



Instruction

Defense Intelligence Agency

DEFENSE INTELLIGENCE AGENCY
WASHINGTON, DC 20340-5100

DIAI 5400.002
6 November 2006
OPR: DA

Freedom of Information Act Program

- References:
- (a) DIAR 12-39, "Freedom of Information Act Program", 24 August 1999 (canceled)
 - (b) Title 5, United States Code, Section 552, as amended, "Freedom of Information Act"
 - (c) DoD 5400.7-R, "Freedom of Information Act Program", 4 September 1998
 - (d) Executive Order 13392, "Improving Agency Disclosure of Information", 14 December 2005
 - (e) DoD Directive 5400.4, "Provision of Information to Congress", 30 January 1978
 - (f) DoD Directive 7650.1, "General Accounting Office (GAO) and Comptroller General Access to Records", 11 September 1997
 - (g) through (k) – see enclosure 1

1. Purpose

- 1.1. Replaces reference (a).
- 1.2. Implements reference (b), which establishes the statutory right of public access to executive branch information in the federal government, reference (c), which provides guidance regarding administration of the Freedom of Information Act Program within the Department of Defense (DoD), and reference (d), which emphasizes a new citizen centered and results oriented focus on agency Freedom of Information Act (FOIA) offices.
- 1.3. Defines terms and outlines responsibilities of the components of the Defense Intelligence Agency (DIA) in responding to requests for information from the general public. Generally, information other than that subject to the exemptions recognized in reference (b), and discussed in paragraph 3 of this instruction will be provided to the public.

2. Definitions

- 2.1. Freedom of Information Act (FOIA) Request

- 2.1.1. A written request for DIA records that reasonably describes the record(s), made by any person including: a member of the public (U.S. or foreign citizen); an organization or business (U.S. or foreign); a local or state government (U.S. only); but not 1) a fugitive from the law; or 2) a foreign government or a representative of a foreign government. Requesters should also indicate a willingness to pay fees associated with the processing of their request or, in the alternative, why a waiver of fees may be appropriate (see enclosure 2).
- 2.1.2. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically. Requests received by facsimile or electronically must have a postal mailing address included since it may not be practical to provide a substantive response electronically. The request is considered properly received or perfected, when the above conditions have been met and the request arrives at the FOIA Office of DIA.

2.2. Records

- 2.2.1. Records are the products of data compilation, such as all books, papers, maps, photographs, machine readable materials or other documentary materials, regardless of physical form or characteristics, created or received by DIA in connection with the transaction of public business and in DIA's possession and control at the time the FOIA request is made.
- 2.2.2. The following are not included within the definition of the word "record":
 - 2.2.2.1. Objects or articles, such as structures, furniture, paintings, sculptures, three-dimensional models, vehicles, and equipment, whatever their historical value or value as evidence.
 - 2.2.2.2. Administrative tools by which records are created, stored, and retrieved, if not created or used as sources of information about organizations, policies, functions, decisions, or procedures of a DoD component. Normally, computer software – including source code, object code, and listings of source and object codes, regardless of medium – are not Agency records. 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. (Exceptions to this policy are outlined below.) In some instances, computer software may have to be treated as an Agency record and processed under the FOIA. These situations are rare and shall be treated on a case-by-case basis. Examples of when computer software may have to be treated as an Agency record:
 - a) When the data are embedded within the software and cannot be extracted without the software. In this situation, both the data and the software must be reviewed for release or denial under the FOIA.

- b) When the software itself reveals information about organizations, policies, functions, decisions, or procedures of the Agency, such as computer models, used to forecast budget outlays, calculate system costs, or optimization models on travel costs.

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

2.2.2.4. Personal notes 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.

2.2.2.5. Information stored within a computer for which there is no existing computer program or printout for retrieval of the requested information.

3. Responsibilities

3.1. The Director, and on his behalf, the Deputy Director, exercises overall responsibility for ensuring DIA compliance with statutory requirements of the Freedom of Information Act (FOIA).

3.2. The Chief of Staff acts as the responsible official for all denials of appeals.

3.3. The Office for DIA Information Services provides oversight for an effective FOIA Office in compliance with the provisions of reference (b).

3.4. The Public Access Branch is the office of primary responsibility for receiving and processing all FOIA requests from the public. The Public Access Branch/DAN-1A will:

3.4.1. Maintain appropriate suspenses and authorize all extensions of responses.

3.4.2. Act as the responsible operating office for all Agency actions related to the FOIA.

3.4.3. Draft and transmit responses on:

- a) The release of records and/or information.
- b) Obtaining supplemental information from the requester.
- c) Informing the requester of any fees required.
- d) The transfer to another element or agency of the initial request.

3.5. The General Counsel provides legal advice and guidance on FOIA requests, appeals, and litigations. The General Counsel:

- 3.5.1. Ensures uniformity in the FOIA legal positions within DIA and with DoD.
- 3.5.2. Secures coordination when necessary with the DoD General Counsel on denials of public requests.
- 3.5.3. Acts as the focal point in all judicial actions.
- 3.5.4. Reviews all final denials.
- 3.6. Agency Directorates are responsible to respond to FOIA taskings from the Public Access Branch in a timely manner.
 - 3.6.1. When identified by DAN-1A as the office of primary responsibility (OPR) DIA directorates and special staff offices will:
 - (a) Search files for any relevant records, and/or
 - (b) Review records for possible public release within the time constraints assigned, and
 - (c) Prepare a signed documented response in any case of release or non-release.
- 3.7. All employees are required to read this instruction to ensure familiarity with the requirements of the FOIA as implemented.
- 4. Procedures
 - 4.1. Compliance with the Freedom of Information Act
 - 4.1.1. The provisions of the FOIA, as implemented by reference (c) and this instruction, will be supported in both letter and spirit.
 - 4.1.2. Requested records will be withheld only when a significant and legitimate governmental purpose is served by withholding them. Records that require protection against unauthorized release in the interest of the national defense or foreign relations of the United States will not be provided.
 - 4.1.3. Official requests from Members of Congress, the Government Accountability Office, or other Congressional support activities acting in their official capacity, are governed by references (e), (f), and (g). Requests from private parties, or officials of state or local governments, are governed by reference (c).
 - 4.1.4. Records will not be withheld solely because their release might result in criticism or embarrassment of DoD or this Agency (see reference (h)).

- 4.1.5. The applicability of the FOIA depends on the existence of an “identifiable record” (reference (b)). Accordingly, if DIA has no record containing information requested by a member of the public, it is under no obligation to compile information to create or obtain such a record.
- 4.1.6. Although the mission of DIA does not encompass regulatory or decision making matters in the sense of a public use agency, there is reading room material for the general public on the DIA website.
- 4.1.7. Pursuant to reference (b) fees may apply with regard to services rendered to the public under the Freedom of Information Act (see enclosure 2.) With regard to fees, the specific guidance of DoD, as set forth in reference (c), will be followed.

4.2. Processing Procedures

- 4.2.1. The tasked office must search all office files and data bases, automated or manual, under the control of that office for responsive documents. All specat and other special communication channels must be searched.
 - 4.2.1.1. Only DAN-1A(FOIA) is required to do a WISE search in response to the FOIA request.
- 4.2.2. The tasked office will make a written recommendation as to the releasability of the responsive documents located as a result of the search or forwarded to the tasked office for releasability review.
 - 4.2.2.1. Identify the specific FOIA or Privacy Act exemption, or if applicable, the particular paragraph of Executive Order 12958, as amended, that permits withholding.
- 4.2.3. The reviewer from the tasked office must release any portions of the document that can reasonably be segregated from the portions which are exempt from release.
 - 4.2.3.1. If, however, the nonexempt material is so "inextricably intertwined" that disclosure of it would "leave only essentially meaningless words and phrases," the entire sentence, paragraph, or document, as appropriate, can be withheld. Review of the information should be such as to lean toward release of as much data as possible without compromising, among other things, "sources and methods." If material is to be withheld, there must be a reasonably foreseeable harm" which could result from disclosure.
- 4.2.4. The reviewer from the tasked office must provide a written narrative stating specifically what harm will be caused if the requested information is released, and why the anticipated harm can be reasonably expected to occur.
 - 4.2.4.1. The justification for withholding of information from documents must be persuasive in articulating what harm will occur if the data is released. The

exemptions will be applied with "specific reference to such harm" and must be document-specific, not boilerplate. This narrative justification may be classified if it will aid in explaining the anticipated harm that would result from disclosure. The two purposes for this narrative are to ensure that our decision to withhold information is well founded on need, and to serve as the basis for any sworn declaration which the Director may be required to make to justify the withholding, if our claim of exemption is challenged in court.

4.2.5. Responding offices must ensure all actions are completed within their Directorate before a response is forwarded to DAN-1A(FOIA).

4.2.5.1. If further review is needed by another center or agency outside of DIA, then so advise the FOIA Office through the response memorandum. The FOIA Office will then coordinate any additional reviews.

4.2.6. The responding office must provide a search report, copies of responsive documents, and an index of forwarded documents to DAN-1A(FOIA).

4.2.6.1. The reviewing activity must provide unedited copies of responsive documents to DAN-1A(FOIA). For each document containing information recommended for withholding, the reviewer must also provide an additional copy of that document with the recommended portion to be removed, bracketed, and notated with the exemption number or paragraph which supports the withholding. The index must reference the originating activity, serial or message number, document date, title or subject, and classification for each document. The index should be grouped by originator, and arranged chronologically, oldest first, within groups. The office symbol for the activity preparing the index, and date of preparation, must be annotated on each page of the index.

4.2.7. Search reports must be in writing and specifically identify the files or databases searched, search parameters, and names of person(s) conducting the search.

4.2.7.1. Negative reports are required. Oral replies will not clear the tasker.

4.2.8. Tasker will not be closed until in compliance with all FOIA processing procedures.

4.2.8.1. DAN-1A(FOIA) will clear responding DIA activities taskings through the Automatic Tasking System when all reviews within the tasked activity are completed and DAN-1A(FOIA) receives the required documents and index, or a written statement that no responsive documents were located.

4.2.9. After making the final agency releasability review, DAN-1A(FOIA) will prepare for release of those documents that are not being withheld.

4.2.9.1. The FOIA Office will continue to remove classification markings from documents to avoid mistaking the unclassified released document as still containing classified information. In addition, the authors' names will normally be withheld from DIA-originated material as an internal matter of a relatively trivial nature and not of genuine public interest, and to protect employees from an unwarranted invasion of their personal privacy.

4.2.10. Identification of the Record:

4.2.10.1. Identification of the record desired is the responsibility of the requester. The requester must provide a description of the desired record that enables DIA to locate the record with a reasonable amount of effort. The Act does not authorize “fishing expeditions.” When DIA receives a request that does not “reasonably describe” the requested record, it will notify the requester of the deficiency. The deficiency will be highlighted in a letter to the requester seeking clarification and asking the requester to provide the type of information outlined below. This Agency is not obligated to act on the request until the requester responds to the letter seeking clarification. When practicable, DIA will 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 FOIA.

4.2.10.2. The following guidelines are provided to handle “fishing expedition” requests and are based on the principle of reasonable effort. Descriptive information about a record may be divided into two broad categories:

(a) 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.

(b) 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.

4.2.10.3. Generally, a record is not reasonably described unless the description contains sufficient category I information to permit the conduct of an organized, non-random search based on DIA’s filing arrangements and existing retrieval systems, or unless the record contains enough category II information to permit inference of the category I elements needed to conduct such a search.

4.2.10.4. A record must exist and be in the possession or control of DIA at the time of the request to be considered subject to this instruction. There is no obligation to create, compile, or obtain a record to satisfy a FOIA request.

4.2.11. Denial of records:

- 4.2.11.1. Requests for records may be denied only when the officials designated in paragraph 3 determine that such denial is authorized by the FOIA.
- 4.2.11.2. The prior application of FOR OFFICIAL USE ONLY (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 will be evaluated to determine whether, under current circumstances, FOIA exemptions apply and whether a significant and legitimate governmental purpose is served by withholding the record or portions of it.
- 4.2.12. When an initial request is denied, the requester will be apprised of the following:
 - 4.2.12.1. The basis for the refusal shall be explained to the requester in writing, identifying the applicable statutory exemption or exemptions invoked under provisions of this instruction.
 - 4.2.12.2. 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 criteria and rationale of reference (h), and that this determination is based on a declassification review.
 - 4.2.12.3. The final denial shall include the name and title or position of the official responsible for the denial.
 - 4.2.12.4. The response shall advise the requester with regard to denied information whether or not any reasonably segregable portions were found.
 - 4.2.12.5. The response shall advise the requester of the right to appeal within 60 days of the date of the initial denial letter.
- 4.2.13. All DIA elements responding to FOIA requests will follow the specific FOIA processing procedures set forth in this instruction.
- 4.2.14. Initial availability, releasability, and cost determinations will normally be made within 20 working days of the date on which a written request for an identifiable record is received by DIA. If due to unusual circumstances, additional time is needed, a written notification of the delay will be forwarded to the requester explaining the circumstances of the delay and when the Agency will make a determination on the request.
- 4.2.15. Requests shall be processed in order of receipt and in accordance with our multi-track processing system as required by statute, which allows for simpler cases to be processed before larger, more complex cases, where appropriate, by placing them in certain tracks respectively.
- 4.2.16. Expedited processing:

4.2.16.1. DIA may expedite action on a request regardless of its ranking within the order of receipt upon a showing of exceptional need or urgency. Exceptional need or urgency is determined at the discretion of DIA in accordance with the section below. Requests and appeals will be taken out of order and given expedited treatment whenever it is determined they involve:

- (a) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.
- (b) Urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.
- (c) Loss of substantial due process rights, or
- (d) A matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence.

4.2.16.2. A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of the person's knowledge and belief, explaining in detail the basis for requesting expedited processing. Within ten calendar days of its receipt of a request for expedited processing, DIA shall decide whether to grant it and shall notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of the decision shall be acted upon expeditiously.

4.3. How the Public Submits Requests for Records

4.3.1. Requests to obtain copies of records must be made in writing. The requests should contain at least the following information:

- 4.3.1.1. Reasonable identification of the desired record as specified in paragraph 4.2.10., including (if known) title or description, date, and the issuing office.
- 4.3.1.2. With respect to matters of official records concerning civilian or military personnel, the first name, middle name or initial, surname, date of birth, and social security number of the individual concerned, if known.
- 4.3.1.3. Persons desiring records should direct inquiries to:

Defense Intelligence Agency
200 MacDill Blvd

ATTN: DAN-1A (FOIA)
Washington, DC 20340-5100

4.4. FOIA Exemptions: The following types of records may be withheld in whole or in part from public disclosure unless otherwise prescribed by law.

4.4.1. Exemption (b)(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 (reference (i)). Although material may not be classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. The procedures outlined in reference (j) regarding classification apply. In addition, this exemption shall be invoked when the following situations are apparent:

4.4.1.1. The fact of the existence or nonexistence of a record would itself reveal classified information. In this situation, DIA shall neither confirm nor deny the existence or nonexistence of the record being requested. A “refusal to confirm or deny” response must be used consistently, not only when a record exists, but also when a record does not exist. Otherwise, the pattern of using a “no record” response when a record does not exist, and a “refusal to confirm or deny” when a record does exist will itself disclose national security information.

4.4.1.2. Information that concerns one or more of the classification categories established by executive order (reference (h)) and reference (i) shall be classified if its unauthorized disclosure, either by itself or in the context of other information, could reasonably be expected to cause damage to the national security.

4.4.2. Exemption (b)(2). Those containing rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or practices of DIA if their release to the public would substantially hinder the effective performance of a significant function of the DoD, and they do not impose requirements directly on the general public. This exemption has two profiles, high (b)(2) and low (b)(2).

4.4.2.1. Records qualifying under high (b)(2) are those containing or constituting, rules, regulations, orders, manuals, directives and instructions, the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the DoD.

4.4.2.2. Records qualifying under the low (b)(2) profile are those that are trivial and housekeeping in nature from which there is no legitimate public interest or benefit to be gained. Their release would constitute an administrative burden.

- 4.4.3. Exemption (b)(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. For example, DIA has the authority to withhold DIA employee names through reference (k).
- 4.4.4. Exemption (b)(4). Those containing trade secrets or commercial or financial information that the DIA 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.
- 4.4.4.1. 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 governmental interest.
- 4.4.4.2. When a request is received for a record that was obtained or 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) shall be notified promptly of that request and afforded reasonable time (e.g. 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). For further guidance, see reference (c).
- 4.4.5. Exemption (b)(5). Those concerning internal advice, recommendations, and subjective evaluations, as contrasted with factual matters, which are reflected in records pertaining to the decision-making process of an agency whether within or among agencies or within or among DoD components. Also exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege.
- 4.4.6. Exemption (b)(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. Release of information about an individual contained in a Privacy Act system of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties.
- 4.4.7. Exemption (b)(7). Records or information compiled for the purpose of enforcing civil, criminal, or military law, including the implementation of executive orders or regulations issued pursuant to law, but only to the extent that the production of such law enforcement records or information (A) could be reasonably expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could constitute an unwarranted invasion of the personal privacy of others (reference (c)), (D) could disclose the

identity of a confidential source, (E) would disclose investigative techniques and procedures, or (F) could endanger the life or physical safety of law enforcement personnel. This exemption may be invoked to prevent disclosure of documents not originally created for, but later gathered for, law enforcement purposes.

4.5. Filing an Appeal for Refusal to Make Records Available

- 4.5.1. A requester may appeal an initial decision to withhold a record. Furthermore, if a requester determines a “no record” response in answer to a request to be adverse, this determination may also be appealed. Appeals should be addressed to:

Defense Intelligence Agency
200 MacDill Blvd
ATTN: DAN-1A (FOIA)
Washington, DC 20340-5100

- 4.5.2. The requester shall be advised that the appellate authority must receive an appeal no later than 60 calendar days after the date of the initial denial letter.
- 4.5.3. Final determination on appeals normally will be made within 20 working days of receipt of the appeal at the above address. If additional time is needed to decide the appeal because of unusual circumstances, the final determination may be delayed for the number of working days, not to exceed 20 days. DIA may expedite action on an appeal request regardless of its ranking within the order of receipt upon showing exceptional need or urgency. Exceptional need or urgency is determined at the discretion of DIA.
- 4.5.4. When an appeal is denied, the requester will be apprised of the following:
- 4.5.4.1. The basis for the refusal shall be explained to the requester, in writing, identifying the applicable statutory exemption or exemptions invoked under provisions of this regulation.
- 4.5.4.2. 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 criteria and rationale of the governing executive order, and that this determination is based on a declassification review.
- 4.5.4.3. The final denial shall include the name and title or position of the official responsible for the denial.
- 4.5.4.4. The response shall advise the requester with regard to denied information whether or not any reasonably segregable portions were found.

4.5.4.5. The response shall advise the requester of the right to judicial review.

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//Original Signed

Deputy Director for Administration

Enclosures -- 2

E1. Additional References

E2. Uniform Agency Fees