

PART 1700—PROCEDURES FOR DISCLOSURE OF RECORDS PURSUANT TO THE FREEDOM OF INFORMATION ACT

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AUTHORITY: 5 U.S.C. 552, 50 U.S.C. 401-442; Pub. L. 108-458, 118 Stat. 3638.

SOURCE: 72 FR 45894, Aug. 16, 2007, unless otherwise noted.

§ 1700.1 Authority and purpose.

(a) *Authority.* This part is issued under the authority of and in order to implement the Freedom of Information Act, as amended, 5 U.S.C. 552; the National Security Act of 1947, as amended, 50 U.S.C. 401-442; and the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638.

(b) *Purpose in general.* This part prescribes procedures for:

- (1) ODNI administration of the FOIA;
- (2) Requesting records pursuant to the FOIA; and
- (3) Filing an administrative appeal of an initial adverse decision under the FOIA.

§ 1700.2 Definitions.

For purposes of this Part, the following terms have the meanings indicated:

(a) *Days* means calendar days when ODNI is operating and specifically excludes Saturdays, Sundays, and legal public holidays;

(b) *Direct costs* means those expenditures which ODNI actually incurs in the processing of a FOIA request; it

does not include overhead factors such as space;

(c) *Pages* means paper copies of standard office size or the dollar value equivalent in other media;

(d) *Reproduction* means generation of a copy of a requested record in a form appropriate for release;

(e) *Review* means all time expended in examining a record to determine whether any portion must be withheld pursuant to law and in effecting any required deletions but excludes personnel hours expended in resolving general legal or policy issues; it also means personnel hours of professional time;

(f) *Search* means all time expended in looking for and retrieving material that may be responsive to a request utilizing available paper and electronic indices and finding aids; it also means personnel hours of professional time or the dollar value equivalent in computer searches;

(g) *Expression of interest* means a written or electronic communication submitted by any person requesting information on or concerning the FOIA program, the availability of documents from ODNI, or both;

(h) *Fees* means those direct costs which may be assessed a requester considering the categories established by the FOIA; requesters should submit information to assist the ODNI in determining the proper fee category and the ODNI may draw reasonable inferences from the identity and activities of the requester in making such determinations; the fee categories include:

(1) *Commercial use request:* A request in which the disclosure sought is primarily in the commercial interest of the requester and which furthers such commercial, trade, income or profit interests;

(2) *Educational institution:* A preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made

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under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(3) *Noncommercial scientific institution:* An institution that is not operated on a commercial basis, as that term is defined in paragraph (h)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(4) *Representative of the news media:* An individual actively gathering news for an entity that is organized and operated to publish and broadcast news to the public and pursuant to the entity's news dissemination function and not its commercial interests; the term "news" means information which concerns current events, would be of current interest to the general public, would enhance the public understanding of the operations or activities of the U.S. Government, and is in fact disseminated to a significant element of the public at minimal cost; freelance journalists are included in this definition if they provide sufficient evidence to justify an expectation of publication through such an organization, even though not actually employed by it; a publication contract or prior publication record is relevant to such status;

(5) *All other:* A request from an individual not within paragraphs (h)(1), (2), (3), or (4) of this section;

(i) *Freedom of Information Act, "FOIA,"* or "the Act" means the statute as codified at 5 U.S.C. 552;

(j) *ODNI* means the Office of the Director of National Intelligence and its component organizations. It does not include other members of the Intelligence Community as defined in 50 U.S.C. 401a, or other federal entities subsequently designated in accordance with this authority, unless specifically designated as included in this part or in the notice of a system of records;

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(k) *Potential requester* means a person, organization, or other entity who submits an expression of interest.

§ 1700.3 Contact for general information and requests.

For general information on this Part, to inquire about the FOIA program at ODNI, or to file a FOIA request (or expression of interest), please direct communication in writing to the Office of the Director of National Intelligence, Chief FOIA Officer c/o Director, Information Management Office, Washington, DC 20511 by mail or by facsimile at (703) 482-2144. FOIA requests can also be submitted by electronic mail to *FOIA @ dni.gov*. For general information or status information on pending cases only, call the ODNI FOIA Customer Service Center at (571) 204-4774.

§ 1700.4 Preliminary information.

Members of the public shall address all communications to the point of contact specified in § 1700.3 and clearly delineate the communication as a request under the FOIA. ODNI staff who receive a FOIA request shall expeditiously forward the request to the Director, Information Management Office (IMO). Requests and appeals (as well as referrals and consultations) received from FOIA requesters who owe outstanding fees for information services at this or other federal agencies will not be accepted and action on all pending requests shall be terminated in such circumstances.

§ 1700.5 Requirements as to form and content.

(a) *Required information.* No particular form is required. A request must reasonably describe the record or records being sought and be submitted in accordance with this regulation. Documents must be described sufficiently to enable a staff member familiar with the subject to locate the documents with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and the subject matter of the record. As a general rule, the more specific you are about the records or type of records

that you want, the more likely it will be that the IMO will be able to locate records responsive to your request. The IMO will provide you an opportunity to discuss your request with it so that you may modify your request to meet the requirements of this section. If after having been asked to do so you do not provide the IMO with information sufficient to enable it to locate responsive records your request will be closed.

(b) *Additional information for fee determination.* A requester must provide sufficient personally identifying information to allow staff to determine the appropriate fee category and to contact the requester easily.

§ 1700.6 Fees for records services.

(a) *In general.* Search, review, and reproduction fees will be charged in accordance with the provisions below relating to schedule, limitations, and category of requester. Applicable fees will be due even if a subsequent search locates no responsive records or some or all of the responsive records must be denied under one or more of the exemptions of the FOIA.

(b) *Fee waiver requests.* Records will be furnished without charge or at a reduced rate when ODNI determines:

(1) As a matter of administrative discretion, the interest of the United States Government would be served, or

(2) It is in the public interest to provide responsive records because the disclosure is likely to contribute *significantly* to the public understanding of the operations or activities of the United States Government and is not primarily in the commercial interest of the requester.

(c) *Fee waiver appeals.* Denials of requests for fee waivers or reductions

may be appealed to the Director of the Intelligence Staff, or his functional equivalent, through the ODNI Chief FOIA Officer. A requester is encouraged to provide any explanation or argument as to how his or her request satisfies the requirements of this regulation and the Act. See §1700.14 for further details on appeals.

(d) *Time for fee waiver requests and appeals.* Appeals should be resolved prior to the initiation of processing and the incurring of costs. However, fee waiver requests will be accepted at any time prior to an agency decision regarding the request, except when processing has been initiated, in which case the requester must agree to be responsible for costs in the event of an adverse administrative or judicial decision.

(e) *Agreement to pay fees.* If you make a FOIA request, it shall be considered a firm commitment by you to pay all applicable fees chargeable under this regulation, up to and including the amount of \$25.00, unless you ask for a waiver of fees. When making a request, you may specify a willingness to pay a greater or lesser amount.

(f) *Advance payment.* The ODNI may require an advance payment of up to 100 percent of the estimated fees when projected fees exceed \$250.00, not including charges associated with the first 100 pages of production and two hours of search (when applicable), or when the requester previously failed to pay fees in a timely fashion, for fees of any amount. ODNI will hold in abeyance for 45 days those requests where advance payment has been requested.

(g) *Schedule of fees—(1) In general.* The schedule of fees for services performed in responding to requests for records is as follows:

Personnel Search and Review		
Clerical/Technical	Quarter hour	\$5.00
Professional/Supervisory	Quarter hour	10.00
Manager/Senior Professional	Quarter hour	18.00
Computer Search and Production		
Search (on-line)	Flat rate	10.00
Search (off-line)	Flat rate	30.00
Other activity	Per minute	10.00
Tapes (mainframe cassette)	Each	9.00

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Tapes (mainframe cartridge)	Each	9.00
Tapes (mainframe reel)	Each	20.00
Tapes (PC 9mm)	Each	25.00
Diskette (3.5")	Each	4.00
CD (bulk recorded)	Each	10.00
CD (recordable)	Each	20.00
Telecommunications	Per minute50
Paper (mainframe printer)	Per page10
Paper (PC b&w laser printer)	Per page10
Paper (PC color printer)	Per page	1.00

Paper Production

Photocopy (standard or legal)	Per page10
Microfiche	Per frame20
Pre-printed (if available)	Per 100 pages	5.00
Published (if available)	Per item	NTIS

(2) *Application of schedule.* Personnel search time includes time expended in manual paper records searches, indices searches, review of computer search results for relevance, and personal computer system searches. In any event where the actual cost to ODNI of a particular item is less than the above schedule (e.g., a large production run of a document resulting in a cost less than \$5.00 per hundred pages), then the actual lesser cost will be charged.

(3) *Other services.* For all other types of output, production, or reproduction (e.g., photographs, maps, or published reports), ODNI will charge actual cost or amounts authorized by statute. Determinations of actual cost shall include the commercial cost of the media, the personnel time expended in making the item to be released, and an allocated cost of the equipment used in making the item, or, if the production is effected by a commercial service, then that charge shall be deemed the actual cost for purposes of this regulation.

(h) *Limitations on collection of fees—(1) In general.* No fees will be charged if the cost of collecting the fee is equal to or greater than the fee itself. That cost includes the administrative costs to ODNI of billing, receiving, recording, and processing the fee for deposit to the Treasury Department and, as of the date of these regulations, is deemed to be \$10.00.

(i) *Fee categories.* There are four categories of FOIA requesters for fee purposes: Commercial use requesters, edu-

cational and non-commercial scientific institution requesters, representatives of the news media requesters, and all other requesters. The categories are defined in §1700.2 and applicable fees will be assessed as follows:

(1) *Commercial use requesters:* Charges which recover the full direct costs of searching for, reviewing, and duplicating responsive records (if any);

(2) *Educational and non-commercial scientific institution requesters, and representatives of the news media requesters:* Only charges for reproduction beyond the first 100 pages;

(3) *All other requesters:* Charges which recover the full direct cost of searching for and reproducing responsive records (if any) beyond the first 100 pages of reproduction and the first two hours of search time which will be furnished without charge.

(j) *Associated requests.* If it appears a requester or a group of requesters acting in concert have requested portions of an apparently unitary request for the purpose of avoiding the assessment of fees, ODNI may aggregate any such requests and charge accordingly. Requests from multiple requesters will not be aggregated without clear evidence. ODNI will not aggregate multiple unrelated requests.

§1700.7 Processing of requests for records.

(a) *In general.* Requests meeting the requirements of §1700.3 through §1700.6 shall be accepted as formal requests and processed under the FOIA and this

Part. A request will not be considered received until it reaches the IMO. Ordinarily upon its receipt a request will be date-stamped as received. It is this date that establishes when your request is received for administrative purposes, not any earlier date such as the date of the letter or its postmark date. For the quickest possible handling, both the request letter and the envelope should be marked "Freedom of Information Act Request."

(b) *Electronic Reading Room.* ODNI maintains an online FOIA Reading Room on the ODNI Web site which contains the information that the FOIA requires be routinely made available for public inspection and copying as well as other information determined to be of general public interest.

(c) *Confirming the existence of certain documents.* In processing a request, ODNI shall decline to confirm or deny the existence of responsive records whenever the fact of their existence or nonexistence is itself classified under Executive Order 12,958 and its amending orders, reveals intelligence sources and methods protected pursuant to 50 U.S.C. 403-1(i)(1), or would be an invasion of the personal privacy of third parties. In such circumstances, ODNI, in its final written response, shall so inform the requester and advise of his or her right to file an administrative appeal.

(d) *Time for response.* Whenever the statutory time limits for processing a request cannot be met because of "unusual circumstances," as defined in the FOIA, and the component determines to extend the time limits on that basis, ODNI will inform the requester in writing and advise the requester of the right to narrow the scope of his or her request or agree to an alternative timeframe for processing.

(e) *Multitrack processing.* ODNI may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request, including through limits based on the number of pages involved. ODNI may provide requesters in its slower track with an opportunity to limit the scope of their requests in order to qualify for faster processing

within the specified limits of its faster track.

§ 1700.8 Action on the request.

(a) *Initial action for access.* ODNI staff identified to search for records pursuant to a FOIA request shall search all relevant record systems within their cognizance as of the date the search is commenced. A staff member tasked to conduct a search shall:

- (1) Determine whether records exist;
- (2) Determine whether and to what extent any FOIA exemptions apply;
- (3) Make recommendations for withholding records or portions of records that originated in the staff member's organization and for which there is a legal basis for denial or make a recommendation in accordance with §1700.7(c). In making recommendations, ODNI staff shall be guided by the procedures specified in §1700.10 regarding confidential commercial information and §1700.11 regarding third party information; and

(4) Forward to the Director, IMO, all records responsive to the request.

(b) *Referrals and consultations.* ODNI records containing information originated by other ODNI components shall be forwarded to those entities for action in accordance with paragraph (a) of this section and returned. Records originated by other federal agencies or ODNI records containing other federal agency information shall be forwarded to such agencies for processing and direct response to the requester or for consultation and return to the ODNI. ODNI will notify the requester if it makes a referral for direct response.

(c) *Release of information.* When the Director, IMO (or Appeals Authority) makes a final determination to release records, the records will be forwarded to the requester in an appropriate format promptly upon compliance with any preliminary procedural requirements, including payment of fees. If any portion of a record is withheld initially or upon appeal, the Director, IMO (or Appeals Authority) will provide a written response that shall include, at a minimum:

- (1) The basis for the withholding, citing the specific statutory exemption or exemptions invoked under the FOIA with respect to each portion withheld,

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unless documents are withheld in accordance with §1700.7(c);

(2) When the withholding 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;

(3) When the denial is based on 5 U.S.C. 552(b)(3), the statute relied upon; and

(4) Notice to the requester of the right to judicial review.

§ 1700.9 Payment of fees, notification of decision, and right of appeal.

(a) *Fees in general.* Fees collected under this part do not accrue to ODNI and shall be deposited immediately to the general account of the United States Treasury.

(b) *Notification of decision.* Upon completion of all required review and the receipt of accrued fees (or promise to pay such fees), ODNI will promptly inform the requester in writing of those records or portions of records that will be released and those that will be denied.

(1) For documents to be released, ODNI will provide paper copies or documents on electronic media, if requested and available;

(2) For documents not released or partially released, ODNI shall explain the reasons for any denial and give notice of a right of administrative appeal. For partial releases, redactions will be made to ensure requesters can see the placement and general length of redactions with the applicable exemption or exemptions clearly with respect to each redaction.

§ 1700.10 Procedures for business information.

(a) *In general.* Business information obtained by ODNI from a submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section. For purposes of this section, the following definitions apply:

(1) *Business information* means commercial or financial information in which a legal entity has a recognized property interest;

(2) *Confidential commercial information* means such business information pro-

vided to the United States Government by a submitter which is reasonably believed to contain information exempt from release under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm; and

(3) *Submitter* means any person or entity who provides confidential commercial information to the United States Government; it includes, but is not limited to, corporations, businesses (however organized), State governments, and foreign governments.

(b) *Designation of confidential commercial information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be confidential commercial information and hence protected from required disclosure pursuant to Exemption 4 of the FOIA. Such designations shall expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(c) *Process in event of FOIA request—*

(1) *Notice to submitters.* ODNI shall provide a submitter with prompt written notice of receipt of a FOIA request encompassing business information whenever:

(i) The submitter has in good faith designated the information as confidential commercial information, or

(ii) ODNI staff believe that disclosure of the information could reasonably be expected to cause substantial competitive harm, and

(iii) The information was submitted within the last 10 years unless the submitter requested and provided acceptable justification for a specific notice period of greater duration.

(2) *Form of notice.* Communication to a submitter of commercial information shall either describe the exact nature of the confidential commercial information at issue or provide copies of the responsive records containing such information.

(3) *Response by submitter.* (i) Within seven days of the notice described in

paragraph (c)(1), all claims of confidentiality by a submitter must be supported by a detailed statement of any objection to disclosure. Such statement shall:

(A) Affirm that the information has not been disclosed to the public;

(B) Explain why the information is a trade secret or confidential commercial information;

(C) Explain in detail how disclosure of the information will result in substantial competitive harm;

(D) Affirm that the submitter will provide ODNI and the Department of Justice with such litigation support as requested; and

(E) Be certified by an officer authorized to legally bind the submitter.

(ii) It should be noted that information provided by a submitter pursuant to this provision may itself be subject to disclosure under the FOIA.

(4) *Decision and notice of intent to disclose.* (i) ODNI shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to its final determination. If the Director, IMO, decides to disclose a document over the objection of a submitter, ODNI shall provide the submitter a written notice that shall include:

(A) A statement of the reasons for which the submitter's disclosure objections were not sustained;

(B) A description of the information to be disclosed; and

(C) A specified disclosure date that is seven days after the date of the instant notice.

(ii) When notice is given to a submitter under this section, the ODNI shall also notify the requester and, if the ODNI notifies a submitter that it intends to disclose information, then the requester shall be notified also and given the proposed date for disclosure.

(5) *Notice of FOIA lawsuit.* If a requester initiates legal action seeking to compel disclosure of information asserted to be within the scope of this section, ODNI shall promptly notify the submitter. The submitter, as specified above, shall provide such litigation assistance as required by ODNI and the Department of Justice.

(6) *Exceptions to notice requirement.* The notice requirements of this section

shall not apply if ODNI determines that:

(i) The information should not be disclosed, pursuant to Exemption 4 and/or any other exemption of the FOIA;

(ii) The information has been published lawfully or has been officially made available to the public;

(iii) The disclosure of the information is otherwise required by law or federal regulation; or

(iv) The designation made by the submitter under this section appears frivolous, except that, in such a case, the ODNI will, within a reasonable time prior to the specified disclosure date, give the submitter written notice of any final decision to disclose the information.

§ 1700.11 Procedures for information concerning other persons.

(a) *In general.* Personal information concerning individuals other than the requester shall not be disclosed under the FOIA if the proposed release would constitute a clearly unwarranted invasion of personal privacy, or, if the information was compiled for law enforcement purposes, it could reasonably be expected to constitute an unwarranted invasion of personal privacy. See 5 U.S.C. 552 (b)(6) and (b)(7)(C). For purposes of this section, the following definitions apply:

(1) Personal information means any information about an individual that is not a matter of public record, or easily discernible to the public, or protected from disclosure because of the implications that arise from Government possession of such information.

(2) Public interest means the public interest in understanding the operations and activities of the United States Government and not simply any matter that might be of general interest to the requester or members of the public.

(b) *Determination to be made.* In making the required determination under this section and pursuant to Exemptions 6 and 7(C) of the FOIA, ODNI will balance the privacy interests that would be compromised by disclosure against the public interest in release of the requested information.

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(c) *Otherwise.* A requester seeking information on a third party is encouraged to provide a signed affidavit or declaration from the third party consenting to disclosure of the information. However, any such statements shall be narrowly construed and the Director, IMO, in the exercise of that officer's discretion and administrative authority, may seek clarification from the third party prior to any or all releases.

§ 1700.12 Requests for expedited processing.

(a) *In general.* All requests will be handled in the order received on a strictly "first-in, first-out" basis. Exceptions to this rule will only be made in accordance with the following procedures.

(b) *Procedure.* A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for requesting expedited processing. Within ten calendar days of its receipt of a request for expedited processing, the IMO shall decide whether to grant it and shall notify the requester of the decision. If a request for expedited processing is granted, the request shall be given priority and shall be processed as soon as practicable.

(c) *Determination to be made:* Requests and appeals will be taken out of order and given expedited processing treatment whenever it is determined that they involve:

(1) 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; or

(2) An urgency to inform the public concerning an actual or alleged Federal Government activity, if made by a person primarily engaged in disseminating information.

§ 1700.13 Right to appeal and appeal procedures.

(a) *Right to appeal.* Individuals who disagree with a decision not to produce a document or parts of a document, to deny a fee category request, to deny a request for a fee waiver or fee reduction, to deny expedited processing, or a decision regarding a fee estimate or a

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determination that no records exist, should submit a written request for review to the Chief FOIA Officer c/o Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511. The words "FOIA APPEAL" should be written on the letter and the envelope. The appeal must be signed by the individual or his legal counsel.

(b) *Requirements as to time and form.* Appeals of adverse decisions must be received within 45 days of the date of the ODNI's initial decision. Requesters should include a statement of the reasons supporting the request for reversal of the initial decision.

(c) *Exceptions.* No appeal shall be accepted if the requester has outstanding fees for information services at this or another federal agency. In addition, no appeal shall be accepted if the information in question has been the subject of an administrative review within the previous two years or is the subject of pending litigation in the Federal courts.

§ 1700.14 Action by appeals authority.

(a) The Director of the Intelligence Staff, after consultation with any ODNI component organization involved in the initial decision as well as with the Office of General Counsel, will make a final determination on the appeal. Appeals of denials of requests for expedited processing shall be acted on expeditiously.

(b) The Director, IMO, will ordinarily be the initial deciding official on FOIA requests to the ODNI. However, in the event the Director of the Intelligence Staff makes an initial decision that is later appealed, the Principal Deputy Director for National Intelligence will decide the appeal in accordance with the procedures in this section.

PART 1701—ADMINISTRATION OF RECORDS UNDER THE PRIVACY ACT OF 1974

Subpart A—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974

Sec.

1701.1 Purpose, scope, applicability.

1701.2 Definitions.