-modified butterfat, enzyme-modified steam-rendered chicken fat, and enzyme-modified refined beef fat are generally recognized as safe (GRAS) for use as direct human food ingredients. The safety of these ingredients has been evaluated under the comprehensive safety review conducted by the agency.

EFFECTIVE DATE: August 10, 1987.

FOR FURTHER INFORMATION CONTACT:

Hortense Macon, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C Street, SW., Washington, DC 20204, 202-472-5690.

SUPPLEMENTARY INFORMATION: In the Federal Register of November 23, 1984 (49 FR 46164), FDA published a proposal to affirm that enzyme-modified milk powder, enzyme-modified butterfat, enzyme-modified steam-rendered chicken fat, and enzyme-modified refined beef fat are GRAS for use as direct human food ingredients. FDA published the proposal in accordance with its announced review of GRAS and prior-sanctioned food ingredients.

In accordance with § 170.35 (21 CFR 170.35), copies of the scientific literature review and the report of the Select Committee on GRAS Substances (the Select Committee) on enzyme-modified fats are available for public review in the Dockets Management Branch (HFA-305), Food and Drug Administration, Room 4-62, 5600 Fishers Lane, Rockville, MD 20857. Copies of these documents also are available for public purchase from the National Technical Information Service, as announced in the proposal.

In addition to proposing to affirm the GRAS status of enzyme-modified milk powder, enzyme-modified butterfat, enzyme-modified steam-rendered chicken fat, and enzyme-modified refined beef fat, FDA gave public notice that it was unaware of any prior-sanctioned food uses for these ingredients other than the proposed conditions of use. Persons asserting additional or extended uses in accordance with approvals granted by the U.S. Department of Agriculture or FDA before September 6, 1958, were given notice to submit proof of those sanctions so that the safety of any prior-sanctioned uses could be determined. That notice was also an opportunity to have prior-sanctioned uses of enzyme-modified fats recognized by issuance of an appropriate regulation under Part 181—Prior Sanctioned Food Ingredients (21 CFR Part 181) or affirmed as GRAS under Part 184 or 186 (21 CFR Part 184 or 186), as appropriate.

FDA also gave notice that failure to submit proof of an applicable prior

sanction in response to the proposal would constitute a waiver of the right to assert that sanction at any future time.

No reports of prior-sanctioned uses for enzyme-modified milk powder, enzyme-modified butterfat, enzyme-modified steam-rendered chicken fat, or enzyme-modified refined beef fat were submitted in response to the proposal. Therefore, in accordance with the proposal, any right to assert a prior sanction for use of these ingredients under conditions different from those set forth in this final rule has been waived.

FDA received three comments on the proposal. Two comments were from producers and users of enzyme-modified fats, and one comment was from a producer and supplier of enzymes.

A summary of the comments and the agency's responses to them follow.

1. One comment from a producer of enzyme-modified fats noted that the proposed regulation provided for the preparation of enzyme-modified milk powder only from a milk powder source. The comment asserted that data contained in its original request for GRAS affirmation of enzyme-modified milk powder demonstrated that enzyme-modified milk powder is also prepared from other sources such as reconstituted milk powder, whole milk, concentrated or condensed whole milk, and evaporated milk. The comment suggested that the proposed affirmation is too restrictive and requested that the agency include the additional sources in the final regulation on enzyme-modified milk powder.

The agency has reviewed this request and has found that these additional sources were inadvertently omitted from the proposal. Based on its review of the data in agency files, FDA finds that reconstituted milk powder, whole milk, concentrated or condensed whole milk, evaporated milk, and milk powder have a history of safe use prior to 1958 in the preparation of enzyme-modified milk powder. Therefore, the agency has amended the final rule to permit the use of reconstituted milk powder, whole milk, concentrated or condensed whole milk, and evaporated milk, in addition to milk powder, as sources in the preparation of enzyme-modified milk powder.

2. The same comment also asserted that enzyme-modified butterfat is produced from milkfat as well as butterfat. The comment requested that the final rule be amended to reflect this fact.

The agency has reviewed this request and has found that this source was inadvertently not included in the proposal when it was published. Based on a review of agency data, FDA finds

that the use of milkfat has a history of safe use prior to 1958 in the preparation of enzyme-modified butterfat. In addition, the agency finds that the terms "butterfat" and "milkfat" identify the fatty portion of milk, and that it is this fatty portion that is enzyme modified. The agency considers milkfat derived from milk to be an appropriate source for the production of enzyme-modified butterfat. Therefore, the agency has amended the final rule to permit the use of milkfat as an additional source in the preparation of enzyme-modified butterfat.

3. One comment from a producer and user of enzyme-modified fats supported FDA's proposal to affirm enzyme-modified fats as GRAS.

The agency acknowledges this comment. Because this comment essentially agrees with FDA, the agency has not made any changes in the regulation as a result of this comment.

4. One comment from a producer and supplier of enzymes stated that esterase-lipase enzyme derived from *Mucor miehei* is approved for use as a flavor enhancer in cheeses, fats and oils, and milk products under § 173.140 (21 CFR 173.140), and that this enzyme product could also be used to prepare enzyme-modified fats. The comment stated that the proposed regulation should be amended to provide for the use of this food additive enzyme in the preparation of enzyme-modified fats.

The agency has reviewed the comment and finds that the proposal specifically provides for the use of GRAS enzymes in the production of GRAS enzyme-modified fats. Nonetheless, the use of esterase-lipase enzyme derived from *Mucor miehei* is regulated in § 173.140 as a flavor enhancer in a number of food categories including fats and oils. Therefore, because a food additive regulation exists that defines the proper use of this enzyme, the agency finds that it is unnecessary to modify § 184.1287 to include this food additive enzyme.

In the proposal, FDA stated that it would work with the Committee on Food Chemicals Codex of the National Academy of Sciences to develop acceptable specifications for enzyme-modified fats used as direct food ingredients and would incorporate those specifications into the regulation when they were developed. To date, however, work on the specifications is still incomplete. Until the specifications are developed, these ingredients for direct food uses must comply with the descriptions in their respective regulations and be of food-grade purity (21 CFR 170.30(h)(1) and 182.1(b)(3)).

The agency has previously considered the environmental effects of this rule as announced in the proposed rule of November 23, 1984 (49 FR 46184). No new information or comments have been received that would effect the agency's previous determination that there is no significant impact on the human environment and that an environmental impact statement is not required.

In accordance with the Regulatory Flexibility Act, the agency previously considered the potential effects that this rule would have on small entities, including small businesses. In accordance with section 605(b) of the Regulatory Flexibility Act, the agency has determined that no significant impact on a substantial number of small entities would derive from this action. FDA has not received any new information or comments that would alter its previous determination.

In accordance with Executive Order 12291, FDA has previously analyzed the potential economic effects of this final rule. As announced in the proposal, the agency has determined that the rule is not a major rule as determined by the Order. The agency has not received any new information or comments that would alter its previous determination.

The agency's findings of no major economic impact and no significant impact on a substantial number of small entities, and the evidence supporting these findings, are contained in a threshold assessment which may be seen in the Dockets Management Branch (address above).

List of Subjects in 21 CFR Part 184

Direct food ingredients; Food ingredients; Generally recognized as safe (GRAS) food ingredients.

Therefore, under the Federal Food, Drug, and Cosmetic Act, Part 184 is amended as follows:

PART 814—DIRECT FOOD SUBSTANCES AFFIRMED AS GENERALLY RECOGNIZED AS SAFE

1. The authority citation for 21 CFR Part 184 continues to read as follows:

Authority: Secs. 201(s), 402, 409, 701, 52 Stat. 1046-1047 as amended, 1055-1056 as amended, 72 Stat. 1784-1788 as amended (21 U.S.C. 321(s), 342, 348, 371); 21 CFR 5.10 and 5.61.

2. By adding new § 184.1287, to read as follows:

§ 184.1287 Enzyme-modified fats.

(a) Enzyme-modified refined beef fat, enzyme-modified butterfat, and enzyme-modified steam-rendered chicken fat are prepared from refined beef fat; butterfat

or milkfat; and steam-rendered chicken fat, respectively, with enzymes that are generally recognized as safe (GRAS). Enzyme-modified milk powder may be prepared with GRAS enzymes from reconstituted milk powder, whole milk, condensed or concentrated whole milk, evaporated milk, or milk powder. The lipolysis is maintained at a temperature that is optimal for the action of the enzyme until appropriate acid development is attained. The enzymes are then inactivated. The resulting product is concentrated or dried.

(b) FDA is developing food-grade specifications for these enzyme-modified ingredients in cooperation with the National Academy of Sciences. In the interim, the ingredients must be of purity suitable for their intended use.

(c) In accordance with § 184.1(b)(1), the ingredients are used in food with no limitation other than current good manufacturing practice. The affirmation of these ingredients as generally recognized as safe (GRAS) as direct human food ingredients is based upon the following current good manufacturing practice conditions of use:

(1) The ingredients are used as flavoring agents and adjuvants as defined in § 170.3(o)(12) of this chapter.

(2) The ingredients are used in food at levels not to exceed current good manufacturing practice.

(d) Prior sanctions for these ingredients different from the uses established in this section do not exist or have been waived.

Dated: June 30, 1987.

Sanford A. Miller,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 87-15656 Filed 7-9-87; 8:45 am]

BILLING CODE 4180-01-M

21 CFR Part 510

Animal Drugs, Feeds, and Related Products; Change of Sponsor Address

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of sponsor address for Fermenta Animal Health Co.

EFFECTIVE DATE: July 10, 1987.

FOR FURTHER INFORMATION CONTACT: David L. Gordon, Center for Veterinary Medicine (HFV-238), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-6243.

SUPPLEMENTARY INFORMATION:

Fermenta Animal Health Co. informed FDA of a change of address from 7528 Auburn Rd., P.O. Box 8001, Painesville, OH 44077, to 7410 NW. Tiffany Springs Parkway, Box 260, Kansas City, MO 64153-1865. The agency is amending 21 CFR 510.600(c) (1) and (2) to reflect the sponsor address change.

List of Subjects in 21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, Part 510 is amended as follows:

PART 510—NEW ANIMAL DRUGS

1. The authority citation for 21 CFR Part 510 is revised to read as follows:

Authority: Secs. 512, 701(a) (21 U.S.C. 360b, 371(a)); 21 CFR 5.10 and 5.83.

§ 510.600 [Amended]

2. Section 510.600 *Names, addresses, and drug labeler codes of sponsors of approved applications* is amended in paragraph (c)(1) in the entry for "Fermenta Animal Health Co.," and in paragraph (c)(2) in the entry for "054273" by revising the sponsor address to read "7410 NW. Tiffany Springs Parkway, Box 260, Kansas City, MO 64153-1865."

Dated: July 2, 1987.

Richard A. Carnevale,

Acting Associate Director for Scientific Evaluation, Center for Veterinary Medicine.

[FR Doc. 87-15693 Filed 7-9-87; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 286

[DoD Directive 5400.7 and DoD 5400.7-R]

DoD Freedom of Information Act Program

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule implements certain provisions of the Freedom of Information Reform Act of 1986, which required agency promulgation of regulations specifying a uniform scheduled of fees and guidelines for determining waiver or reduction of such fees. This rule conforms with the Office

of Management and Budget's (OMB) Uniform Freedom of Information Act Fee Schedule and Guidelines, and is published pursuant to the Freedom of Information Reform Act of 1986 (Pub. L. 99-570); section 954 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. 99-661), as amended by the Defense Technical Corrections Act of 1987 (Pub. L. 100-26).

EFFECTIVE DATE: August 10, 1987.

FOR FURTHER INFORMATION CONTACT: Charlie Y. Talbott, Office of the Assistant Secretary of Defense (Public Affairs) Washington, DC 20301-1400, Telephone (202) 697-1180.

SUPPLEMENTARY INFORMATION: 32 CFR Part 286 was published in the *Federal Register* on April 29, 1980. The interim rule on revision to 32 CFR Part 286 was published for public comment in the *Federal Register* on April 24, 1987, 52 FR 13641. Three public comments were received and taken into consideration in developing the final rule. All commentators desired that the Department of Defense liberalize its definitions of the media and freelance journalists beyond that established by OMB. The Department of Defense considers the OMB definitions practical, and will remain in conformance with those definitions. One commentator considered the policy on release of personnel names and duty addresses too restrictive. The policy was reviewed and it was determined that the balancing test between the individuals' right to privacy and the public's right to know remained the basic criteria in determining disclosure on a case-by-case basis. Consequently, the Department of Defense elects not to affect any change to the policy. One commentator revealed a discrepancy in the Department of Defense's application of fee waiver factors, which has now been corrected in the final rule.

List of Subjects in 32 CFR Part 286

Freedom of information.

Accordingly, 32 CFR Part 286 is revised as follows:

PART 286—DOD FREEDOM OF INFORMATION ACT PROGRAM

Subpart A—General Provisions

- Sec.
- 286.1 Purpose and applicability.
 - 286.3 DoD public information.
 - 286.5 Definitions.
 - 286.7 Policy.

Subpart B—FOIA Reading Rooms

- 286.9 Requirements.
- 286.11 Indexes.

Subpart C—Exemptions

- Sec.
- 286.12 General provisions.
 - 286.13 Exemptions.

Subpart D—For Official Use Only

- 286.15 General provisions.
- 286.17 Markings.
- 286.19 Dissemination and transmission.
- 286.21 Safeguarding FOUO information.
- 286.23 Termination, disposal and unauthorized disclosures.

Subpart E—Release and Processing Procedures

- 286.25 General provisions.
- 286.27 Initial determinations.
- 286.29 Appeals.
- 286.31 Judicial actions.

Subpart F—Fee Schedule

- 286.33 General provisions.
- 286.35 Collection of fees and fee rates.
- 286.37 Collection of fees and fee rates for technical data.

Subpart G—Reports

- 286.39 Reports control.
- 286.41 Annual report.

Subpart H—Education and Training

- 286.43 Responsibility and purpose.

Appendix A—Unified Commands—Processing Procedures for FOI Appeals

Appendix B—Addressing FOIA Requests

Appendix C—Litigation Status Sheet

Appendix D—Other Reason Categories

Appendix E—Record of Freedom of Information (FOI) Processing Cost (DD Form 2086)

Appendix F—DoD Freedom of Information Act Program Components

Authority: Public Law 99-570, secs. 1801-1804; Pub. L. 99-661, sec. 2328; 5 U.S.C. 552.

Subpart A—General Provisions

§ 286.1 Purpose and applicability.

(a) *Purpose.* The purpose of this part is to provide policies and procedures for the Department of Defense (DoD) implementation of the Freedom of Information Act and to promote uniformity in the DoD Freedom of Information Act (FOIA) Program. This part amplifies enclosures 2 through 7 of DoD Directive 5400.¹

(b) *Applicability.* (1) This part applies to the Office of the Secretary of Defense (OSD) (which includes for the purpose of this Regulation the Organization of the Joint Chiefs of Staff, Unified Commands and OSD administrative

support agencies), the Military Departments and the Defense Agencies (hereafter referred to as "DoD Components"), and takes precedence over all Component regulations that supplement the DoD FOIA Program. A list of DoD Components is at Appendix F.

(2) The National Security Agency records are subject to the provisions of this part only to the extent the records are not exempt under Pub. L. 86-36.

§ 286.3 DoD public information.

(a) *Public information.* The public has a right to information concerning the activities of its government. DoD policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people. A DoD record requested by a member of the public who follows rules established by proper authority in the Department of Defense shall be withheld only when it is exempt from mandatory public disclosure under the FOIA. In the event a requested record is exempt under the FOIA, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by the release of the record. In order that the public may have timely information concerning DoD activities, records requested through public information channels by news media representatives that would not be withheld if requested under the FOIA should be released upon request. Prompt responses to requests for information from news media representatives should be encouraged to eliminate the need for these requesters to invoke the provisions of the FOIA and thereby assist in providing timely information to the public. Similarly, requests from other members of the public for information should continue to be honored through appropriate means even though the request does not qualify under FOIA requirements.

(b) *Control system.* A request for records that invokes the FOIA shall enter a formal control system designed to ensure compliance with the FOIA. A release determination must be made and the requester informed within the time limits specified in this part. Any request for DoD records that either explicitly or implicitly cites the FOIA shall be processed under the provisions of this part or under the Privacy Act, when the request is from the subject of the records requested (see § 286.7(d)).

¹Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 301, 5801 Tabor Avenue, Philadelphia, PA 19120.

§ 286.5 Definitions.

(a) *Definitions.* As used in this part, the following terms and meanings shall be applicable.

(b) *FOIA request.* A written request for DoD records, made by a member of the public, and either explicitly or implicitly invokes the FOIA, DoD Directive 5400.7, this part or DoD Component supplementing regulations or instructions.

(c) *Agency record.* (1) The products of data compilation, regardless of physical form or characteristics, made or received by a DoD Component in connection with the transaction of public business and preserved by a DoD Component primarily as evidence of the organization, policies, functions, decisions, or procedures of the DoD Component.

(2) The following are not included within the definition of the word "record":

(i) Library and museum material made, acquired, and preserved solely for reference or exhibition.

(ii) Objects or articles, such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles and equipment, whatever their historical value, or value as evidence.

(iii) Commercially exploitable resources, including but not limited to:

(A) Maps, charts, map compilation manuscripts, map research materials and data if not created or used as primary sources of information about organizations, policies, functions, decisions, or procedures of a DoD Component.

(B) Computer software, if not created or used as primary sources of information about organizations, policies, functions, decisions, or procedures of a DoD Component. (This does not include the underlying data which is processed and produced by such software and which may in some instances be stored with the software).

(iv) Unaltered publications and processed documents, such as regulations, manuals, maps, charts, and related geophysical materials, that are available to the public through an established distribution system with or without charges.

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

(vi) Personal records of an individual not subject to agency creation or retention requirements, created and maintained primarily for the convenience of an agency employee, and not distributed to other agency employees for their official use.

(vii) Information stored within a computer for which there is no existing computer program or printout.

(3) A record must exist and be controlled by the Department of Defense at the time of the request to be considered subject to this part. There is no obligation to create, compile, or obtain a record to satisfy an FOIA request.

(d) *DoD component.* An element of the Department of Defense, as defined in § 286.1(b) authorized to receive and act independently on FOIA requests. A DoD Component has its own initial denial authority (IDA) or appellate authority, and general counsel.

(e) *Initial denial authority.* An official who has been granted authority by the head of a DoD Component to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure.

(f) *Appellate authority.* The head of the DoD Component or the Component head's designee having jurisdiction for this purpose over the record.

(g) *Administrative appeal.* A request by a member of the general public, made under the FOIA, asking the appellate authority of a DoD Component to reverse an IDA decision to withhold all or part of a requested record or to deny a request for waiver or reduction of fees.

§ 286.7 Policy.

(a) *Compliance with the Freedom of Information Act (FOIA).* DoD personnel are expected to comply with the provisions of the FOIA and this part in both letter and spirit. This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create conditions that will promote public trust.

(b) *Openness with the public.* The Department of Defense shall conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records not specifically exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.

(c) *Avoidance of procedural obstacles.* DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly. Components shall provide assistance to requesters to help them understand and comply with procedures established by this part and any supplemental regulations published by the DoD Components.

(d) *Prompt Action on Requests.* When a member of the public complies with the procedures established in this Regulation for obtaining DoD records, the request shall receive prompt attention; a reply shall be dispatched within 10 working days, unless a delay is authorized. In circumstances where a Component has a significant number of requests, e.g., 10 or more, the requests will be processed in order of receipt. This does not; however, preclude a Component from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt. Requests by individuals for access to records about themselves are processed under the provisions of the respective Act cited in the request. Requests that cite *both Acts or neither Act* are processed under *both Acts*, using the fee provisions of the Federal Privacy Act and the time limits of the FOIA. If access is controlled by another federal statute, follow the provisions of the controlling statute and § 286.13(a)(3). For further details, see DoD 5400.11-R.² Even though a request that invokes the FOIA is administratively processed under Privacy Act procedures, no record shall be withheld that would be released under FOIA procedures.

(e) *Use of exemptions.* Records that may be withheld under the exemptions outlined in Subpart C shall be made available to the public when it is determined that no governmental interest will be jeopardized by their release. Determination of jeopardy to governmental interest is within the sole discretion of the Component, consistent with statutory requirements, security classification requirements, or other requirements of law.

(f) *Public Domain.* Nonexempt records released under the authority of this part are considered to be in the public domain. Nonexempt records maintained in a DoD Component's Public Reading Room, or which can be made available in the Public Reading Room within a short time frame (15 minutes or less) are considered to be in the public domain. Exempt records released pursuant to this part or other statutory or regulatory authority, however, may be considered to be in the public domain only when their release constitutes a waiver of the FOIA exemption. When the release does not constitute such a waiver, such as when disclosure is made to a properly constituted advisory committee or to a Congressional Committee, the released

² Copies may be obtained, if needed, from the U.S. Dept of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

records do not lose their exempt status. Also, while authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the same individual seeks the records in a private or personal capacity.

(g) *Creating a record.* A record must exist and be in the possession and control of the Department of Defense at the time of the request to be considered subject to this part. Mere possession of a record does not presume departmental control and such records, or identifiable portions thereof, would be referred to the originating Agency for direct response to the requester. There is no obligation to create nor compile a record to satisfy an FOIA request. A DoD Component, however, may compile a new record when so doing would result in a more useful response to the requester, or be less burdensome to the agency than providing existing records, and the requester does not object. Cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee which would be charged for providing the existing record. Fee assessment for direct search, review (in the case of commercial requesters), and duplication associated with the request shall be in accordance with § 286.33(b).

(h) *Description of requested record.* (1) Identification of the record desired is the responsibility of the member of the public who requests a record. The requester must provide a description of the desired record, that enables the Government to locate the record with a reasonable amount of effort. The Act does not authorize "fishing expeditions." When a DoD Component receives a request that does not "reasonably describe" the requested record, it shall notify the requester of the defect. The defect should be highlighted in a specificity letter, asking the requester to provide the type of information outlined in § 286.7(h)(2). Components are not obligated to act on the request until the requester responds to the specificity letter. When practicable, Components shall offer assistance to the requester in identifying the records sought and in reformulating the request to reduce the burden on the agency in complying with the Act.

(2) The following guidelines are provided to deal with "fishing expedition" requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories.

(i) Category I is file-related and includes information such as type of

record (for example, memorandum), title, index citation, subject area, date the record was created, and originator.

(ii) Category II is event-related and includes the circumstances that resulted in the record being created or the date and circumstances surrounding the event the record covers.

(3) Generally, a record is not reasonably described unless the description contains sufficient Category I information to permit the conduct of an organized, nonrandom search based on the Component's filing arrangements and existing retrieval systems, or unless the record contains sufficient Category II information to permit inference of the Category I elements needed to conduct such a search.

(4) The following guidelines deal with requests for personal records. Ordinarily, when personal identifiers are provided only in connection with a request for records concerning the requester, only records retrievable by personal identifiers need be searched. Search for such records may be conducted under Privacy Act procedures. No record may be denied that is releasable under the FOIA.

(5) The above guidelines notwithstanding, the decision of the DoD Component concerning reasonableness of description must be based on knowledge of its files. If the description enables DoD Component personnel to locate the record with reasonable effort, the description is adequate.

(i) *Referrals.* (1) A request received by a DoD Component having no records responsive to a request shall be referred routinely to another DoD Component, if the other Component confirms that it has the requested record, and this belief can be confirmed by the other DoD Component. In cases where the Component receiving the request has reason to believe that the existence or nonexistence of the record may in itself be classified, that Component will consult the DoD Component having a cognizance over the record in question before referring the request. If the DoD Component that is consulted determines that the existence or nonexistence of the record is in itself classified, the requester shall be so notified by the DoD Component originally receiving the request, and no referral shall take place. Otherwise, the request shall be referred to the other DoD Component, and the requester shall be notified of any such referral. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester.

(2) Whenever a record or a portion of a record is, after prior consultation,

referred to another DoD Component or to a government agency outside of the Department of Defense for a release determination and direct response, the requester shall be informed of the referral. Referred records shall only be identified to the extent consistent with security requirements.

(3) A DoD Component shall refer an FOIA request for a classified record that it holds to another DoD Component or agency outside the DoD, if the record originated in the other DoD Component or outside agency or if the classification is derivative. In this situation, provide the record and a release recommendation on the record with the referral action.

(4) A DoD Component may also refer a request for a record that it originated to another DoD Component or agency when the record was created for the use of the other DoD Component or agency. The DoD Component or agency for which the record was created may have an equally valid interest in withholding the record as the DoD Component that created the record. In such situations, provide the record and a release recommendation on the record with the referral action. An example of such a situation is a request for audit reports prepared by the Defense Contract Audit Agency. These advisory reports are prepared for the use of contracting officers and their release to the audited contractor should be at the discretion of the contracting officer. Any FOIA request shall be referred to the appropriate contracting officer and the requester shall be notified of the referral.

(5) Within DoD, a Component shall ordinarily refer an FOIA request for a record that it holds, but that was originated by another DoD Component or that contains substantial information obtained from another DoD Component, to that Component for direct response, after direct coordination and obtaining concurrence from the Component. The requester then shall be notified of such referral. DoD Components shall not, in any case, release or deny such records without prior consultation with the other DoD Component.

(6) DoD Components that receive referred requests shall answer them in accordance with the time limits established by the FOIA and this part. Those time limits shall begin to run upon receipt of the referral by the official designated to respond.

(7) Agencies outside the Department of Defense that are subject to the FOIA:

(i) A Component may refer an FOIA request for any record that originated in an agency outside the DoD or that is

based on information obtained from an outside agency to the agency for direct response to the requester after coordination with the outside agency, if that agency is subject to FOIA. Otherwise, the Component must respond to the request.

(ii) A DoD Component shall not honor any FOIA request for investigative, intelligence, or any other type of records that are on loan to the DoD for a specific purpose, if the records are restricted from further release and so marked. Such requests shall be referred to the agency that provided the record.

(iii) Notwithstanding anything to the contrary in § 286.7(i), a Component shall forward a request for National Security Council (NSC) documents or White House files to NSC for a direct response to the requester. DoD documents in which the NSC has a concurrent reviewing interest shall be forwarded to DFOISR, OASD (Public Affairs) which shall effect this coordination with the NSC, and return the documents to the originating agency after the NSC review and determination.

(8) To the extent referrals are consistent with the policies expressed by this paragraph, referrals between offices of the same DoD Component are authorized.

(9) On occasion, the DoD receives FOIA requests for Government Accounting Office (GAO) documents containing DoD information, either directly from requesters, or as referrals from the GAO. The GAO is outside the Executive Branch, and as such, all FOIA requests for GAO documents containing DoD information will be processed under the provisions of Security Review or Mandatory Declassification Review (MDR) Directives (DoD 5200.1-R³ and DoD Directive 5230.9⁴). Requests received in DoD for unclassified GAO reports containing DoD information will be transferred to the GAO Distribution Center, ATTN: DHISF, P.O. Box 6015, Gaithersburg, MD 20877. Requests received in the DoD for classified GAO documents (for documents unidentifiable as to classification) will be referred to the GAO Office of Security and Safety, Washington, DC 20548. After internal review, the GAO will refer the request and documents to DoD, Office of the Inspector General, and the Component will refer the action to the Assistant Secretary of Defense (Public Affairs), Directorate for Freedom of Information and Security Review for processing under Security Review or

MDR provisions. (See DoD Directive 7650.2⁵).

(j) *Authentication.* Records provided under this part shall be authenticated with an appropriate seal, whenever necessary, to fulfill an official Government or other legal function. This service, however, is in addition to that required under FOIA and is not included in the FOIA fee schedule. DoD Components may charge for the service at a rate of \$5.20 for each authentication.

(k) *Unified and specified commands.*

(1) The Unified Commands are placed under the jurisdiction of the OSD, instead of the administering Military Department, only for the purpose of administering the DoD FOIA Program. This policy represents an exception to the policies directed in DoD Directive 5100.3⁶ it authorizes and requires the Unified Commands to process FOI requests in accordance with DoD Directive 5400.7 and this part. The Unified Commands shall forward directly to the Office of the Assistant Secretary of Defense (Public Affairs), OASD(PA), all correspondence associated with the appeal of an initial denial for records under the provisions of the FOIA. Procedures to effect this administrative requirement are outlined in Appendix A.

(2) The Specified Commands remain under the jurisdiction of the administering Military Department. The Commands shall designate IDAs within their headquarters; however, the appellate authority shall reside with the Military Department.

(l) *Records management.* FOIA records shall be maintained and disposed of in accordance with DoD Component Disposition instructions and schedules.

Subpart B—FOIA Reading Rooms

§ 286.9 Requirements.

(a) *Reading room.* Each Component shall provide an appropriate facility or facilities where the public may inspect and copy or have copied the materials described below. DoD Components may share reading room facilities if the public is not unduly inconvenienced. The cost of copying shall be imposed on the person requesting the material in accordance with the provisions of Subpart F.

(b) *Material availability.* The FOIA requires that so-called "(a)(2)" materials be made available in the FOI reading room for inspection and copying, unless such materials are published and copies are offered for sale. Identifying details that, if revealed,

would create a clearly unwarranted invasion of personal privacy may be deleted from "(a)(2)" materials made available for inspection and copying. In every case, justification for the deletion must be fully explained in writing. However, a DoD Component may publish in the Federal Register a description of the basis upon which it will delete identifying details of particular types of documents to avoid clearly unwarranted invasions of privacy. In appropriate cases, the DoD Component may refer to this description rather than write a separate justification for each deletion. So-called "(a)(2)" materials are:

(1) Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases, as defined in 5 U.S.C. 551, that may be cited, used, or relied upon as precedents in future adjudications.

(2) Statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register.

(3) Administration staff manuals and instructions, or portions thereof, that establish DoD policy or interpretations of policy that affect a member of the public. This provision does not apply to instructions for employees on tactics and techniques to be used in performing their duties, or to instructions relating only to the internal management of the DoD Component. Examples of manuals and instructions not normally made available are:

(i) Those issued for audit, investigation, and inspection purposes, or those that prescribe operational tactics, standards of performance, or criteria for defense, prosecution, or settlement of cases.

(ii) Operations and maintenance manuals and technical information concerning munitions, equipment, systems, and foreign intelligence operations.

§ 286.11 Indexes.

(a) *"(a)(2)" materials.* (1) Each DoD Component shall maintain in each facility prescribed in § 286.9(a) and index of materials described in § 286.9(b) that are issued, adopted, or promulgated, after July 4, 1976. No "(a)(2)" materials issued, promulgated, or adopted after July 4, 1967 that are not indexed and either made available or published may be relied upon, used or cited as precedent against any individual unless such individual has actual and timely notice of the contents of such materials. Such materials issued, promulgated, or adopted before July 4, 1967, need not be indexed, but must be

³ See footnote 2 to § 286.7(d).

⁴ See footnote 1 to § 286.3(a).

⁵ See footnote 1 to § 286.3(a).

made available upon request if not exempted under this part.

(2) Each DoD Component shall promptly published quarterly or more frequently, and distribute, by sale or otherwise, copies of each index of "(a)(2)" materials or supplements thereto unless it publishes in the Federal Register an order containing a determination that publication is unnecessary and impracticable. A copy of each index or supplement not published shall be provided to a requester at a cost not to exceed the direct cost of duplication as set forth in Subpart F of this part.

(3) Each index of "(a)(2)" materials or supplement thereto shall be arranged topically or by descriptive words rather than by case name or numbering systems so that members of the public can readily locate material. Case name and numbering arrangements, however, may also be included for DoD Component convenience.

(b) *Other materials.* (1) Any available index of DoD Component material published in the Federal Register, such as material required to be published by section 552(a)(1) of the FOIA, shall be made available in DoD Component FOIA reading rooms.

(2) Although not required to be made available in response to FOIA requests or made available in FOIA Reading Rooms, "(a)(1)" materials shall, when feasible, be made available in FOIA reading rooms for inspection and copying. Examples of "(a)(1)" materials are: Descriptions of an agency's central and field organization, and to the extent they affect the public rules of procedures, descriptions of forms available, instruction as to the scope and contents of papers, reports, or examinations, and any amendment, revisions, or report of the aforementioned.

Subpart C—Exemptions

§ 286.12 General provisions.

(a) *General.* Records that meet the exemption criteria in § 286.13 may be withheld from public disclosure and need not be published in the Federal Register, made available in a library reading room, or provided in response to an FOIA request.

(b) *Jeopardy of government interest.* An exempted record, other than those being withheld pursuant to Exemptions 1, 3 or 6, shall be made available upon the request of any individual when, in the judgment of the releasing DoD Component or higher authority, no jeopardy to government interest would be served by release. It is appropriate for DoD Components to use their

discretionary authority on a case-by-case basis in the release of given records. If a DoD Component determines that a record requested under the FOIA meets the Exemption 4 withholding criteria set forth in this part the DoD Component shall not ordinarily exercise its discretionary power to release, absent circumstances in which a compelling public interest will be served by release of that record. Further guidance on this issue may be found at § 286.13(a)(4) and § 286.27(h).

§ 286.13 Exemptions.

(a) *FOIA exemptions.* The following types of records may be withheld in whole or in part from public disclosure unless otherwise prescribed by law.

(1) *Number 1.* Those properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by executive order and implemented by regulations, such as DoD 5200.1-R. Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures in DoD 5200.1-R, section 2-204f apply.

(2) *Number 2.* Those containing or constituting rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or practices of a DoD Component if their release to the public would substantially hinder the effective performance of a significant function of the Department of Defense and they do not impose requirements directly on the general public. Examples include:

(i) Those operating rules, guidelines, and manuals for DoD investigators, inspectors, auditors, or examiners that must remain privileged in order for the DoD Component to fulfill a legal requirement.

(ii) Personnel and other administrative matters, such as examination questions and answers used in training courses or in the determination of the qualifications of candidates for employment, entrance on duty, advancement, or promotion.

(iii) Lists of DoD personnel names and duty addresses (civilian and military) created primarily for internal, trivial, housekeeping purposes for which there is no legitimate public interest or benefit. This exemption is appropriate when it would impose an administrative burden to process the request, and the requester is not seeking the information for the benefit of the general public (see also § 286.13(a)(6)(ii)).

(3) *Number 3.* Those concerning matters that a statute specifically exempts from disclosure by terms that

permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. Examples of statutes are:

(i) National Security Agency Information Exemption, Pub. L. 86-36, section 6.

(ii) Patent Secrecy, 35 U.S.C. 181 through 188. Any records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy Orders have been issued.

(iii) Restricted Data and Formerly Restricted Data, 42 U.S.C. 2162.

(iv) Communication Intelligence, 18 U.S.C. 798.

(v) Authority to Withhold From Public Disclosure Certain Technical Data, 10 U.S.C. 130 and 32 CFR Part 250.

(vi) Confidentiality of Medical Quality Records; Qualified Immunity Participants, 10 U.S.C. 1102.

(4) *Number 4.* Those containing trade secrets or commercial or financial information that a DoD Component receives from a person or organization outside the government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the government's ability to obtain necessary information in the future; or impair some other legitimate government interest. Examples include records that contain:

(i) Commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary data.

(ii) Statistical data and commercial or financial information concerning contract performance, income, profits, losses, and expenditures, if offered and received in confidence from a contractor or potential contractor.

(iii) Personal statements given in the course of inspections, investigations, or audits, when such statements are received in confidence from the individual and retained in confidence because they reveal trade secrets or commercial or financial information normally considered confidential or privileged.

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

(v) Scientific and manufacturing process or developments concerning technical or scientific data or other information submitted with an application for a research grant, or with a report while research is in progress.

(vi) Technical or scientific data developed by a contractor or subcontractor exclusively at private expense, and technical or scientific data developed in part with federal funds and in part at private expense, wherein the contractor or subcontractor has retained legitimate proprietary interests in such data in accordance with Title 10, U.S.C. 2320 through 2321 and DoD Federal Acquisition Regulation Supplement (DFARS), Subpart 27.4. Technical data developed exclusively with federal funds may be withheld under exemption 3 if it meets the criteria of Title 10, U.S.C. 130 and 32 CFR Part 250 (see § 286.13(a)(3)(v)).

(5) *Number 5.* Except as provided in paragraphs (a)(5)(iii) through (v) of this section, internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, that are reflected in records pertaining to the decision-making process of an agency, whether within or among agencies (as defined in 5 U.S.C. 552(e)) or within or among DoD Components.

(i) Examples include:

(A) The nonfactual portions of staff papers, to include after-action reports and situation reports containing staff evaluations, advice, opinions or suggestions.

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

(C) Those nonfactual portions of evaluations by DoD Component personnel of contractors and their products.

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

(E) Trade secret or other confidential research development, or commercial information owned by the Government, where premature release is likely to affect the government's negotiating position or other commercial interests.

(F) Records that are exchanged among agency personnel and within and among DoD Components or agencies as part of the preparation for anticipated administrative proceeding by an agency or litigation before any Federal, State, or military court, as well as records that qualify for the attorney-client privilege.

(G) Those portions of official reports of inspection, reports of the Inspector General, audits, investigations, or surveys pertaining to safety, security, or the internal management, administration, or operation of one or more DoD Components, when these records have traditionally been treated by the courts as privileged against disclosure in litigation.

(ii) If any such intra or interagency record or reasonable segregable portion of such record hypothetically would be made available routinely through the "discovery process" in the course of litigation with the agency, i.e., the process by which litigants obtain information from each other that is relevant to the issues in a trial or hearing, then it should not be withheld from the general public even though discovery has not been sought in actual litigation. If, however, the information hypothetically would only be made available through the discovery process by special order of the court based on the particular needs of a litigant, balanced against the interests of the agency in maintaining its confidentiality, then the record or document need not be made available under this part.

(iii) Intra or interagency memoranda or letters that are factual, or those reasonably segregable portions that are factual, are routinely made available through "discovery," and shall be made available to a requester, unless the factual material is otherwise exempt from release, inextricably intertwined with the exempt information, so fragmented as to be uninformative, or so redundant of information already available to the requester as to provide no new substantive information.

(iv) A direction or order from a superior to a subordinate, though contained in an internal communication, generally cannot be withheld from a requester if it constitutes policy guidance or a decision, as distinguished from a discussion of preliminary matters or a request for information or advice that would compromise the decision-making process.

(v) An internal communication concerning a decision that subsequently has been made a matter of public record must be made available to a requester when the rationale for the decision is expressly adopted or incorporated by reference in the record containing the decision.

(6) *Number 6.* Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to the requester would result in a clearly unwarranted invasion of personal privacy.

(i) Examples of other files containing personal information similar to that contained in personnel and medical files include:

(A) Those compiled to evaluate or adjudicate the suitability of candidates for civilian employment or membership in the Armed Forces, and the eligibility of individuals (civilian, military, or contractor employees) for security clearances, or for access to particularly sensitive classified information.

(B) Files containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken.

(ii) In determining whether the release of information would result in a "clearly unwarranted invasion of personal privacy," consideration shall be given to the stated or ascertained purpose of the request. When determining whether a release is "clearly unwarranted," the public interest in satisfying this purpose must be balanced against the sensitivity of the privacy interest being threatened. One example of such is lists of names and duty addresses of DoD personnel (civilian and military) assigned to units that are sensitive, routinely deployable, or stationed in foreign territories. Release of such information could aid in the targeting of DoD employees and their families by terrorists (see also § 286.13(a)(2)(iii)). This exemption shall not be exercised in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family.

(iii) Individual's personnel, medical, or similar file may be withheld from them or their designated legal representative only to the extent consistent with 32 CFR Part 286a.

(iv) A clearly unwarranted invasion of the privacy of the persons identified in a personnel, medical or similar record may constitute a basis for deleting those reasonably segregable portions of that record, even when providing it to the subject of the record.

(7) *Number 7.* Records or information compiled for law enforcement purposes;

i.e., civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law.

(i) This exemption applies, however, only to the extent that production of such law enforcement records or information could result in the following:

(A) Could reasonably be expected to interfere with enforcement proceedings.

(B) Would deprive a person of the right to a fair trial or to an impartial adjudication.

(C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy of a living person, including surviving family members of an individual identified in such a record.

(D) Could reasonably be expected to disclose the identity of a confidential source, including a source within the DoD, a State, local, or foreign agency or authority, or any private institution which furnishes the information on a confidential basis.

(E) Could disclose information furnished from a confidential source and obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation.

(F) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

(G) Could reasonably be expected to endanger the life or physical safety of any individual.

(ii) Examples include:

(A) Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

(B) The identity of firms or individuals being investigated for alleged irregularities involving contracting with Department of Defense when no indictment has been obtained nor any civil action filed against them by the United States.

(C) Information 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 agency or office within a DoD Component. National security intelligence investigations include background security investigations and those investigations conducted for the

purpose of obtaining affirmative or counterintelligence information.

(iii) The right of individual litigants to investigative records currently available by law (such as, the Jencks Act, 18 U.S.C. 3500) is not diminished.

(iv) When the subject of an investigative record is the requester of the record, it may be withheld only as authorized by 32 CFR Part 286a.

(v) *Exclusions.* Excluded from the above exemption are the following two situations applicable to the DoD:

(A) Whenever a request is made which involves access to records or information compiled for law enforcement purposes, and the investigation or proceeding involves a possible violation of criminal law where there is reason to believe that the subject of the investigation or proceeding is unaware of its pendency, and the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, Components may, during only such times as that circumstance continues, treat the records or information as not subject to exemption number 7. In such situation, the response to the requester will state that *no records* were found.

(B) Whenever informant records maintained by a criminal law enforcement organization within a DoD Component under the informant's name or personal identifier are requested by a third party using the informant's name or personal identifier, the Component may treat the records as not subject to exemption number 7, unless the informant's status as an informant has been officially confirmed. If it is determined that the records are not subject to exemption 7, the response to the requester will state that *no records* were found.

(8) *Number 8.* Those contained in or related to examination, operation or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

(9) *Number 9.* Those containing geological and geophysical information and data (including maps) concerning wells.

Subpart D—For Official Use Only

§ 286.15 General provisions.

(a) *General.* Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public for one or more of the reasons cited in FOIA Exemptions 2 through 9 shall be considered as being for official use only. *No other material shall be*

considered or marked "For Official Use Only" (FOUO), and FOUO is not authorized as an anemic form of classification to protect national security interests.

(b) *Prior FOUO application.* The prior application of FOUO markings is not a conclusive basis for withholding a record that is requested under the FOIA. When such a record is requested, the information in it shall be evaluated to determine whether, under current circumstances, FOIA exemptions apply in withholding the record or portions of it. If any exemption or exemptions apply or applies, it may nonetheless be released when it is determined that no governmental interest will be jeopardized by its release.

(c) *Historical papers.* Records such as notes, working papers, and drafts retained as historical evidence of DoD Component actions enjoy no special status apart from the exemptions under the FOIA.

(d) *Time to mark records.* The marking of records at the time of their creation provides notice of FOUO content and facilitates review when a record is requested under the FOIA. Records requested under the FOIA that do not bear such markings, shall not be assumed to be releasable without examination for the presence of information that requires continued protection and qualifies as exempt from public release.

(e) *Distribution statement.* Information in a technical document that requires a distribution statement pursuant to DoD Directive 5230.24⁶ shall bear that statement and shall not be marked FOUO.

§ 286.17 Markings.

(a) *Location of markings.* (1) An unclassified document containing FOUO information shall be marked "For Official Use Only" at the bottom on the outside of the front cover (if any), on the first page, on the back page, and on the outside of the back cover (if any).

(2) Within a classified document, an individual page that contains both FOUO and classified information shall be marked at the top and bottom with the highest security classification of information appearing on the page.

(3) Within a classified or unclassified document, an individual page that contains FOUO information but no classified information shall be marked "For Official Use Only" at the bottom of the page.

(4) Other records, such as, photographs, films, tapes, or slides, shall

⁶ See footnote 1 to § 286.1(a).

be marked "For Official Use Only" or "FOUO" in a manner that ensures that a recipient or viewer is aware of the status of the information therein.

(5) FOUO material transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the FOUO marking. This may be accomplished by typing or stamping the following statement on the record prior to transfer:

This document contains information
EXEMPT FROM MANDATORY
DISCLOSURE under the FOIA.
Exemptions.....apply.

§ 286.19 Dissemination and transmission.

(a) *Release and transmission procedures.* Until FOUO status is terminated, the release and transmission instructions that follow apply:

(1) FOUO information may be disseminated within DoD Components and between officials of DoD Components and DoD Contractors, consultants, and grantees to conduct official business for the Department of Defense. Recipients shall be made aware of the status of such information, and transmission shall be by means that preclude unauthorized public disclosure. Transmittal documents shall call attention to the presence of FOUO attachments.

(2) DoD holders of FOUO information are authorized to convey such information to officials in other departments and agencies of the executive and judicial branches to fulfill a government function, except to the extent prohibited by the Privacy Act. Records thus transmitted shall be marked "For Official Use Only", and the recipient shall be advised that the information has been exempted from public disclosure, pursuant to the FOIA, and that special handling instructions do or do not apply.

(3) Release of FOUO information to Members of Congress is governed by DoD Directive 5400.4.⁷ Release to the General Accounting Office (GAO) is governed by DoD Directive 7650.1.⁷ Records released to the Congress or GAO should be reviewed to determine whether the information warrants FOUO status. If not, prior FOUO markings shall be removed or effaced. If withholding criteria are met, the records shall be marked FOUO and the recipient provided an explanation for such exemption and marking. Alternatively, the recipient may be requested, without marking the record, to protect against its public disclosure for reasons that are explained.

(b) *Transporting FOUO information.* Records containing FOUO information shall be transported in a manner that precludes disclosure of the contents. When not commingled with classified information, FOUO information may be sent via first-class mail or parcel post. Bulky shipments, such as distributions of FOUO Directives or testing materials, that otherwise qualify under postal regulations may be sent by fourth-class mail.

(c) *Electrically transmitted messages.* Each part of electrically transmitted messages containing FOUO information shall be marked appropriately. Unclassified messages containing FOUO information shall contain the abbreviation "FOUO" before the beginning of the text. Such messages shall be transmitted in accordance with communications security procedures in ACP-121 (US Supp 1) for FOUO information.

§ 286.21 Safeguarding FOUO information.

(a) *During duty hours.* During normal working hours, records determined to be FOUO shall be placed in an out-of-sight location if the work area is accessible to non-governmental personnel.

(b) *During nonduty hours.* At the close of business, FOUO records shall be stored so as to preclude unauthorized access. Filing such material with other unclassified records in unlocked files or desks, etc., is adequate when normal U.S. Government or government-contractor internal building security is provided during nonduty hours. When such internal security control is not exercised, locked buildings or rooms normally provide adequate after-hours protection. If such protection is not considered adequate, FOUO material shall be stored in locked receptacles such as file cabinets, desks, or bookcases. FOUO records that are subject to the provisions of Pub. L. 86-36 shall meet the safeguards outlined for that group of records.

§ 286.23 Termination, disposal and unauthorized disclosures.

(a) *Termination.* The originator or other competent authority, e.g., initial denial and appellate authorities, shall terminate "For Official Use Only" markings or status when circumstances indicate that the information no longer requires protection from public disclosure. When FOUO status is terminated, all known holders shall be notified, to the extent practical. Upon notification, holders shall efface or remove the "For Official Use Only" markings, but records in file or storage need not be retrieved solely for that purpose.

(b) *Disposal.* (1) Nonrecord copies of FOUO materials may be destroyed by tearing each copy into pieces to preclude reconstructing, and placing them in regular trash containers. When local circumstances or experience indicates that this destruction method is not sufficiently protective of FOUO information, local authorities may direct other methods but must give due consideration to the additional expense balanced against the degree of sensitivity of the type of FOUO information contained in the records.

(2) Record copies of FOUO documents shall be disposed of in accordance with the disposal standards established under 44 U.S.C. Chapter 33, as implemented by DoD Component instructions concerning records disposal.

(c) *Unauthorized disclosure.* The unauthorized disclosure of FOUO records does not constitute an unauthorized disclosure of DoD information classified for security purposes. Appropriate administrative action shall be taken, however, to fix responsibility for unauthorized disclosure whenever feasible, and appropriate disciplinary action shall be taken against those responsible. Unauthorized disclosure of FOUO information that is protected by the Privacy Act may also result in criminal sanctions against responsible persons. The DoD Component that originated the FOUO information shall be informed of its unauthorized disclosure.

Subpart E—Release and Processing Procedures

§ 286.25 General provisions.

(a) *Public information.* (1) 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 FOIA may be denied only when:

(i) The record is subject to one or more of the exemptions in Subpart C of this part, and the government's interest will be jeopardized by its release.

(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

⁷ See footnote 1 to § 286.1(a).

information in a record is requested by the subject of the record or his attorney, notarization of the request may be required.

(2) Individuals seeking DoD information should address their FOI requests to one of the addresses listed in Appendix B.

(b) *Requests from private parties.* The provisions of the FOIA are reserved for persons with private interests as opposed to federal or foreign governments seeking information. Requests from private persons will be made in writing, and will clearly show all other addressees within the federal government to whom the request was also sent. This procedure will reduce processing time requirements, and ensure better inter and intra-agency coordination. Foreign governments seeking information from Department of Defense Components should use established official channels for obtaining information. Release of records to individuals under the FOIA is considered public release of information, except as provided for in § 286.7(f).

(c) *Requests from government officials.* Requests from officials of state, or local governments for DoD Component records shall be honored on an expeditious basis whenever possible. For purposes of determining whether the record or records shall be provided, such officials acting in an individual capacity shall be considered the same as any other requester.

(d) *Privileged release to officials.* (1) Subject to the provisions of DoD 5200.1-R, applicable to classified information, DoD Directive 5400.11, applicable to personal privacy, or other applicable law, records exempt from release under Subpart C of this part may be authenticated and released, in accordance with DoD Component regulations, to officials requesting them on behalf of local, state or federal governmental bodies, whether legislative, executive, administrative, or judicial, as follows:

(i) To Congress, in accordance with DoD Directive 5400.4.

(ii) To the Federal courts, whenever ordered by officers of the court as necessary for the proper administration of justice.

(iii) To other Federal agencies, both executive and administrative, as determined by the head of a DoD Component or designee.

(iv) To state and local officials, as determined by the head of a DoD Component or designee.

(2) DoD Components shall inform officials receiving records under the provisions of § 286.25(d)(1) that those

records are exempt from public release under the FOIA and are privileged. DoD Components shall also advise officials of any special handling instructions.

§ 286.27 Initial determinations.

(a) *Initial denial authority.* (1) Components shall limit the number of IDAs appointed. In designating its IDAs, a DoD Component shall balance the goals of centralization of authority to promote uniform decisions and decentralization to facilitate responding to each request within the time limitations of the FOIA.

(2) The initial determination of whether to make a record available upon request may be made by any suitable official designated by the DoD Component in published regulations. The presence of the marking "For Official Use Only" does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under this part is applicable and should be invoked.

(3) The officials designated by DoD Components to make initial determinations should consult with public affairs officers (PAOs) to become familiar with subject matter that is considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media.

(b) *Reasons for not releasing a record.* There are seven reasons for not complying with a request for a record:

(1) The request is transferred to another DoD Component, or to another federal agency.

(2) The request is withdrawn by the requester.

(3) The information requested is not a record within the meaning of the FOIA and this part.

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

(5) The requester has failed unreasonably to comply with procedural requirements, including payment of fees, imposed by this part or DoD Component supplementing regulations.

(6) The DoD Component determines through knowledge of its files and reasonable search efforts that it neither controls nor otherwise possesses the requested record. (A "no record" determination is not considered a denial; therefore an appeal is not appropriate).

(7) The record is denied in accordance with procedures set forth in the FOIA and this part.

(c) *Denial Tests.* To deny a requested record that is in the possession and control of a DoD Component, it must be determined that the denial meets the following tests:

(1) The record is included in one or more of the nine categories of records exempt from mandatory disclosure as provided by the FOIA and outlined in Subpart C of this part.

(2) The use of its discretionary authority is deemed unwarranted.

(d) *Reasonably segregable portions.* Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when the meaning of these portions is not distorted by deletion of the denied portions and when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. When a record is denied in whole, the response advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release.

(e) *Response to requester.* (1) Initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 10 working days after receipt of the request by the official designated to respond.

(2) When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

(3) When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the DoD Component.

(4) The response to the requester should contain information concerning the fee status of the request, consistent with the provisions of Subpart F of this part.

(5) The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this part. Merely referring to a classification or to a "For Official Use Only" marking on the requested record does not constitute a proper citation or explanation of the basis for invoking an exemption.

(6) When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

(f) *Extension of time.* (1) In unusual circumstances, when additional time is needed to respond, the DoD Component shall acknowledge the request in writing within the 10-day period, describe the circumstances requiring the delay, and indicate the anticipated date for substantive response that may not exceed 10 additional working days. Unusual circumstances that may justify delay are:

(i) The requested record is located in whole or in part at places other than the office processing the request.

(ii) The request requires the collection and evaluation of a substantial number of records.

(iii) Consultation is required with other DoD Components or agencies having substantial interest in the subject matter to determine whether the records requested are exempt from disclosure in whole or in part under provisions of this part or should be released as a matter of discretion.

(2) The statutory extension of time for responding to an initial request must be approved on a case-by-case basis by the final appellate authority for the DoD Component, or in accordance with regulations of the DoD Component, or in accordance with regulations of the DoD Component that establish guidance governing the circumstances in which such extensions may be granted.

(3) In these unusual cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester with a request that he agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. Components are reminded that the requester still retains the right to

treat this delay as a de facto denial with full administrative remedies.

(4) As an alternative to the taking of formal extensions of time as described in paragraphs (f) (1) through (3) of this section, the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

(g) *Misdirected requests.* Misdirected requests shall be forwarded promptly to the DoD Component with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the DoD Component that manages the records requested.

(h) *Records of non-U.S. Government source.* (1) When a request is received for a record that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information (also known as "the submitter" for matters pertaining to proprietary data under 5 U.S.C. 552 Exemption (b)(4)) (Subpart C, § 286.13(a)(4)) will be notified promptly of that request and afforded reasonable time (eg. 30 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under Exemption (b)(4). If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under Exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under the FOIA. When a substantial issue has been raised, the DoD Component may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known.

(2) The coordination provisions of this paragraph also apply to any non-U.S.

Government record in the possession and control of DoD from multi-national organizations, such as NATO and NORAD, or foreign Governments. Coordination with foreign Governments under the provisions of this paragraph will be made through Department of State.

(i) *File of initial denials.* Copies of all initial denials shall be maintained by each DoD Component in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation.

(j) *Special mail services.* Components are authorized to use registered mail, certified mail, certificates of mailing and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence.

(k) *Receipt accounts.* The Treasurer of the United States has established two accounts for FOIA receipts. These accounts, which are described in the following, shall be used for depositing all FOIA receipts, except receipts for industrially-funded and non-appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Industrially-funded and nonappropriated funded activity FOIA receipts shall be deposited to the applicable fund.

(1) *Receipt Account 3210.9999, Sale of Publications and Reproductions, Freedom of Information Act.* This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles.

(2) *Receipt Account 3210.0500, Fees and Other Charges for Services, Freedom of Information Act.* This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could not be filled with existing publications or forms.

§ 289.29 Appeals.

(a) *General.* If the official designated by the DoD Component to make initial determinations on requests for records declines to provide a record because the official considers it exempt, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for

disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a request for waiver or reduction of fees. A "no record" finding may not be appealed, although the requester may ask the agency to search other files or provide more detailed identification to facilitate another search of the files.

(b) *Time of receipt.* An FOI appeal has been received by a DoD Component when it reaches the office of the appellate authority having jurisdiction. Misdirected appeals should be referred expeditiously to the proper appellate authority.

(c) *Time limits.* (1) The requester must file an appeal so that it reaches the appellate authority no later than 45 calendar days after the date of the initial denial letter. At the conclusion of this period, the case may be considered closed; however, such closure does not preclude the requester from filing litigation for denial of his appeal. In cases where the requester is provided several incremental determinations for a single request, the time for the appeal shall not begin until the requester receives the last such notification. Records which are denied shall be retained during the time permitted for appeal.

(2) Final determinations on appeals normally shall be made within 20 working days after receipt.

(d) *Delay in Responding to an Appeal.* (1) If additional time is needed due to the unusual circumstances described in § 286.27(f), the final decision may be delayed for the number of working days (not to exceed 10), that were not utilized as additional time for responding to the initial request.

(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. Requesters shall be advised that, if the delay exceeds the statutory extension provision or is for reasons other than the unusual circumstances identified in § 286.27(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, whether or not the requester seeks a court order for release of the records, but a copy of any response provided subsequent to filing of a complaint shall be forwarded to the Department of Justice.

(e) *Response to the requester.* (1) When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

(2) Final refusal to provide a requested record or to approve a request for waiver or reduction of fees must be made in writing by the head of the DoD Component or by a designated representative. The response, at a minimum, shall include the following:

(i) The basis for the refusal shall be explained to the requester, in writing, both with regard to the applicable statutory exemption or exemptions invoked under provisions of this part.

(ii) When the final refusal is based in whole or in part on a security classification, the explanation shall include a determination that the record meets the cited criteria and rationale of the governing Executive order, and that this determination is based on a declassification review, with the explanation of how that review confirmed the continuing validity of the security classification.

(iii) The final denial shall include the name and title or position of the official responsible for the denial.

(iv) The response shall advise the requester that the material being denied does not contain meaningful portions that are reasonably segregable.

(v) The response shall advise the requester of the right to judicial review.

(f) *Consultation.* (1) Final refusal, involving issues not previously resolved or that the DoD Component knows to be inconsistent with rulings of other DoD Components, ordinarily should not be made before consultation with the Office of the General Counsel of the Department of Defense.

(2) Tentative decisions to deny records that raise new or significant legal issues of potential significance to other agencies of the government shall be brought to the attention of the Freedom of Information Committee of the Department of Justice through the Office of Information Law and Policy.

§ 286.31 Judicial actions.

(a) *General.* (1) This section states current legal and procedural rules for the convenience of the reader. The statements of rules do not create rights or remedies not otherwise available, nor do they bind DoD to particular judicial interpretations or procedures.

(2) A requester may seek an order from a United States 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 within the time limits prescribed by the FOIA and set forth in this Regulation.

(b) *Jurisdiction.* The requester may bring suit in the United States District Court in the district in which the requester resides or is the requester's place of business, in the district in which the record is located, or in the District of Columbia.

(c) *Burden of proof.* The burden of proof is on the DoD Component to justify its refusal to provide a record. The court shall evaluate the case de novo (anew) and may elect to examine any requested record in camera (in private) to determine whether the denial was justified.

(d) *Actions by the Court.* (1) When a DoD Component has failed to make a determination within the statutory time limits but can demonstrate due diligence in exceptional circumstances, the court may retain jurisdiction and allow the Component additional time to complete its review of the records.

(2) If the court determines that the requester's complaint is substantially correct, it may require the United States to pay reasonable attorney fees and other litigation costs.

(3) When the court orders the release of denied records, it may also issue a written finding that the circumstances surrounding the withholding raise questions whether DoD Component personnel acted arbitrarily and capriciously. In these cases, the special counsel of the Merit System Protection Board will conduct an investigation to determine whether or not disciplinary action is warranted. The DoD Component is obligated to take the action recommended by the special counsel.

(4) The court may punish the responsible official for contempt when a DoD Component fails to comply with the court order to produce records that it determines have been withheld improperly.

(e) *Non-United States Government source information.* A requester may bring suit in a U.S. District Court to compel the release of records obtained from a nongovernment source or records based on information obtained from a nongovernment source. Such source shall be notified promptly of the court action. When the source advises that it is seeking court action to prevent release, the DoD Component shall defer answering or otherwise pleading to the complainant as long as permitted by the

Court or until a decision is rendered in the court action of the source, whichever is sooner.

(f) *Litigation status sheet.* Freedom of Information managers at DoD Component level shall be aware of litigation under the FOIA. Such information will provide management insights into the use of the nine exemptions by Component personnel. The Litigation Status Sheet at Appendix C provides a standard format for recording information concerning FOIA litigation and forwarding that information to the Office of the Secretary of Defense. Whenever a complaint under the FOIA is filed in a U.S. District Court, the DoD Component named in the complaint shall forward a Litigation Status Sheet, with items 1 through 6 completed, and a copy of the complaint to the Director for Freedom of Information and Security Review, Office of the Assistant Secretary of Defense (Public Affairs) with an information copy to the Office of Legal Counsel, Department of Defense General Counsel. A revised Litigation Status Sheet shall be provided at each stage of the litigation.

Subpart F—Fee Schedule

§ 286.33 General provisions.

(a) *Authorities.* The Freedom of Information Act (5 U.S.C. 552), as amended; by the Freedom of Information Reform Act of 1986; the Paperwork Reduction Act (44 U.S.C. 35); the Privacy Act of 1974 (5 U.S.C. 552a); the Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*); the Budget and Accounting Procedures Act (31 U.S.C. 67 *et seq.*); the Defense Authorization Act for FY 87, section 954 (Pub. L. 99-661), as amended by the Defense Technical Corrections Act of 1987 (Pub. L. 100-26).

(b) *Application.* (1) The fees described in this section apply to FOIA requests, and conform to the Office of Management and Budget Uniform Freedom of Information Act Fee Schedule and Guidelines (52 FR 10012, March 27, 1987). They reflect direct costs for search, review (in the case of commercial requesters), and duplication of documents, collection of which is permitted by the FOIA. They are neither intended to imply that fees must be charged in connection with providing information to the public in the routine course of business, nor are they meant as a substitute for any other schedule of fees, such as 32 CFR Part 288 which does not supersede the collection of fees under the FOIA. Nothing in this section shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of

records. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552(a)(4)(A)(vi)) means any statute that enables a government agency such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set and collect fees. Components should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs such as the GPO or NTIS, they inform requesters of the steps necessary to obtain records from those sources.

(2) The term "direct costs" means those expenditures a component actually makes in searching for, reviewing (in the case of commercial requesters), and duplicating documents to respond to an FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits), and the costs of operating duplicating machinery. These factors have been included in the fee rates prescribed at § 286.1. Not included in direct costs are overhead expenses such as costs of space, heating or lighting the facility in which the records are stored.

(3) The term "search" includes all time spent looking for material that is responsive to a request. Search also includes a page-by-page or line-by-line identification (if necessary) of material in the document to determine if it, or portions thereof are responsive to the request. Components should ensure that searches are done in the most efficient and least expensive manner so as to minimize costs for both the Component and the requester. For example, Components should not engage in line-by-line searches when duplicating an entire document known to contain responsive information would prove to be the less expensive and quicker method of complying with the request. Time spent reviewing documents in order to determine whether to apply one or more of the statutory exemptions is *not* search time, but review time. See § 286.33(b)(5) for the definition of review, and § 286.35(b)(2) for information pertaining to computer searches.

(4) The term "duplication" refers to the process of making a copy of a document in response to an FOIA request. Such copies can take the form of paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic tape or disk), among others. Every effort will be made to insure that the copy provided is in a

form that is reasonably usable by requesters. If it is not possible to provide copies which are clearly usable, the requester will be notified that their copy is the best available and that the agency's master copy will be made available for review upon appointment. For duplication of computer tapes and audiovisual, the actual cost, including the operator's time, shall be charged. In practice, if a Component estimates that assessable duplication charges are likely to exceed \$25.00, it shall notify the requester of the estimate, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(5) The term "review" refers to the process of examining documents located in response to an FOIA request to determine whether one or more of the statutory exemptions permit withholding. It also includes processing the documents for disclosure, such as excising them for release. Review does *not* include the time spent resolving general legal or policy issues regarding the application of exemptions. It should be noted that charges for commercial requesters may be assessed only for the *initial* review. Components may not charge for reviews required at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(c) *Fee restrictions.* (1) No fees may be charged by any DoD Component if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. With the exception of requesters seeking documents for a commercial use, Components shall provide the first two hours of search time, and the first one hundred pages of duplication without charge. For example, for a request (other than one from a commercial requester) that involved two hours and ten minutes of search time, and resulted in one hundred and five pages of documents, a Component would determine the cost of only ten minutes of search time, and only five pages of reproduction. If this processing cost was equal to, or less than the cost to the Component for billing the requester and processing the fee collected, no charges would result.

(2) Requesters receiving the first two hours of search and the first one hundred pages of duplication without charge are entitled to such only once per request. Consequently, if a Component, after completing its portion of a request, finds it necessary to refer the request to a subordinate office, another DoD Component, or another federal agency to action their portion of the request, the referring Component shall inform the recipient of the referral of the expended amount of search time and duplication cost to date.

(3) The elements to be considered in determining the "cost of collecting a fee" are the administrative costs to the Component of receiving and recording a remittance, and processing the fee for deposit in the Treasury Department's special account. The cost to the Treasury to handle such remittance is negligible and shall not be considered in Components' determinations.

(4) For the purposes of these restrictions, the word "pages" refers to paper copies of a standard size, which will normally be "8½x11" or "11x14". Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction.

(5) In the case of computer searches, the first two free hours will be determined against the salary scale of the individual operating the computer for the purposes of the search. As an example, when the direct costs of the computer central processing unit, input-output devices, and memory capacity equal \$24.00 (two hours of equivalent search at the clerical level), amounts of computer costs in excess of that amount are chargeable as computer search time.

(d) *Fee waivers.* (1) Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in § 286.33(e) when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester.

(2) When direct costs for an FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category.

(3) Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis, consistent with the following factors:

(i) Disclosure of the information "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."

(A) *The subject of the request.* Components should analyze whether the subject matter of the request involves issues which will significantly contribute to the public understanding of the operations or activities of the DoD. Requests for records in the possession of DoD which were originated by non-government organizations and are sought for their intrinsic content, rather than informative value will likely not contribute to public understanding of the operations or activities of the DoD. An example of such records might be press clippings, magazine articles, or records forwarding a particular opinion or concern from a member of the public regarding a DoD activity. Similarly, disclosures of records of considerable age may or may not bear directly on the current activities of the DoD; however, the age of a particular record shall not be the sole criteria for denying relative significance under this factor. It is possible to envisage an informative issue concerning the current activities of the DoD, based upon historical documentation. Requests of this nature must be closely reviewed consistent with the requester's stated purpose for desiring the records and the potential for public understanding of the operations and activities of the DoD.

(B) *The informative value of the information to be disclosed.* This factor requires a close analysis of the substantive contents of a record, or portion of the record, to determine whether disclosure is meaningful, and will inform the public on the operations or activities of the DoD. While the subject of a request may contain information which concerns operations or activities of the DoD, it may not always hold great potential for contributing to a meaningful understanding of these operations or activities. An example of such would be a heavily redacted record, the balance of which may contain only random words, fragmented sentences, or paragraph headings. A determination as to whether a record in this situation will contribute to the public understanding of the operations or activities of the DoD must be approached with caution, and carefully weighed against the arguments offered by the requester. Another example is information already known to be in the public domain. Disclosure of duplicative, or nearly identical information already existing in the public domain may add no meaningful

new information concerning the operations and activities of the DoD.

(C) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* The key element in determining the applicability of this factor is whether disclosure will inform, or have the potential to inform the public, rather than simply the individual requester or small segment of interested persons. The identity of the requester is essential in this situation in order to determine whether such requester has the capability and intention to disseminate the information to the public. Mere assertions of plans to author a book, researching a particular subject, doing doctoral dissertation work, or indigency are insufficient without demonstrating the capacity to further disclose the information in a manner which will be informative to the general public. Requesters should be asked to describe their qualifications, the nature of their research, the purpose of the requested information, and their intended means of dissemination to the public.

(D) *The significance of the contribution to public understanding.* In applying this factor, components must differentiate the relative significance or impact of the disclosure against the current level of public knowledge, or understanding which exists prior to the disclosure. In other words, will disclosure on a current subject of wide public interest be unique in contributing previously unknown facts, thereby enhancing public knowledge, or will it basically duplicate what is already known by the general public. A decision regarding *significance* requires objective judgment, rather than subjective determination, and must be applied carefully to determine whether disclosure will likely lead to a significant public understanding of the issue. Components *shall not* make value judgments as to whether the information is *important* enough to be made public.

(ii) Disclosure of the information "is not primarily in the commercial interest of the requester."

(A) *The existence and magnitude of a commercial interest.* If the request is determined to be of a commercial interest, Components should address the magnitude of that interest to determine if the requester's commercial interest is primary, as opposed to any secondary personal or non-commercial interest. In addition to profit-making organizations, individual persons or other organizations may have a commercial interest in obtaining certain records. Where it is difficult to determine

whether the requester is of a commercial nature, Components may draw inference from the requester's identity and circumstances of the request. In such situations, the provisions of § 286.33(e) apply. Components are reminded that in order to apply the commercial standards of the FOIA, the requester's commercial benefit must *clearly* override any personal or non-profit interest.

(B) *The primary interest in disclosure.* Once a requester's commercial interest has been determined, Components should then determine if the disclosure would be *primarily* in that interest. This requires a balancing test between the commercial interest of the request against any public benefit to be derived as a result of that disclosure. Where the public interest is served above and beyond that of the requester's commercial interest, a waiver or reduction of fees would be appropriate. Conversely, even if a significant public interest exists, and the relative commercial interest of the requester is determined to be greater than the public interest, then a waiver or reduction of fees would be inappropriate. As examples, news media organizations have a commercial interest as business organizations; however, their inherent role of disseminating news to the general public can ordinarily be presumed to be of a *primary* interest. Therefore, any commercial interest becomes secondary to the *primary* interest in serving the public. Similarly, scholars writing books or engaged in other forms of academic research, may recognize a commercial benefit, either directly, or indirectly (through the institution they represent); however, normally such pursuits are *primarily* undertaken for educational purposes, and the application of a fee charge would be inappropriate. Conversely, data brokers or others who merely compile government information for marketing can normally be presumed to have an interest *primarily* of a commercial nature.

(4) Components are reminded that the above factors and examples are not all inclusive. Each fee decision must be considered on a case-by-case basis and upon the merits of the information provided in each request. When the element of doubt as to whether to charge or waive the fee cannot be clearly resolved, Components should rule in favor of the requester.

(5) In addition, the following additional circumstances describe situations where waiver or reduction of fees are most likely to be warranted:

(i) A record is voluntarily created to preclude an otherwise burdensome effort to provide voluminous amounts of

available records, including additional information not requested.

(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).

(e) *Fee assessment.* (1) Fees may not be used to discourage requesters, and to this end, FOIA fees are limited to standard charges for direct document search, review (in the case of commercial requesters) and duplication.

(2) In order to be as responsive as possible to FOIA requests while minimizing unwarranted costs to the taxpayer, Components shall adhere to the following procedures:

(i) Analyze each request to determine the category of the requester. If the Component determination regarding the category of the requester is different than that claimed by the requester, the component will:

(A) Notify the requester that he should provide additional justification to warrant the category claimed, and that a search for responsive records will not be initiated until agreement has been attained relative to the category of the requester. Absent further category justification from the requester, and within a reasonable period of time (i.e., 30 calendar days), the Component shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights of the determination.

(B) Advise the requester that, notwithstanding any appeal, a search for responsive records will not be initiated until the requester indicates a willingness to pay assessable costs appropriate for the category determined by the Component.

(ii) Requesters must submit a fee declaration appropriate for the below categories.

(A) *Commercial.* Requesters must indicate a willingness to pay all search, review and duplication costs.

(B) *Educational or Noncommercial Scientific Institution or News Media.* Requesters must indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are desired.

(C) *All Others.* Requesters must indicate a willingness to pay assessable search and duplication costs if more than two hours of search effort or 100 pages of records are desired.

(iii) If the above conditions are not met, then the request need not be processed and the requester shall be so informed.

(iv) In the situations described by paragraphs (e)(2) (i) and (ii) of this section, Components must be prepared

to provide an estimate of assessable fees if desired by the requester. While it is recognized that search situations will vary among Components, and that an estimate is often difficult to obtain prior to an actual search, requesters who desire estimates are entitled to such before committing to a willingness to pay. Should Component estimates exceed the actual amount of the estimate or the amount agreed to by the requester, the amount in excess of the estimate or the requester's agreed amount shall not be charged without the requester's agreement.

(v) No DoD Component may require advance payment of any fee, i.e., payment before work is commenced or continued on a request, unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.00. As used in this sense, a timely fashion is 30 calendar days from the date of billing (the fees have been assessed in writing) by the Component.

(vi) Where a Component estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the Component shall notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payments, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(vii) Where a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 calendar days from the date of the billing), the Component may require the requester to pay the full amount owed, plus any applicable interest, or demonstrate that he has paid the fee, and to make an advance payment of the full amount of the estimated fee before the Component begins to process a new or pending request from the requester. Interest will be at the rate prescribed in section 3717 of Title 31, U.S.C.A., and confirmed with respective Finance and Accounting Offices.

(viii) After all work is completed on a request, and the documents are ready for release, Components may request payment prior to forwarding the documents if there is no payment history on the requester, or if the requester has previously failed to pay a fee in a timely fashion (i.e., within 30 calendar days from the date of the billing). In the case of the latter, the provisions of paragraph (e)(2)(vii) of the section apply.

Components may not hold documents ready for release pending payment from requesters with a history of prompt payment.

(ix) When Components act under paragraphs (e)(2)(i) through (vii) the administrative time limits of the FOIA (i.e., 10 working days from receipt of initial requests, and 20 working days from receipt of appeals, plus permissible extensions of these time limits) will begin only after the Component has received a willingness to pay fees and satisfaction as to category determination, or fee payments (if appropriate).

(x) Components may charge for time spent searching for records, even if that search fails to locate records responsive to the request, or if records located are determined to be exempt from disclosure. In practice, if the Component estimates that search charges are likely to exceed \$25.00 it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with Component personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(3) *Commercial requesters.* Fees shall be limited to reasonable standard charges for document search, review and duplication when records are requested for commercial use. Requesters must reasonably describe the records sought (see § 286.5(h)).

(i) The term "commercial use" request" refers to a request from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, Components must determine the use to which a requester will put the documents requested. Moreover, where a Component has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, Components should seek additional clarification before assigning the request to a specific category.

(ii) When Components receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial requesters (unlike other requesters) are not entitled to two hours of free search time, nor 100 free pages of reproduction of documents. Moreover, commercial requesters are not normally entitled to a waiver or reduction of fees based upon an assertion that disclosure would be in the public interest. However, because use is the exclusive

determining criteria, it is possible to envision a commercial enterprise making a request that is not for commercial use. It is also possible that a non-profit organization could make a request that is for commercial use. Such situations must be addressed on a case-by-case basis.

(4) *Educational institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by an educational institution whose purpose is scholarly research. Requesters must reasonably describe the records sought (see § 286.7(h)). The term "educational institution" refers to a pre-school, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(5) *Non-commercial scientific institution requesters.* Fees shall be limited to only reasonable standard charges for document duplication (excluding charges for the first 100 pages) when the request is made by a non-commercial scientific institution whose purpose is scientific research. Requesters must reasonably describe the records sought (see § 286.7(h)). The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as defined in paragraph (e)(3) of this section and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(6) Components shall provide documents to requesters in paragraphs (e)(4) and (5) of this section for the cost of duplication alone, excluding charges for the first 100 pages. 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.

(7) *Representatives of the news media.* Fees shall be limited to only reasonable standard charges for documents duplication (excluding charges for the first 100 pages) when the request is made by a representative of the news media. Requesters must reasonably describe the records sought (see § 286.7(h)).

(i) The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but Components may also look to the past publication record of a requester in making this determination.

(ii) To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (e)(7)(i) of this section and his or her request must not be made for commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. For example, a document request by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be a request from an entity eligible for inclusion in this category, and entitled to records at the cost of reproduction alone (excluding charges for the first 100 pages).

(8) *All other requesters.* Components shall charge requesters who do not fit into any of the above categories, fees which recover the full direct cost of searching for and duplicating records, except that the first two hours of search time and the first 100 pages of duplication shall be furnished without charge. Requesters must reasonably describe the records sought (see § 286.7(h)). Requests from subjects about themselves will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for duplication. Components are reminded that this category of requester, as well

as the aforementioned categories of requesters may be eligible for a waiver or reduction of fees if such is in the public interest as defined under § 286.33(d)(1). (See also § 286.33(e)(3)(ii)).

(f) *Aggregating requests.* Except for requests that are for a commercial use, a Component may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When a Component reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30 day period had been made to avoid fees. For requests made over a longer period; however, such a presumption becomes harder to sustain and Components should have a solid basis for determining that aggregation is warranted in such cases. Components are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may Components aggregate multiple requests on unrelated subjects from one requester.

(g) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).* The Debt Collection Act of 1982 (Pub. L. 97-365) provides for a minimum annual rate of interest to be charged on overdue debts owed the Federal Government. Components may levy this interest penalty for any fees that remain outstanding 30 calendar days from the date of billing (the first demand notice) to the requester of the amount owed. The interest rate shall be as prescribed in section 3717 of Title 31 U.S.C.A. Components should verify the current interest rate with respective Finance and Accounting Offices. After one demand letter has been sent, and 30 calendar days have lapsed with no payment, Components may submit the debt to respective Finance and Accounting Offices for collection pursuant to the Debt Collection Act of 1982.

(h) *Computation of fees.* The fee schedule in this chapter shall be used to compute the search, review (in the case of commercial requesters) and duplication costs associated with processing a given FOIA request. Costs shall be computed on time actually spent. Neither time-based nor dollar-based minimum charges for search, review and duplication are authorized.

§ 286.35 Collection of fees and fee rates.

(a) *Collection of fees.* Collection of fees will be made at the time of providing the documents to the requester or recipient when the requester specifically states that the costs involved shall be acceptable or acceptable up to a specified limit that covers the anticipated costs. Collection of fees may not be made in advance unless the requester has failed to pay previously assessed fees within 30 calendar days from the date of the billing by the DoD Component, or the Component has determined that the fee will be in excess of \$250 (see § 286.33(e)).

(b) *Search Time.* (1) *Manual Search:*

Type	Grade	Hourly rate (dollars)
Clerical.....	E9/GS8 and below.....	12
Professional.....	01-06/GS9-GS/GM15.....	25
Executive.....	07/GS/GM16/ES1 and above.....	45

(2) *Computer Search:*

Computer search is based on direct cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The salary scale (equating to paragraph (b)(1) of this section) for the computer operator/programmer determining how to conduct and subsequently executing the search will be recorded as part of the computer search.

(c) *Duplication.*

Type	Cost per page (cents)
Pre-Printed material.....	02
Office copy.....	15
Microfiche.....	25
Computer copies (tapes or printouts).....	Actual cost of duplicating the tape or printout (includes operator's time and cost of the tape).

(d) *Review Time* (in the case of commercial requesters):

Type	Grade	Hourly rate (dollars)
Clerical.....	E9/GS8 and below.....	12
Professional.....	01-06/GS9-GS15.....	25
Executive.....	07/GS16/ES1 and above.....	45

(e) *Audiovisual documentary materials.* Search costs are computed as for any other record. Duplication cost is the actual direct cost of reproducing the material, including the wage of the person doing the work. Audiovisual materials provided to a requester need not be in reproducible format or quality.

(f) *Other records.* Direct search and duplication cost for any record not described above shall be computed in the manner described for audiovisual documentary material.

(g) *Costs for special services.* Complying with requests for special services is at the discretion of the Components. Neither the FOIA, nor its fee structure cover these kinds of services. Components may, therefore, recover the costs of special services requested by the requester after agreement has been obtained in writing from the requester to pay for one or more of the following services:

(1) Certifying that records are true copies.

(2) Sending records by special methods such as express mail, etc.

§ 286.37 Collection of fees and fee rates for technical data.

(a) *Fees for technical data.* (1) Technical data, other than technical data that discloses critical technology with military or space application, if required to be released under the FOIA, shall be released after the person requesting such technical data pays *all reasonable costs* attributed to search, duplication and review of the records to be released. Technical data, as used in this section, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). This term does not include computer software, or data incidental to contract administration, such as financial and/or management information. Department of Defense Components shall retain the amounts received by such a release, and it shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with request. *All reasonable costs* as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full cost shall include all *direct* and *indirect* costs to

conduct the search and to duplicate the records responsive to the request. This cost is to be differentiated from the direct costs allowable under § 286.35 for other types of information released under the FOIA.

(2) *Waiver.* Components shall waive the payment of costs required in paragraph a. above, which are greater than the costs that would be required for release of this same information under § 286.35 if:

(i) The request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States. However, Components may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, which will be refunded upon submission of an offer by the citizen or corporation;

(ii) The release of technical data is requested in order to comply with the terms of an international agreement; or,

(iii) The Component determines in accordance with § 286.33(d)(1) that such a waiver is in the interest of the United States.

(3) *Fee Rates*—(i) *Search Time.* (A) Manual Search:

Type	Grade	Hourly rate (dollars)
Clerical (Minimum Charge)	E9/GS8 and below	13.25 8.30

Professional (To be established at actual hourly rate prior to search. A minimum charge will be established at ½ hourly rates).

(B) Computer search is based on the total cost of the central processing unit, input-output devices, and memory capacity of the actual computer configuration. The wage (based upon the scale in paragraph (a)(3)(i) of this section for the computer operator/programmer determining how to conduct, and subsequently executing the search will be recorded as part of the computer search.

(ii) *Duplication:*

Type	Cost
Aerial Photographs, Specifications, Permits, Charts, Blueprints, and other technical documents	\$2.60

Type	Cost
Engineering data (microfilm):	
Aperture cards:	
Silver duplicate negative, per card	.75
When key punched and verified, per card	.85
Diazo duplicate negative, per card	.65
When key punched and verified, per card	.75
35mm roll film, per frame	.50
16mm roll film, per frame	.45
Paper prints (engineering drawings), each	1.50
Paper reprints of microfilm indices, each	.10

(iii) *Review time:*

Type	Grade	Hourly rate (dollars)
Clerical	E9/GS8 and below	13.25
(Minimum Charge)		8.30

Professional (To be established at actual hourly rate prior to review. A minimum charge will be established at ½ hourly rates)

(4) *Other technical data records.*

Charges for any additional services not specifically provided previously, consistent with 32 CFR Part 288 shall be made by Components at the following rates:

(i) Minimum charge for office copy (up to six images)	\$3.50
(ii) Each additional image	.10
(iii) Each typewritten page	3.50
(iv) Certification and validation with seal, each	5.20
(v) Hand-drawn plots and sketches, each hour or fraction thereof	12.00

Subpart G—Reports

§ 286.39 Reports control.

General. The reporting requirement outlined in this section is assigned Report Control Symbol DD-PA (A) 1365.

§ 286.41 Annual report.

(a) *Reporting time.* Each DoD Component shall prepare statistics and accumulate paperwork for the preceding calendar year on those items prescribed for the annual report and submit them in duplicate to the ASD(PA) on or before each February 1. Existing DoD standards and registered data elements are to be used for all data requirements to the greatest extent possible in accordance with the provisions of DoD Directive 5000.11^a. The standard data elements are contained in DoD 5000.12-M⁹.

(b) *Annual Report Content:* The

^a See footnote 8 of § 286.1(a)

⁹ See footnote 9 of § 286.7(d)

following instructions and attached format shall be used in preparing the annual report.

(1) *Item 1*

(i) *Completed public requests.* Enter the total number of FOIA requests received and responded to during the reporting period.

(ii) *Completed reportable requests.* Enter the number of actions taken on a completed public request. To arrive at the figure, count the number of blocks checked in item a. of the Annual Report Worksheet (see § 286.41(d)) for each request processed.

Note.—This figure will be equal to or greater than paragraph (b)(1)(i) of this section.

(iii) *Number of Requests Denied.* Enter the number of FOIA requests which were denied in whole or in part based on one or more of the nine FOIA exemptions.

(iv) *Other Reason Responses.* Enter the number of FOIA requests in which you were unable to provide the requested information based on "Other Reason" response, (see paragraph (b)(2)(iii) of this section for an explanation of an "Other Reason" responses).

(v) *Total:* Enter the sum of paragraphs (b)(1) (iii) and (iv) of this section.

(2) *Item 2.* (i) *Exemptions invoked on initial determinations.* Identify the exemption(s) claimed for each request that was denied in whole or in part. Since more than one exemption may be claimed when responding to a single request, this number will be equal or greater than that of paragraph (b)(1)(iii) of this section.

(ii) *"(b)(3)" statutes invoked on initial determinations.* Identify the statute(s) cited when you claimed a "(b)(3)" exemption. Cite the specific sections when invoking the Atomic Energy Act of 1954, or the National Security Act of 1947.

(iii) *Initial request other reason responses.* Identify the "other reason" response cited when responding to an FOIA request and enter the number of times each was claimed.

(A) *Transferred requests.* Enter the number of times a request was transferred to another DoD Component or Federal agency for action.

(B) *Lack of records.* Enter the number of times a search of files failed to identify records responsive to subject request and there was no statutory obligation to create a record.

(c) *Failure of requester to reasonably describe record.* Enter the number of times an FOIA request could not be

acted on since the requester failed to reasonably describe the record(s) being sought.

(D) *Other failures by requester to comply with published rules and/or directives:* Enter the number of times a requester failed to follow published rules concerning time, place, fees, and procedures.

(E) *Request/Appeal withdrawn by requester:* Enter the number of times a requester withdrew a request/appeal.

(F) *Not an agency record:* Enter the number of items a requester was provided a response indicating the requested information was not an agency record.

Total. Enter the sum of paragraphs (b) (1) through (6). The total will be equal to or greater than paragraph (b)(1)(iv) since more than one other reason response may be claimed.

(3) *Item 3—Initial Denial Authorities (IDA's by Participation).* (i) *Total IDA's authorized.* Enter the total number of IDA's at your activity.

(ii) *Individuals involved in adverse determinations.* Enter the name, grade, activity and title of each individual who signed a partial/total denial or "other reason" response and cite the number of instances of participation.

(4) *Item 4—*

Number of Appeals and Results

Number of appeals. Enter the disposition of appeals under the appropriate category and then the total.

(5) *Item 5—(i) Exemptions invoked on appeal determinations.* Identify the exemption(s) claimed for each appeal that is denied in whole or part. Since more than one exemption may be claimed when responding to a single appeal, this number will be equal to or greater than the total listed in paragraph (b)(4) of this section.

(ii) *Statutes invoked on appeal determinations.* Identify the statute(s) cited when you claimed a "(b)(3)" exemption.

(iii) *Other reasons cited on appeal determinations.* Identify the "other reason" response when responding to an appeal and enter the number of times each was claimed and the total.

(6) *Item 6—Participation of appellate authorities (those responsible for denials in whole or in part).* Enter the name, grade, activity, and title of each individual who signed a partial/total denial or "other reason" response and cite the number of instances of participation.

(7) *Item 7—Court opinions and action taken.* Briefly describe the results of each suit the Judge Advocate General and/or the General Counsel participated in during the calendar year. Provide a

copy of each final court opinion or order.

(8) *Item 8—FOIA implementation rules or regulations.* List all changes or revisions of rules or regulations affecting the implementation of the FOIA Program, followed by the **Federal Register** reference (volume number, date, and page) that announces the change or revision to the public. Append a copy of each.

(9) *Item 9—FOIA instructional and educational efforts.* Report what training/seminars your activity has given or attended during this reporting period.

(10) *Item 10—(i) Cost of routine request.* Some reporting activities will find it economical to develop an average cost factor for processing repetitive routine requests rather than tracking costs on each request as it is processed. This section provides for that economy.

Grade	Number of personnel	Salary	Percent of time	Costs
0-5	1	\$50,000	10	\$5,000
0-1	1	21,000	30	6,000
GS-12	1	35,000	50	17,500
GS-5	1	18,000	50	9,000

To determine the manyear computation: Add the total percentages of time and divide the percentage by 100.

Sample computation. Manyears = 140% divided by 100 = 1.4 manyears.

(B) *Direct costs for other personnel involved in processing request not included above upon accumulation of total hourly data.* This section accounts for all other personnel (not reported above) who are involved in processing FOIA requests. Enter the total hourly cost for each area. Only search, review, and reproduction costs may be recouped from the requester. Review costs may only be recouped from commercial requesters. In the case of collections resulting from release of technical data, all reasonable costs for search and reproduction may be recouped (See § 286.37).

(1) *Search Time Cost.* This includes only those direct costs associated with time spent looking for material that is responsive to a request, including line-by-line identification of material within a document to determine if it is responsive to the request. Searches may be done manually or by computer using existing programming.

(2) *Classification review costs.* This includes all direct costs incurred during the process of examining documents located in response to a commercial use request to determine whether any

but care must be exercised so that costs are comprehensive to include a 25% overhead, yet are not duplicated elsewhere in the report.

(ii) *Personnel costs.* (Civilian and Military)

(A) *Direct costs of personnel assigned FOI duties based upon estimated payroll manyears by grade.* Personnel costs are reported in two ways. This section uses a manyear/wage type of costing by grade. To achieve this computation, identify those individuals who are primarily involved in the planning, program management and/or administrative handling of FOIA requests. Use DoD Accounting Guidance Handbook (DoD 7220.9-M) for military personnel and Office of Personnel Management salary table for civilian personnel to identify salaries.

Sample computation.

portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure; e.g. doing all that is necessary to excise them and otherwise prepare them for release. It does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(3) *Coordination and Approval/Denial Decision Costs.* This includes all costs involved in coordinating the release/denial of documents requested under the FOIA.

(4) *Correspondence and Form Preparation Costs.* This includes all costs involved in typing responses, filling out forms and/or logbooks, supplies, etc., to respond to an FOIA request.

(5) *Other Activity Costs.* This includes all other processing costs not covered above, such as processing time by the mail room.

Total Manhour Costs: Enter the sum of § 286.41(b)(2)(i) through (v).

(C) *Application of Overhead.* The overhead rate is 25% and includes the cost of supervision, space and administrative support. Add items 1 and 2, then multiply the sum by 25%.

(iii) *Other Case Related Costs:* Using the fee schedule, enter the total amounts incurred in each area to process FOIA requests.

B. "(b)(3)" Statutes Invoked on Appeal Determinations—

List of "(b)(3)" Statutes Invoked

Number of Times Cited

C. "Other Reasons" Cited on Appeal Determination

1

2

3

4

5

Total

ITEM 6

A. List of All Individuals Who Signed an Appeal Determination or "Other Reason" response—

Name

Rank

Title

Number of Instances of Participation

Exemption

Other

ITEM 7

A. Court Opinions and Actions Taken, for Example—

J.Q. Public v. Department of the Army, Civil No. 87-2600 (S.D. Cal.). On January 1, 1987, plaintiff filed suit seeking a CID investigation which was being reviewed by the United States Attorney for possible prosecution. Plaintiff is a former Army General attorney. Final order, May 1987, ordered release of majority of CID report of investigation.

ITEM 8

A. FOIA Implementation Rules or Regulations (Published During the Reporting Period)—

Document Identification

Federal Register Reference

Number

Date

Page

ITEM 9

A. FOIA Instructional and Educational Efforts—

Course

Sponsor

Date

Hours

ITEM 10

	Cost
A. Cost of Routine Requests Processed: (Number of reportable requests X cost factor per request).	\$
B. Personnel Costs (Civilian and Military):	
1. Direct costs of personnel assigned FOI duties based upon estimated payroll man-years by grade, Total Man-years.	\$
2. Direct costs for other personnel involved in processing requests not included above based upon accumulation of total hourly data:	
a. Search Time Costs	\$
b. Classification Review and Excising Action Costs.	\$
c. Coordination/Approval/Denial Decision Costs.	\$
d. Correspondence and Form Preparation Costs.	\$
e. Other Activity Costs	\$
Total Man-hour Costs	\$
3. Application of Overhead (Subtotal 1+2) X 25% overhead.	\$
Total of Personnel Costs	\$
C. Other Case Related Costs:	
1. Computer	\$
2. Office Copy Reproduction	\$
3. Microfiche Reproduction	\$
4. Cost of Printed Records	\$
Total of Other Costs	\$

ITEM 10—Continued

	Cost
D. Other Operating Costs:	
1. Reporting Costs:	
a. Operational	\$
b. User	\$
c. Overhead: (a + b) X 25%	\$
2. Other Costs as Directed or Which can be Reasonably Ascertained.	\$
Total Other Operating Costs (Subtotal 1+2).	\$
E. Summary:	
1. Total Costs of Sections 10A through 10C	\$
2. Amount Collected from Requesters during this Reporting Period:	
a. Search	\$
b. Copy	\$
c. Review	\$
d. Total Collected	\$

ITEM 11

A. Formal Time Limit Extension Taken:			
(1) Location	(2) Volume	(3) Consultation	(4) Court involvement
B. Total			

(d) Annual Report Worksheet.

a. Action[s] Taken on Completed Public Request:

☐ Granted in Full
☐ Granted in Part
☐ Denied

Other:

☐ Transferred to: _____
☐ Lack of Records
☐ Requester failed to reasonably describe the record
☐ Requester failed to comply with established rules/directives
☐ Requester withdrew request/appeal
☐ Not an agency record

b. Completed Reportable Requests: _____
(Count the number of actions checked in a. and enter total)

c. Statutory FOIA Exemptions Invoked:

(Enter total number blocks checked below)

☐ (b)(1)
☐ (b)(2)
☐ (b)(3)
☐ (b)(4)
☐ (b)(5)
☐ (b)(6)
☐ (b)(7)
☐ (b)(8)
☐ (b)(9)

d. List of (b)(3) Statutes Invoked: _____

e. Name, Command and Title of Initial Denial Authority: _____

f. Remarks: _____

Subpart H—Education and Training**§ 286.43 Responsibility and purpose.**

(a) *Responsibility.* The head of each DoD Component is responsible for the establishment of educational and training programs on the provisions and requirements of this part. The educational programs should be targeted toward all members of the DoD Component, developing a general understanding and appreciation of the DoD FOIA Program; whereas, the training programs should be focused toward those personnel who are involved in the day-to-day processing of FOI requests, and should provide a thorough understanding of the procedures outlined in this Regulation.

(b) *Purpose.* 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 FOIA Program, thereby improving the interaction with members of the public and improving the public trust in the Department of Defense.

(c) *Scope and principles.* Each Component shall design its FOIA educational and training programs to fit the particular requirements of personnel dependent upon their degree of involvement in the implementation of this part. The program should be designed to accomplish the following objectives:

(1) Familiarize personnel with the requirements of the FOIA and its implementation by this Regulation.

(2) Instruct personnel, who act in FOI matters, concerning the provisions of this Regulation, 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.

(d) *Implementation.* To ensure uniformity of interpretation, all major educational and training programs concerning the implementation of this Regulation should be coordinated with the Director, Freedom of Information and Security Review, OASD (Public Affairs).

(e) *Uniformity of legal interpretation.* In accordance with DoD Directive 5400.7 the General Counsel of the Department of Defense shall ensure uniformity in the legal position and interpretation of the DoD FOIA Program.

Appendix A—Unified Commands—Processing Procedures for FOI Appeals.**1. General.**

a. In accordance with DoD Directive 5400.7 and this part, the Unified Commands are placed under the jurisdiction of the Office of the Secretary of Defense, instead of the administering Military Department, only for the purpose of administering the Freedom of Information (FOI) Program. This policy represents an exception to the policies in DoD Directive 5100.3.

b. The policy change above authorizes and requires the Unified Commands to process FOI requests in accordance with DoD Directive 5400.7 and DoD Instruction 5400.10¹⁰, August 20, 1981, and to forward directly to the Office of the Assistant Secretary of Defense (Public Affairs) all correspondence associated with the appeal of an initial denial for information under the provisions of the Freedom of Information Act (FOIA).

2. Responsibilities of Commands.

Unified Commanders in Chief shall:

a. Designate the officials authorized to deny initial FOI requests for records.

b. Designate an office as the point-of-contact for FOI matters.

c. Refer FOI cases to the ASD(PA) for review and evaluation when the issues raised are of unusual significance, precedent setting, or otherwise require special attention or guidance.

d. Consult with other OSD and DoD Components that may have a significant interest in the requested record prior to a final determination. Coordination with agencies outside of the Department of Defense, if required, is authorized.

e. Coordinate proposed denials of records with the appropriate Unified Command's Office of the Staff Judge Advocate.

f. Answer any request for a record within 10 working days of receipt. The requester shall be notified that his request has been granted or denied. In unusual circumstances, such notification may state that additional time, not to exceed 10 working days, is required to make a determination.

g. Provide to the ASD(PA) when the request for a record is denied in whole or in part, a copy of the response to the requester or his representative, and any internal memoranda that provide background information or rationale for the denial.

h. State in the response that the decision to deny the release of the requested information, in whole or in part, may be appealed to the ASD(PA), the Pentagon, Washington, DC 20301.

i. Upon request, submit to ASD(PA) a copy of the records that were denied. ASD(PA) shall make such requests when adjudicating appeals.

3. Fees for FOI Requests.

The fees charged for requested records

¹⁰ See footnote 1 to § 286.1(a)

shall be in accordance with Subpart F of this part.

4. Communications.

Excellent communication capabilities currently exist between the Office of the ASD(PA) and the Public Affairs Offices of the Unified Commands. This communication capability shall be used for FOI cases that are time sensitive.

5. Reporting Requirements.

a. The Unified Commands shall submit to the ASD(PA) an annual report. The instructions for the report are outlined in Subpart F of this part.

b. The annual report shall be submitted in duplicate to the ASD(PA) not later than each February 1. This reporting requirement is assigned Report Control Symbol DD-PA 1365.

Appendix B—Addressing FOIA Requests**1. General.**

a. The Department of Defense includes the Office of the Secretary of Defense and the Organization of the Joint Chiefs of Staff, the Military Departments, the Unified and Specified Commands, and such other agencies as the Secretary of Defense establishes to meet specific requirements.

b. The Department of Defense does not have a central repository for DoD records. FOI requests, therefore, should be addressed to the DoD Component that has custody of the record desired. In answering inquiries regarding FOI requests, DoD personnel shall assist requesters in determining the correct DoD Component to address their requests. If there is uncertainty as to the ownership of the record desired, the requester shall be referred to the DoD Component that is most likely to have the record.

2. Listing of DoD Component Addresses for FOI Requests.

a. Office of the Secretary of Defense/ Organization of the Joint Chiefs of Staff (OSD/OJCS).

Send all requests for records from the below listed offices to: Directorate for Freedom of Information and Security Review, Assistant Secretary of Defense (Public Affairs), Room 2C757, The Pentagon, Washington, DC 20301-1400.

Executive Secretariat

Under Secretary of Defense (Policy)

Deputy Under Secretary of Defense (Policy)

Deputy Under Secretary of Defense (Policy & Resources)

Deputy Under Secretary of Defense (Trade Security Policy)

Under Secretary of Defense (Acquisition)

Assistant Secretary of Defense

(Procurement & Logistics)

Assistant Secretary of Defense (Command, Control, Communication and Intelligence)

Assistant Secretary of Defense (Research and Technology)

Assistant Secretary of Defense (Atomic Energy)

Director of Defense Research and Engineering
 Director of Small and Disadvantaged Business Utilization
 Assistant Secretary of Defense (Comptroller)
 Assistant Secretary of Defense (Force Management & Personnel)
 Assistant Secretary of Defense (Health Affairs)
 Assistant Secretary of Defense (International Security Policy)
 Deputy Assistant Secretary of Defense (European & NATO Policy)
 Deputy Assistant Secretary of Defense (Negotiations Policy)
 Deputy Assistant Secretary of Defense (Nuclear Forces & Arms Control Policy)
 Assistant Secretary of Defense (International Security Affairs)
 Deputy Assistant Secretary of Defense (African Affairs)
 Deputy Assistant Secretary of Defense (East Asian & Pacific Affairs)
 Deputy Assistant Secretary of Defense (Inter-American Affairs)
 Deputy Assistant Secretary of Defense (Near East & South Asian Affairs)
 Deputy Assistant Secretary of Defense (Policy Analysis)
 Defense Security Assistance Agency
 Assistant Secretary of Defense (Legislative Affairs)
 Assistant Secretary of Defense (Public Affairs)
 Assistant Secretary of Defense (Reserve Affairs)
 Assistant to the Secretary of Defense (Intelligence Oversight)
 General Counsel
 Inspector General
 Net Assessment
 Program Analysis & Evaluation
 Defense Advanced Research Projects Agency
 Strategic Defense Initiative Organization
 Operational Test and Evaluation
 Defense Systems Management College
 National Defense University
 Armed Forces Staff College
 Department of Defense Dependents Schools
 Uniformed Services University of the Health Sciences

b. Department of the Army.

Army records may be requested from those Army officials who are listed in 32 CFR Part 518, Appendix B. Send requests to Chief, Information Access Branch, AS-OPS-MRA, Hoffman I, Room 1146, 2461 Eisenhower Avenue, Alexandria, VA 22331-0301, for records of the Headquarters, U.S. Army, or if there is uncertainty as to which Army activity may have the records.

c. Department of the Navy.

Navy and Marine Corps records may be requested from any Navy or Marine Corps activity by addressing a letter to the Commanding Officer and clearly indicating that it is an FOI request. Send requests to Director, OPNAV Support Services Division, OP-09B30, Pentagon, Room 5E521, Washington, DC 20350-2000, for records of the Headquarters, Department of the Navy, and to Freedom of Information and Privacy Act Office, Code MPI-60, HQMC, Room 4046, Washington, DC 20308-0001, for records of

the U.S. Marine Corps, or if there is uncertainty as to which Navy or Marine activities may have the records.

d. Department of the Air Force.

Air Force records may be requested from the Commander (ATTENTION: DADF) of any Air Force installation, major command, or separate operating agency, or from the Headquarters, United States Air Force. Requester should send FOI requests to Freedom of Information Manager, HQ USAF/DADF, Pentagon, Room 4A1088C, Washington, DC 20330-5025, for Air Force records of Headquarters, United States Air Force, or if there is uncertainty as to which Air Force activity may have the records.

e. Defense Contract Audit Agency (DCAA).

DCAA records may be requested from any of its regional offices or from its headquarters. Requesters should send FOI requests to the Defense Contract Audit Agency, ATTN: CMR, Cameron Station, Alexandria, VA 22304-6178, for records of its headquarters or if there is uncertainty as to which DCAA region may have the records sought.

f. Defense Communications Agency (DCA).

DCA records may be requested from any DCA field activity or from its headquarters. Requesters should send FOI requests to Defense Communications Agency, Code H104, Washington, DC 20305-2000.

g. Defense Intelligence Agency (DIA).

FOI requests for DIA records may be addressed to Defense Intelligence Agency, ATTN: RTS-1 (FOIA), Washington, DC 20340-3299.

h. Defense Investigative Service (DIS).

All FOI requests for DIS records should be sent to the Defense Investigative Service, ATTN: V0020, 1900 Half St., SW, Washington, DC 20324-1700.

i. Defense Logistics Agency (DLA).

DLA records may be requested from its headquarters or from any of its field activities. Requesters should send FOI requests to Defense Logistics Agency, ATTN: DLA-XAM, Cameron Station, Alexandria, VA 22304-6130.

j. Defense Mapping Agency (DMA).

FOI requests for DMA records may be sent to the Defense Mapping Agency, Naval Observatory Building 56, Washington, DC 20305-3000.

k. Defense Nuclear Agency (DNA).

FOI requests for DNA records may be sent to the Defense Nuclear Agency, Public Affairs Office, Room 111, Washington, DC 20305-1000.

l. National Security Agency (NSA).

FOI requests for NSA records may be sent to the National Security Agency/Central Security Service, ATTN: Q-43, Fort George G. Meade, MD 20755-6000.

3. Other Addresses.

Although the below organizations are OSD/OJCS Components, for the purposes of the FOIA, requests may be sent direct to the addresses indicated.

a. Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS).

Director, Attention: Freedom of Information Officer, OCHAMPUS, Aurora, CO 80045-6900.

b. Chairman, Armed Services Board of Contract Appeals (ASBCA).

Chairman, Armed Services Board of Contract Appeals, Hoffman II, 200 Stovall Street, Alexandria, VA 22332.

c. U.S. Central Command.

U.S. Central Command/CCAG, MacDill Air Force Base, FL 33608.

d. U.S. European Command.

Records Administrator, Headquarters, U.S. European Command/ECJ1-A, APO New York 09128.

e. U.S. Southern Command.

Attorney-Advisor (International), Headquarters U.S. Southern Command/SCSJA, APO Miami 34003-0007.

f. U.S. Pacific Command.

Administrative & Security Programs Division (J147A), Joint Secretariat, CINCPAC Box 28, Camp H.M. Smith, HI 96861-5025.

g. U.S. Special Operations Command.

Freedom of Information Officer, ATTN: U.S. Special Operations Command, MacDill Air Force Base, FL 33608.

h. U.S. Atlantic Command.

Commander-in-Chief, Atlantic Command, Code J008, Norfolk, VA 23511.

i. U.S. Space Command.

Chief, Records Management Division, Directorate of Administration, United States Space Command, Peterson Air Force Base, CO 80914-5001.

4. National Guard Bureau.

FOI requests for National Guard Bureau records may be sent to the Chief, National Guard Bureau, (NGB-PO), Pentagon, Room 2E383, Washington, DC 20301-2500.

5. Miscellaneous.

If there is uncertainty as to which DoD component may have the DoD record sought, the requester may address a Freedom of Information request to the Director, Freedom of Information and Security Review, Office of the Assistant Secretary of Defense (Public Affairs), Room 2C757, Pentagon, Washington, DC 20301-1400.

Appendix C—Litigation Status Sheet

1. Case Number ¹
2. Requester
3. Document Title or Description
4. Litigation
 - a. Date Complaint Filed
 - b. Court
 - c. Case File Number ¹
5. Defendants (agency and individual)
6. Remarks: (brief explanation of what the case is about)
7. Court Action

¹ Number used by Component for reference purposes.

- a. Court's Finding
- b. Disciplinary Action (as appropriate)
- 8. Appeal (as appropriate)
 - a. Date Complaint Filed
 - b. Court
 - c. Case File Number ¹
 - d. Court's Finding
 - e. Disciplinary Action (as appropriate)

Appendix D—Other Reason Categories

1. Transferred Requests

This category applies when responsibility for making a determination or a decision on categories 2, 3, or 4 below is shifted from one Component to another, or to another federal agency.

2. Lack of Records

This category covers those situations wherein the requester is advised the DoD Component has no record or has no statutory obligation to create a record.

3. Failure of Requester to Reasonably Describe Record

This category is specifically based on Section 552(a) (3)(a) of the FOIA.

4. Other Failures by Requesters to Comply with Published Rules or Directives

This category is based on section 552(a)(3)(b) of the FOIA and includes instances of failure to follow published rules concerning time, place, fees, and procedures.

5. Request Withdrawn by Requester

This category covers those situations wherein the requester asks an agency to disregard the request (or appeal) or pursues the request outside FOIA channels.

6. Not an Agency Record

This category covers situations where the information requested is not an agency record within the meaning of the FOIA and this part.

BILLING CODE 3810-01-M

APPENDIX E

RECORD OF FREEDOM OF INFORMATION (FOI) PROCESSING COST

Please read instructions on reverse before completing form.

1. REQUEST NUMBER	2. TYPE OF REQUEST (X one)		3. DATE COMPLETED (YYMMDD)	
	a. INITIAL	b. APPEAL		
4. CLERICAL HOURS (E-9/GS-8 and below)	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)
a. SEARCH			X \$ 12.00 =	*
b. REVIEW / EXCISING				**
c. CORRESPONDENCE AND FORMS PREPARATION				
d. OTHER ACTIVITY				
5. PROFESSIONAL HOURS (0-1-0-6/GS-9 - GS/GM-15)	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)
a. SEARCH			X \$ 25.00 =	*
b. REVIEW / EXCISING				**
c. COORDINATION / APPROVAL / DENIAL				
d. OTHER ACTIVITY				
6. EXECUTIVE HOURS (0-7/GS/GM-16/ES 1 and above)	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)
a. REVIEW / EXCISING			X \$ 45.00 =	**
b. COORDINATION / APPROVAL / DENIAL				
7. COMPUTER SEARCH	TOTAL HOURS (1)		HOURLY RATE (2)	COST (3)
a. MACHINE HOURS			X	*
8. OFFICE COPY REPRODUCTION	NUMBER (1)		RATE (2)	COST (3)
a. PAGES REPRODUCED			X .15 =	
9. MICROFICHE REPRODUCTION	NUMBER (1)		RATE (2)	COST (3)
a. MICROFICHE REPRODUCED			X .25 =	*
10. PRINTED RECORDS	TOTAL PAGES (1)		RATE (2)	COST (3)
a. FORMS			X .02 =	*
b. PUBLICATIONS				*
c. REPORTS				*

11.

For FOI Office Use Only

a. SEARCH FEES PAID

e. TOTAL COLLECTABLE COSTS

b. COPY FEES PAID

f. TOTAL PROCESSING COSTS

c. TOTAL PAID

g. TOTAL CHARGED

d. DATE PAID (YYMMDD)

h. FEES WAIVED / REDUCED (X one)

Yes	No
-----	----

* Chargeable to all requesters
 ** Chargeable only to commercial requesters

Instructions for Completing DD Form 2086

This Form is Used To Record Costs Associated With the Processing of a Freedom of Information Request

1. **REQUEST NUMBER**—First two digits will express Calendar Year followed by dash (—) and Component's request number, i.e., 87-001.

2. **TYPE OF REQUEST**—Mark the appropriate block to indicate initial request or appeal of a denial.

3. **DATE COMPLETED**—Enter year, month and day, i.e., 870621.

4. **CLERICAL HOURS**—For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search—Time spent in locating from the files the requested information.

Review/Excising—Time spent reviewing the document content and determining if the entire document must retain its classification or segments could be excised thereby permitting the remainder of the document to be declassified. In reviews for other than classification, FOI exemptions 2 through 9 should be considered

Correspondence and Forms Preparation—Time spent in preparing the necessary correspondence and forms to answer the request.

Other Activity—Time spent in activity other than above, such as duplicating documents, hand carrying documents to other locations, restoring files, etc.

—Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Only search cost may be charged to the requester. Further discussion of chargeable fees is found in DoD Directive 5400.7, Enclosure 6.

5. **PROFESSIONAL HOURS**—For each applicable activity category, enter time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Search/Review/Excising, and Other Activity—See explanation above.

Coordination/Approval/Denial—Time spent coordinating the staff action with interested offices or agencies and obtaining the approval for the release or denial of the requested information.

—Multiply the time in the total hours column of each category by the hourly rate and enter the cost figures for each category. Only search cost may be charged to the requester.

6. **EXECUTIVE HOURS**—For each applicable activity category, enter the time expended to the nearest 15 minutes in the total hours column. The activity categories are:

Review/Excising—See explanation above.

Coordination/Approval/Denial—See explanation above.

—Multiply the time in the total hours column in each category by the hourly rate and enter the cost figures for each category.

7. **COMPUTER SEARCH**—Enter exact computer processing value in the total hours column. The salary scale (equating to items 4 and/or 5) for the programmer/operator executing the search will be recorded as part of the computer search cost.

—Multiply the total hours by the computer hourly rate and enter the cost figures. Computer search will be based on direct cost only of the Central Processing Unit, input/output devices, and memory capacity of the actual computer configuration used. This amount is fully chargeable to the requester.

8. **OFFICE COPY REPRODUCTION**—Enter the number of pages reproduced.

—Multiply by the rate per copy and enter cost figures. The entire cost is chargeable to the requester.

9. **MICROFICHE REPRODUCTION**—Enter the number of microfiche copies reproduced.

—Multiply by the rate per copy and enter cost figures. The entire cost is chargeable to the requester.

10. **PRINTED RECORDS**—Enter total pages in each category. The categories are:

Forms (Include any type of printed forms)

Publications (Include any type of bound document, such as directives, regulations, studies, etc.)

Reports (Include any type of memorandum, staff action paper, etc.)

—Multiply the total number of pages in each category by the rate per page and enter cost figures. The entire cost of each category is chargeable to the requester.

11. **FOR FOI OFFICE USE ONLY**—

Search Fees Paid—Enter total search fees paid by the requester.

Copy Fees Paid—Enter the total of copy fees paid by the requester.

Total Paid—Add search fees paid and copy fees paid. Enter total in the total paid block.

Date Paid—Enter year, month and day, i.e., 871024, the fee payment was received.

Total Collectable Costs—Add the blocks in the cost column marked with an asterisk and enter total in the total collectable cost block. Only search, reproduction and printed records are chargeable to the requester.

Total Processing Costs—Add all blocks in the cost column and enter total in the total processing cost block. The total processing cost in most cases will exceed the total collectable cost.

Total Charged—Enter the total amount that the requester was charged, taking into account the fee waiver threshold and fee waiver policy.

Fees Waived/Reduced—Indicate if the cost of processing the request was waived or reduced by placing an "X" in the "Yes" block or an "X" in the "No" block.

Appendix F—DoD Freedom of Information Act Program Components

*Office of the Secretary of Defense/
Organization of the Joint Chiefs of
Staff/Unified Commands and Other
Agencies Assigned to OSD for
Administrative Support*

Department of the Army
Department of the Navy
Department of the Air Force
Defense Communications Agency
Defense Contract Audit Agency
Defense Intelligence Agency
Defense Investigative Service
Defense Logistics Agency
Defense Mapping Agency
Defense Nuclear Agency
National Security Agency
June 30, 1987.

Linda M. Lawson,

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

[FR Doc. 87-15178 Filed 7-9-87; 8:45 am]

BILLING CODE 3810-01-M

PANAMA CANAL COMMISSION

35 CFR Part 257

Enforcement of Nondiscrimination on the Basis of Handicap in Panama Canal Commission Programs

AGENCY: Panama Canal Commission.

ACTION: Final rule.

SUMMARY: This regulation requires that the Panama Canal Commission operate its programs and activities to assure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for "individual with handicaps" and "qualified individual with handicaps", and establishes a complaint mechanism for resolving allegations of discrimination. This regulation is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the

basis of handicap in programs or activities conducted by Federal executive agencies.

DATES: This rule is effective August 10, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Rhode, Jr., Office of the Secretary, Panama Canal Commission, Suite 550, 2000 L Street NW., Washington, DC 20036-4996 (Tel. No. 202-634-8441 TDD) or Mr. John L. Haines, Jr., General Counsel, Panama Canal Commission, APO Miami 34011-5000 (Tel. No. 011-507-52-7511). Copies of this regulation will be made available on tape for persons with impaired vision who request them.

SUPPLEMENTARY INFORMATION: The Panama Canal Commission published proposed regulations concerning the enforcement of nondiscrimination on the basis of handicap on June 11, 1986 at 51 FR 21314. One comment was received concerning the proposed regulation, and the proposed regulation is adopted without substantive change.

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to certain programs and activities conducted by Panama Canal Commission. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Section 119, Pub. L. 95-602, 92 Stat. 2982) and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that:

No otherwise qualified individual with handicaps in the United States, * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies be submitted to the appropriate authorizing committees of Congress and that such

regulations take effect no earlier than the thirtieth day after they have been so submitted. The Panama Canal Commission is submitting these regulations to the Senate Committee on Labor and Human Resources and to the House Committee on Education and Labor. This rule will become effective on August 10, 1987.

The substantive nondiscrimination obligations of the agency, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. See 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment during debate on the floor of the House of Representatives that the Federal Government should have the same obligations under section 504 as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) (remarks of Rep. Jeffords); 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); 124 Cong. Rec. at 38,552 (remarks of Rep. Sarasin).

There are, however, some language differences between this final rule and the Federal government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. See *Dopico v. Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association v. Lewis*, 655 F.2d 1272 (D.C. Cir. 1981); (APTA); See also *Rhode Island Handicapped Action Committee v. Rhode Island Public Transit Authority*, 718 F.2d 490 (1st Cir. 1983).

These language differences are also supported by the decision of the Supreme Court in *Alexander v. Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify a limitation on the duration of Medicaid coverage for inpatient hospital care for handicapped persons. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable" modifications, *id.* at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." *Id.*, at n. 21 [emphasis added].

Incorporation of these language changes makes this regulation consistent with the section 504 regulations for federally assisted programs as they have been interpreted by the Supreme Court. Many of the regulations for federally assisted programs were issued prior to the *Davis* decision, the lower court cases interpreting *Davis*, and the *Alexander* decision; therefore, their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these regulations for federally assisted programs must be interpreted to reflect the holdings of the Federal judiciary. Hence, the Panama Canal Commission believes that there are no significant differences between this final rule for federally conducted programs and the Federal government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice under Executive Order 12250 (45 FR 72995, 3 CFR, 1980 Comp., p. 298), and by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

This regulation is not a major rule within the meaning of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and, therefore, a regulatory impact analysis has not been prepared. This regulation does not have an impact on small entities and is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601 through 612).

Section-by-Section Analysis

Section 257.101 Purpose

Section 257.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973, to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

Section 257.102 Application.

The regulation applies to all programs or activities conducted by the agency except for programs or activities conducted outside the United States which do not involve individuals with handicaps in the United States.

Section 257.103 Definitions.

"Agency." For purposes of this regulation "agency" means the Panama Canal Commission.

"Assistant Attorney General."

"Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the agency's programs or activities. The definition provides examples of commonly used auxiliary aids. Auxiliary aids are addressed in § 257.160(a)(1), and are discussed further in the analysis of that section.

"Complete complaint." A "complete complaint" is defined to include all the information necessary to enable the agency to investigate a complaint. The definition is necessary because the 180-day period for the agency's investigation (see § 257.170(d)) begins when it receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the phrase "or interest in such property" has been deleted and the phrase "rolling stock or other conveyances" has been added. The phrase, "or interest in such property," is deleted, because the term "facility" as used in this regulation, refers to structures and not to intangible property rights. It should, however, be noted that the regulation applies to all programs and activities conducted by the agency involving individuals with handicaps in the United States, regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. The term "facility" is used in §§ 257.149, 257.150 and 257.170(f).

"Individual with handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in

the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps." The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appears in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition reflects the decision of the Supreme Court in *Southeastern Community College v. Davis*.

In that case, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment prevented her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." 442 U.S. at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," *id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." *Id.* at 410.

We have incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make it clear that such a person must be able to participate in the program offered by the agency. The agency is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered, not whether the applicant could benefit or obtain results from some other program that the agency does not offer.

Although the revised definition allows exclusion of some individuals with handicaps from some programs, it requires that an individual with handicaps who is capable of achieving the purpose of the program be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The definition of "qualified individual with handicaps" has been revised to make it clear that the agency has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the agency must follow the procedures established in §§ 257.150(a) and 257.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the agency head or his designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the agency head determines that an action would result in a fundamental alteration, the agency must consider options that would enable an individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

Paragraph (2) explains that "qualified individual with handicaps" means "qualified handicapped person," as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 257.140(2) of this rule. Nothing in this part changes existing regulations applicable to employment.

For programs or activities that do not fall under the first two paragraphs, paragraph (3) adopts the existing definition of "qualified handicapped person" with respect to services in the coordination regulation for programs receiving Federal financial assistance (28 CFR 41.32(b)). Under this definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

"Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the agency and not to programs or activities to which it provides Federal financial assistance.

Section 257.110 Self-evaluation.

This section requires that the agency conduct a self-evaluation of its

compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has demonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes effective and efficient implementation of section 504.

This final rule uses the same provision adopted by the Department of Justice in its final rule implementing section 504 for its federally conducted programs. 28 CFR 39.110. The Department of Justice determined that this regulatory language was appropriate after it had analyzed the Federal Advisory Committee Act (5 U.S.C. app.) Executive Order 12024, and 41 CFR Part 101-6, the regulation of the General Services Administration implementing the Act.

This final rule provides that the agency shall afford an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process and development of transition plans (§ 257.150(d)) by submitting comments (both oral and written).

Section 257.111 Notice.

Section 257.111 requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the agency's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

Section 257.130 General prohibitions against discrimination.

Section 257.130 is an adaptation of the corresponding section of the coordination regulation under section 504 for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 257.130 establish the general principles for analyzing whether any particular action of the agency violates this mandate. These principles serve as the analytical foundation for the remaining

sections of the regulation. Whenever the agency has violated a provision in any of the subsequent sections, it has also violated one of the general prohibitions found in § 257.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (e.g., epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. The Department of Justice has said, for example, in the prototype regulations that it would be permissible to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce, but it may not be permissible to disqualify automatically all those who are blind in just one eye.

Section 504, however, prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (§§ 257.149, 257.150 and 257.151) and communications (§ 257.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the agency administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the agency to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the agency's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits,

or services be provided to individuals with handicaps only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the agency from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the agency from utilizing criteria or methods of administration that deny individuals with handicaps access to the agency's programs or activities. The phrase "criteria or methods of administration" refers to official written agency policies and the actual practices of the agency. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in § 257.130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the agency. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the agency, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the agency must administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, i.e., in a setting that enables individuals with handicaps to interact with nonhandicapped person to the fullest extent possible.

Section 257.140 Employment.

Section 257.140 prohibits discrimination on the basis of handicap

in employment. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith v. U.S. Postal Service*, 742 F.2d 257, 259-260 (6th Cir. 1984); *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 302-304 (5th Cir. 1981). *Contra McGuinness v. U.S. Postal Service*, 744 F.2d 1318, 1320-21 (7th Cir. 1984); *Boyd v. U.S. Postal Service*, 752 F.2d 410, 413-414 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Smith*, 742 F.2d at 262; *Prewitt*, 662 F.2d at 304. Accordingly, § 257.140 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. (It should be noted, however, that section 501 and 29 CFR Part 1613 apply not only to handicapped persons in the United States but also to the employment of U.S. citizens outside the United States.) In addition to this section, § 257.170(b) of this regulation specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination.

The final rule has not been changed. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. While this rule could define terms with respect to employment and enumerate what practices are covered and what requirements apply, the agency is adopting the EEOC's recommendation that, in order to avoid duplicative, competing, or conflicting standards with respect to Federal employment, reference in these regulations to the government-wide EEOC rules is sufficient. The class of Federal employees and applicants covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Section 257.149 Program accessibility: Discrimination prohibited.

Section 257.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 257.150 and 257.151.

Section 257.150 Program accessibility: Existing facilities.

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.56 through 41.58), with certain modifications. Thus, § 257.150 requires that the agency's program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (§ 257.150(a)(1)). Section 257.150(a)(2), unlike 28 CFR 41.56 and 41.57, places explicit limits on the agency's obligation to ensure program accessibility.

Paragraph (a)(2) generally codifies case law that defines the scope of the agency's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the agency is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in § 257.160(d). This provision is based on the Supreme Court's holding in *Southeastern Community College v. Davis*, that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, the courts of appeals have applied this limitation on a showing that only one of the two undue burdens would be created as a result of the modification sought to be imposed under section 504. See e.g., *Dopico v. Goldschmidt*, *supra*; *American Public Transit Association v. Lewis*, *supra* (cited as *APTA*).

This interpretation is also supported by the recent decision of the Supreme Court in *Alexander v. Choate*, *supra*. *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days a year. The plaintiffs argued that this reduction violated section 504, because it had an adverse impact on handicapped persons. The Court assumed without

deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by Section 504 or its implementing regulations. 469 U.S. at 299. Relying on *Southeastern Community College v. Davis*, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the [Federal] grantee offers". *Id.* at 301, and that "reasonable adjustments in the nature of the benefit being offered must at times be made to assure meaningful access." *Id.* at n. 21 (emphasis added). However, section 504 does not require "changes," "adjustments," or "modifications" to existing programs that would be "substantial" * * * or that would constitute "fundamental alteration[s] in the nature of a program." *Id.* at n. 20 (citations omitted).

Alexander supports the position, based on *Davis* and the earlier, lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus, failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation. This provision is unchanged from the proposed rule.

The agency is adopting the proposed rule's procedural requirements for application of the "fundamental alteration" and "undue financial and administrative burdens" language. The agency believes that, in most cases, making an agency program accessible will not result in undue burdens. In determining whether financial and administrative burdens are undue, all agency resources available for use in the funding and operation of the conducted program or activity should be considered. The burden of proving that compliance with § 257.150(a) would fundamentally alter the nature of a program or activity or would result in undue financial and administrative burdens rests with the agency. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee and must be accompanied by a written statement of the reasons for reaching that conclusion. Any person who believes that he or she or any

specific class of persons has been injured by the agency head's decision or failure to make a decision may file a complaint under the compliance procedures established in § 257.170. Finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the agency must still take actions, short of that outer limit, that will open participation in the agency program to individuals with handicaps to the fullest extent possible.

Paragraph (b)(1) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the agency shall give priority consideration to those that will be consistent with the provision of services in the most integrated setting appropriate to the needs of individuals with handicaps. Structural changes in existing facilities are required only when there is no other feasible way to make the agency's program accessible. The agency may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits, as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the agency must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 257.151 Program accessibility: New construction and alterations.

Overlapping coverage exists with respect to new construction under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157). Section 257.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101-19.600 through 101-19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as

amended (42 U.S.C. 4151 through 4157). We believe that it is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

Existing buildings leased by the agency after the effective date of this regulation are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in § 257.150. To the extent that the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of § 257.151.

Federal practice under section 504 has always treated newly-leased buildings as subject to the program accessibility standard for existing facilities. Unlike the construction of new buildings, where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the agency believes the same program accessibility standard should apply to both owned and leased existing buildings.

In *Rose v. United States Postal Services*, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the issue of whether section 504 likewise requires accessibility as condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 257.160 Communications.

Section 257.160 requires the agency to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 257.160(a)(1) to afford an individual with handicaps and equal opportunity to participate in, and enjoy the benefits of, the agency's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice

shall be given primary consideration by the agency (§ 257.160(a)(1)(i)). The agency shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 257.160(d). That paragraph limits the obligation of the agency to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (see discussion of § 257.150(a)(3)). Unless not required by § 257.160(d), the agency shall provide auxiliary aids at no cost to the individual with handicaps.

The regulation requires the agency to provide auxiliary aids to ensure that individuals with handicaps have "an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency." Where the form of communication is different for individuals with handicaps than for non-handicapped people (e.g., oral instead of written for person with impaired vision, sign language instead of speech for persons with impaired hearing) the effectiveness of the communication is the appropriate measurement of equality of treatment.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (e.g., a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. Then, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the agency intends to make clear to the public (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the agency's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective. The agency shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the agency. Auxiliary aids must be afforded where necessary to ensure effective communication at the proceedings.

If sign language interpreters are necessary, the agency may require that it be given reasonable advance notice of

the need for an interpreter. Moreover, the agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature (§ 257.160(a)(1)(ii)). For example, the agency need not provide eyeglasses or hearing aids to applicants or participants in its programs. Similarly, the regulation does not require the agency to provide wheelchairs to persons with mobility impairments.

The language in § 257.160(a)(1)(ii) that states that the agency need not provide individually prescribed devices or readers for personal use is intended to distinguish between communications that are necessary to obtain the benefits of Federal programs and those that are not. This language parallels the requirements of the Federal government's section 504 regulations for federally assisted programs. For example, a federally operated library would have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.

Paragraph (b) requires the agency to provide information to individuals with handicaps concerning accessible services, activities, and facilities. Paragraph (c) requires the agency to provide signs at inaccessible facilities that direct users to locations with information about accessible facilities.

Section 257.170 Compliance procedures.

The compliance procedures in this section follow the same basic scheme as the Justice Department's regulations. These regulations are less detailed, however. To the extent that the Commission determines that additional compliance procedures are warranted, they will be adopted in the form of internal regulations. Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the agency will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The agency is required to accept and investigate all complete complaints (§ 257.170(d)). If it determines that it does not have jurisdiction over a complaint, it shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal government (§ 257.170(e)). The agency

has not adopted a rule requiring the referral of a complaint to the appropriate agency, because there may be circumstances in which there is not any agency which has jurisdiction over the matter complained of or the complaint does not contain sufficient information for the Commission to determine which agency has responsibility.

Paragraph (f) requires the agency to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by individuals with handicaps.

Paragraph (g) requires the agency to provide to the complainant, in writing, findings of fact and conclusions of law, the relief granted if noncompliance is found, and notice of the right to appeal. One appeal within the agency shall be provided (§ 257.170(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (§ 257.170(i)).

Paragraph (l) permits the agency to delegate its authority for investigating complaints to order Federal agencies. However, the statutory obligation of the agency to make a final determination of compliance or noncompliance may not be delegated.

List of Subjects in 35 CFR Part 257

Blind, Buildings, Civil rights, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

For the reasons set forth in the preamble, 35 CFR Chapter I is amended as follows.

Dated: May 15, 1987.

D.P. McAuliffe,
Administrator.

A new Part 257 is added to read as follows:

PART 257—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY PANAMA CANAL COMMISSION

Sec.

- 257.101 Purpose.
- 257.102 Application.
- 257.103 Definitions.
- 257.104–257.109 [Reserved]
- 257.110 Self-evaluation.
- 257.111 Notice.
- 257.112–257.129 [Reserved]
- 257.130 General prohibitions against discrimination.
- 257.131–257.139 [Reserved]

Sec.

- 257.140 Employment.
- 257.141–257.148 [Reserved]
- 257.149 Program accessibility: Discrimination prohibited.
- 257.150 Program accessibility: Existing facilities.
- 257.151 Program accessibility: New construction and alterations.
- 257.152–257.159 [Reserved]
- 257.160 Communications.
- 257.161–257.169 [Reserved]
- 257.170 Compliance procedures.
- 257.171–257.999 [Reserved]

Authority: 29 U.S.C. 794.

§ 257.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 257.102 Application.

This part applies to all programs or activities conducted by the agency except for programs or activities conducted outside the United States which do not involve individuals with handicaps in the United States.

§ 257.103 Definitions.

For purposes of this part, the term—"Agency" means the Panama Canal Commission.

"Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, materials in Braille, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory actions in sufficient detail to inform the agency of the nature and date of the alleged violation of

section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Major life activities" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

"Qualified individual with handicaps" means—

(1) With respect to any covered agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to employment, an individual with handicaps who meets the definition of "qualified handicapped person" set forth in 29 CFR 1613.702(f), which is made applicable to this part by § 257.140; and

(3) With respect to any other covered program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 257.104-257.109 [Reserved]

§ 257.110 Self-evaluation.

(a) The agency shall, by July 11, 1988, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps, or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the evaluation required under paragraph (a)

of this section, maintain on file and make available for public inspection—

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 257.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 257.112-257.129 [Reserved]

§ 257.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the offices of the agency located in the United States.

(b)(1) The agency, in providing any aid, benefit, or service may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others; or

(v) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by

others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissible separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 257.131-257.139 [Reserved]

§ 257.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to

employment in federally conducted programs or activities.

§§ 257.141-257.148 [Reserved]

§ 257.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 257.150 no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 257.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 257.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignments of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of

new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by October 8, 1987, except that where structural changes in facilities are undertaken, such changes shall be made by July 10, 1990, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by January 11, 1988, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section, and if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan.

§ 257.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on

behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151 through 4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 257.152-257.159 [Reserved]

§ 257.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 257.160 would

result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 257.161-257.169 [Reserved]

§ 257.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Director of Equal Opportunity.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 through 4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt by the complainant of decision required by § 257.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by Administrator of the Panama Canal Commission.

(j) The Administrator shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Administrator determines that it needs additional information from the complainant, he shall have 60 days from the date it receives the additional information to make its determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

§§ 257.171-257.999 [Reserved]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL 3203-3]

Air Quality; Approval and Promulgation of Implementation Plans; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Final rulemaking.

SUMMARY: USEPA is approving two negative declarations by the State of Illinois. The first indicates that there are no manufacturers of high density polyethylene or polypropylene resins. The second indicates that there are no vegetable oil processing sources with potential volatile organic compound (VOC) emissions greater than 100 tons per year in Illinois' ozone nonattainment areas. USEPA's approval of these negative declarations exempts the State of Illinois from the necessity of developing a control plan for these types of sources.