

§ 1285.5

32 CFR Ch. XII (7-1-05 Edition)

(8) Establish procedures for the collection and deposit of fees for FOIA services.

(9) Ensure that cost data is maintained for each case file.

(10) Establish procedures to ensure that record denials and “no record” determinations are signed by the PLFA initial denial authority and a copy forwarded to DLA-XAM.

(11) Notify DLA-XAM of requesters who have failed to pay fees in a timely manner.

(12) Prepare and submit reports as required.

(13) Consult with public affairs officers (PAO's) to become familiar with subject matter that is considered to be newsworthy and advise PAO's of all requests from news media representatives.

(14) Establish procedures to provide the Congressional Affairs focal point with an information copy of each FOIA request received from a member of the Congress.

(15) Coordinate any proposed supplements or training material with DLA-XAM prior to publication or dissemination.

(16) Establish procedures to ensure that case files of FOIA releases are maintained for two years after cutoff and that denials are maintained for 6 years after cutoff.

(17) Review all proposed full and partial denials prior to signature by the initial denial authority for compliance with these rules.

§ 1285.5 Procedures.

(a) *FOIA channels.* If DLA personnel receive a FOIA request directly from the public that has not been logged in and processed through the FOIA office, they will immediately forward it to the local FOIA manager.

(b) *Central log system.* Each FOIA manager will maintain a central log of FOIA requests received within the activity to ensure compliance with the time limits and accurate cost accounting, fee assessment, and reporting.

(c) *Time limit.* FOIA requests must be responded to within 10 business days after proper receipt, except in unusual circumstances outlined in paragraph (j) of this section. A request is considered properly received on the date the FOIA

manager receives it provided the request has been reasonably described and the requester has either agreed to pay assessable fees or has provided sufficient justification for a fee waiver.

(d) *Screening requests.* (1) Before assigning a request for search, the FOIA manager will screen the request for defects in the description, the requester category, and the issue of fees. FOIA managers will notify requesters of any such defects and, wherever possible, offer assistance to help remedy the defects. If the FOIA manager must consult with the requester on any of the following issues, then the request is not considered to be properly received and the 10-day time limit does not begin or resume until the requester has satisfactorily addressed the issue.

(i) *Payments in arrears.* If a requester has failed to pay fees for a previous request, then the FOIA manager need not process the current request until the requester pays the delinquent amount. In such situations, the FOIA manager will notify the requester of the defect and provide an opportunity to forward payment along with any assessable interest. At that time, the FOIA manager may, at his or her discretion, demand that the requester also pay an estimated fee for the current request.

(ii) *Faulty description.* If the request is not reasonably described, the FOIA manager will notify the requester of the defect and advise that a search cannot be initiated without more specific information. In making such determinations, FOIA managers may consult with offices of primary interest to determine the details that are needed to conduct a search. See also paragraph (f)(2) of this section and § 1285.2(i) of this part.

(iii) *Requester category and fees.* The FOIA manager will analyze the request to determine the category of the requester. If the category of the requester is different than that claimed by the requester, the FOIA manager will:

(A) Notify the requester that he or she 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

Defense Logistics Agency

§ 1285.5

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 FOIA manager shall render a final category determination, and notify the requester of such determination, to include normal administrative appeal rights.

(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 FOIA manager. Requesters must submit a fee declaration appropriate for the following categories:

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

(2) *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.

(3) *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.

(iv) *Justification for fee waivers*. If the requester has asked for a fee waiver but failed to provide a justification, FOIA managers will ask requesters to address the fee waiver criteria in part 286, subpart F, of this title before further processing the request. FOIA managers are reminded that with some types of records, a final decision cannot be made on waiver until after the records have been surfaced, reviewed, and the public benefit and previous public availability assessed.

(2) In cases where there is disagreement on the category of the requester or there is lack of justification for fee waiver, the FOIA manager may process the request without further contacting the requester if he or she believes it can be processed within the automatic \$15 waiver limit.

(e) *Providing estimates*. In the situations described by paragraphs (d)(1)(iii) and (d)(1)(iv) of this section, DLA activities 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 DLA activities 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 actual costs 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.

(f) *Internal processing*. (1) Upon making a determination that the request is reasonably described, that the fee issue has been settled, and that the requester does not owe for a prior request, the FOIA manager will assign the request to the appropriate office of primary interest (OPI) for handling and provide instructions on the category of the requester, the fees to be charged or waived, and what actions the OPI is to take.

(2) After reviewing a request, the OPI may determine, based on knowledge of the files and programs, that a request is, in fact, not reasonably described. OPI's will notify FOIA managers of such defects immediately so that further details may be sought from the requester. Any delays on the requester's part in receiving more detailed information will not count toward the 10-day time limit.

(g) *Initial determinations*—(1) *Reasons for not releasing a record*. There are seven reasons for not complying with a request for a record:

(i) The request is transferred to another DLA activity, DOD component, or to another Federal agency.

(ii) The DLA activity determines through knowledge of its files and reasonable search efforts that it neither controls nor otherwise possesses the requested record. Responding officials will advise requesters of the right to appeal such determinations. See paragraph (i)(5) of this section for details on processing "no record" responses.

(iii) A record has not been described with sufficient particularity to enable the DLA activity to locate it by conducting a reasonable search.

(iv) The requester has failed unreasonably to comply with procedural requirements, including payment of fees, imposed by this rule.

(v) The request is withdrawn by the requester.

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

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

(2) *Reasonably segregable portions.* Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester 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.

(h) *Preparing documents for public release—(1) Material containing For Official Use Only marks.* When a determination has been made that a FOUO document may be fully released to a requester under any public information program, the FOUO markings will be removed from the requester's copy prior to release. In cases where a person seeks access to his or her own record and the record is marked FOUO to protect that person's personal or proprietary interests, the FOUO marks will be deleted from the requester's copy prior to release, even though the FOUO status has not been terminated. In such cases, the official file copy will retain the FOUO warning. If only portions of a document marked as FOUO are to be released to the public under the FOIA, then the exempt portions will be taped out, blackened out, whited out, or cut out and a copy reproduced for the requester from the marked up copy. Initial denial authorities will ensure that the deleted portion cannot be read and that the FOUO marks have been lined through prior to release.

(2) *Material containing classification markings.* The procedures in paragraph (h)(1) of this section apply to classified documents with the exception that the classified portions will be cut out rather than blackened, taped, or whited out. The classification markings on the requester's copy will be deleted prior to release.

(i) *Response to requester—(1) Time limits.* 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 FOIA manager. When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with procedural requirements.

(2) *Acknowledging date of receipt.* 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.

(3) *Billing.* When fees are being levied, the response to the requester will contain a billing paragraph. Responding officials will advise requesters to make checks or money orders payable to the United States Treasury and forward them to the FOIA manager of the PLFA that incurred the expense. FOIA managers will notify DLA-XAM of names and addresses of requesters who have failed to pay after a second billing has been mailed and 30 days have elapsed without payment.

(4) *Full and partial denials.* (i) When a request for a record is denied in whole or in part on the basis of one or more of the exemptions in part 286, subpart C, of this title the initial denial authority shall inform the requester in writing 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 exemption(s) 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 Executive Order 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 the Director, DLA.

(ii) FOIA managers shall forward a copy of each letter of denial to DLA-XAM, Cameron Station, Alexandria,

Defense Logistics Agency

§ 1285.5

Virginia 22304-6100. Do not include attachments, the incoming request, or any backup material.

(5) *Providing "no record" responses.* (i) If no documents can be located in response to a FOIA request, the initial denial authority will so advise the requester. Requesters will also be advised that, if they consider the response to be adverse, they may file an appeal within 60 calendar days from the date of the response. Requesters are to be advised to address appeals to the local FOIA manager and include the case number and reasons why they believe the DLA activity should have records on the subject matter.

(ii) Before a formal "no record" response is issued, OPI will verify that the requester has adequately described the record. If additional details will aid the search, then the requester will be asked to provide those details. See paragraph (d)(1)(ii) of this section and § 1285.2(i) of this part for procedures for resolving inadequate descriptions.

(iii) In cases where the requested record has been destroyed, the initial denial authority will confirm that the record was retained for the period authorized in DLAM 5015.1 before issuing a formal response. In responding to requesters in these cases, advise the requester that the records were properly destroyed according to Agency rules for record disposition and give the right to appeal as outlined in paragraph (i)(5)(i) of this section. However, do not ask the requester to provide reasons why the activity should have the records.

(iv) Upon receipt of an appeal, the FOIA manager will direct that a second search be conducted using any information supplied by the requester. If the second search produces no documents, the appeal will be forwarded to HQ DLA-G, Cameron Station, Alexandria, Virginia 22304-6100, along with a copy of the case file. The FOIA manager will include the cost information and an explanation of the method of search and the types of offices searched. In cases where the "no record" response was issued because the records have been destroyed, the FOIA manager will verify that the records were destroyed as provided for in DLAM 5015.1 and provide a statement to that effect.

(v) FOIA managers will ensure that a copy of each "no record" response letter is forwarded to DLA-XAM, Cameron Station, Alexandria, Virginia 22304-6100. Do not include attachments, the incoming request, or any backup material.

(6) *Coordination.* OPI's will ensure that the proposed response is fully coordinated with offices having an interest in the request. Proposed responses to FOIA requests from members of the Congress will be coordinated with DLA-Y or the local Congressional Affairs focal point.

(j) *Extensions of time—(1) Formal extensions.* In unusual circumstances, when additional time is needed to respond, the FOIA manager will 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. Such extensions will be approved on a case-by-case basis. 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. Since the requester still retains the right to treat this delay as a defacto denial with full administrative remedies, such extensions should be issued only when essential. The unusual circumstances that may be cited to justify delay are:

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

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

(iii) *Consultation.* 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 rule or should be released as a matter of discretion.

(2) *Informal extensions.* Where practical and expedient, the FOIA manager or official designated to respond may negotiate with the requester and arrange for an informal extension. Such extensions may be appropriate in instances where the records have to be ordered from a record repository; where the record has been sent out for commercial printing and is not expected back before the 10-day time has elapsed; and similar circumstances.

(k) *Misdirected requests.* Misdirected requests shall be forwarded promptly to the FOIA manager of the DLA activity, DoD component, or Federal agency 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 FOIA manager of the PLFA that controls the records requested.

(l) *Records of contractors and other non-U.S. government sources.* (1) Executive Order 12600 of 23 June 1987 (52 FR 23781) establishes predisclosure notification procedures for confidential commercial information. When a request is received for a record that was obtained from a contractor or other non-U.S. Government source or for a record containing information clearly identified as having been provided by a contractor or other 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(b)(4)) (see §286.13(a)(4) of this title) 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. The following procedures will be followed:

(i) The person designated to respond will provide the source with a copy of the incoming request, a copy of the documents responsive to the request, and a letter of instruction. The notification letter will be addressed to the president of the entity or the entity’s counsel and sent by return receipt mail.

(ii) When a substantial issue has been raised, the DLA activity may seek additional information from the source and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved.

(iii) Any objections to release will be evaluated and the source provided with a copy of the activity’s final decision. Where a decision is made to release information claimed to be exempt, the source will be notified that the information will be released on a specified date unless the source seeks a restraining order or takes court action to prevent disclosure. Evaluators are cautioned that any decision to disclose information claimed to be exempt under 5 U.S.C. 552(b)(4) must be made by an official equivalent in rank to the initial denial authority.

(iv) When the source advises it will seek a restraining order or take court action to prevent release of the record or information, the FOIA manager will notify the requester and suspend action on the request until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the FOIA manager shall promptly notify the submitter of this action.

(2) These procedures are 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.

(3) These coordination provisions also apply to any non-U.S. Government record in the possession and control of DLA from multi-national organizations, such as North Atlantic Treaty Organization (NATO) and North American Aerospace Defense Command (NORAD), or foreign governments. Coordination with foreign governments under the provisions of this paragraph shall be made through the Department of State.

(m) *File of initial denials.* Copies of all initial denials shall be maintained by each DLA activity in a form suitable

for rapid retrieval, periodic statistical compilation, and management evaluation.

(n) *Appeals*—(1) *General*—(i) *Appeals to record denials*. Requesters denied access to records under the provisions of part 286, subpart C, of this title may appeal such determinations to the Director, DLA. The appeal should be accompanied by a copy of the letter denying the initial request and contain the basis for disagreement with the initial refusal.

(ii) *Appeals to a “no record” finding*. Requesters have the right to appeal any “no record” finding to the FOIA manager of the activity that issued the finding. The letter of appeal should include the case number and, where appropriate, reasons why the requester believes the activity should have records on the subject matter. Using the information supplied by the requester, the FOIA manager will direct that a second search be conducted. If the second search produces no documents, the appeal will be forwarded to HQ DLA-G, Cameron Station, Alexandria, Virginia 22304-6100, along with a copy of the case file. The FOIA manager will include information on the amount of time spent on the request and provide an explanation of the method of search and the types of offices searched.

(iii) *Appeals to fee waiver denials or requester category decisions*. Requesters may appeal an initial determination regarding placement in a certain fee assessment category or waiver or reduction of fees when disclosure serves the public interest. Requesters will include a basis for disagreement and submit the appeal to the Staff Director, Office of Administration (Attn: DLA-XAM), Cameron Station, Alexandria, Virginia 22304-6100.

(2) *Time limits*—(i) *Time limits to file appeals*. The requester shall be advised to file an appeal so that it reaches the appellate authority no later than 60 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. 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.

(ii) *Time of receipt*. An FOIA appeal is considered received by DLA when it reaches DLA-G or, in the case of fee or requester category appeals, when it reaches DLA-XAM. Misdirected appeals should be referred expeditiously to the appropriate office.

(iii) *Time limits to decide appeals*. Final determinations on appeals normally shall be made within 20 working days after receipt.

(iv) *Delay in responding to an appeal*. (A) If additional time is needed due to the unusual circumstances described in paragraph (j) of this section, the final decision may be delayed for the number of working days (not to exceed 10), that were not used as additional time for responding to the initial request.

(B) 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 paragraph (j) of this section, they may consider their administrative remedies exhausted. They may, however, without prejudicing their right of judicial remedy, await a substantive response. DLA 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.

(C) When the appellate authority or the authority's representative must consult with the requester over an issue not previously settled, such as agreement to pay fees for documents previously denied, then any delays on the requester's part will not count toward the 20-day time limit.

(3) *Response to the requester*. (i) When an appellate authority makes a determination to release all or a portion of records withheld by an IDA, a copy of

§ 1285.6

the records so released should be forwarded promptly to the requester after compliance with any preliminary procedural requirements, such as payment of fees.

(ii) Final refusal to provide a requested record must be made in writing by the DLA Director or his designee. In the case of fee appeals, final refusal to waive or reduce fees must be made in writing by the Staff Director of Administration. Record denial responses, at a minimum, shall conform to the following:

(A) The basis for the refusal shall be explained to the requester with regard to the applicable statutory exemption or exemptions invoked.

(B) 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.

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

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

(4) *Consultation.* (i) Final refusal involving issues not previously resolved or that are known to be inconsistent with rulings of other DoD components ordinarily should not be made without first consulting with the Office of the General Counsel of the Department of Defense.

(ii) Tentative decisions to deny records that raise new or significant legal issues of potential significance to other agencies of the Government shall be provided to the Department of Justice, Attn: Office of Legal Policy, Office of Information and Policy, Washington, DC 20530.

(5) *Records management.* Case files of appeals shall be retained by DLA-G or, in the case of fee or requester category appeals, by DLA-XAM for a period of six years to meet the statute of limitations of claims requirement.

(o) *Special mail services.* DLA activities are authorized to use registered

32 CFR Ch. XII (7-1-05 Edition)

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.

(p) *Receipt accounts.* The Treasurer of the United States has established Receipt Account 3210 for use in depositing search, review, and duplication fees collected under the FOIA. Upon receipt of payment, the FOIA manager will forward the check or money order to DFAS/CO/PDG, P.O. Box 182317, Columbus, Ohio 43218-2317. FOIA managers will advise DFAS that the check is to be deposited to accounting classification 21R3210.0004. This account will not, however, be used for depositing receipts for technical information released under the FOIA, industrially-funded activities, and non-appropriated funded activities. Instead, payments for these shall be deposited to the appropriate fund.

§ 1285.6 Fees and fee waivers.

The rules and rates published in part 286, subpart F of this title apply to this rule. For purposes of computer search, DLA has established rates of \$20 per minute of central processing unit time for mainframe computer use and \$20 per hour of wall clock time for personal computer use. These rates represent average operational costs and may be used when the actual computer cost cannot be determined.

§ 1285.7 Reports.

The reporting requirement outlined in this rule is assigned Report Control Symbol DD-PA(A)1365 and will be prepared according to part 286, subpart G, of this title.

APPENDIX A TO PART 1285—GAINING ACCESS TO DLA RECORDS

I. General

The Defense Logistics Agency was established pursuant to authority vested in the Secretary of Defense and is an agency of DoD under the direction, authority, and control of the Assistant Secretary of Defense (Production and Logistics) and is subject to DoD policies, directives, and instructions. DLA is made up of a headquarters and 22 Primary Level Field Activities (PLFA's). DLA does not have a central repository for its records.