

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to

THE DEFENSE LOGISTICS AGENCY

of the

DEPARTMENT OF DEFENSE

RIN 0790-AI87

Proposed Rule Amending the Freedom of Information Act Program

December 5, 2012

By notice published on October 15, 2012, the Defense Logistics Agency (“DLA”), a component of the Department of Defense (“DOD”), has proposed to revise the agency regulations that implement the Freedom of Information Act (“FOIA”).¹ Pursuant to the notice, the Electronic Privacy Information Center (“EPIC”) submits these comments and recommendations to address the substantial risks to open government and agency accountability that the proposed regulatory changes raise.²

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC regularly submits

¹ Defense Logistics Agency Freedom of Information Act Program, 77 Fed. Reg. 62,469 (proposed Oct. 15, 2012) (to be codified at 32 C.F.R. pt. 300) [hereinafter “Proposed Rule”].

² Georgetown University Law Center students Katie Barlow, Lucas Barnekow, Gerard Fowke III, Christine Hanley, Matthew Magner, Timothy Martin, Evan Nagler, Adaku Onyeka, Robin Richardson, James Romoser, Lisa Qi, and Jung Hwa Song contributed to these comments.

administrative agency comments encouraging federal agencies to uphold the FOIA.³ EPIC also engages in extensive Freedom of Information Act litigation.⁴ Additionally, EPIC publishes *Litigation Under Federal Open Government Laws Guide*, a leading guide for FOIA practitioners and requesters, and has specific expertise with respect to the history and purpose of the FOIA.⁵

The Scope of the Changes

Under the DLA's proposal, the existing DLA FOIA regulations, codified at 32 C.F.R. § 1285, would be revised and redesignated as 32 C.F.R. § 300. The DLA's proposals will substantially alter the DLA FOIA Program, including: definitions governing the program (proposed 32 C.F.R. § 300.3); DLA FOIA Program policy (proposed 32 C.F.R. § 300.4); exemptions (proposed 32 C.F.R. § 300.5); FOIA processing (proposed 32 C.F.R. §§ 300.6 - 300.8); administrative appeals (proposed 32 C.F.R. § 300.9); and fee waivers (proposed 32 C.F.R. § 300.11).

EPIC objects to several of the proposed changes as indicated below. These changes would undermine the FOIA, are contrary to law, and exceed the authority of the agency. We urge the agency to make revisions to proposed change as EPIC has indicated.

Proposed 32 C.F.R. § 300.3. Definitions

³ EPIC, Comments of the Elec. Privacy Info. Ctr. to the Dep't of the Interior on Proposed Freedom of Information Act Regulations (Nov. 13, 2012) (RIN 1093-AA15); EPIC, Comments of the Elec. Privacy Info. Ctr. to the Dep't of Justice on Proposed Freedom of Information Act Regulations (Oct. 18, 2011) (RIN 1105-AB27).

⁴ See, e.g., *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 811 F. Supp. 2d 216 (D.D.C. 2011); *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30 (D.D.C. 2006); *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003); *Litigation Docket, EPIC*, <http://epic.org/privacy/litigation/>.

⁵ EPIC, *Litigation Under the Federal Open Government Laws 2010* 138 (Harry A. Hammitt, Ginger McCall, Marc Rotenberg, John A. Verdi, and Mark S. Zaid, eds., 2010).

Under the proposed regulations, the DLA omits a number of previously defined terms, including “Materials,”⁶ “Agency Records,”⁷ “Public Interest Disclosures,”⁸ and “Releasing Official.”⁹ Some definitions provided for these terms in the current regulations were redundant,¹⁰ while others applied restrictions beyond the scope of what was authorized in the FOIA.¹¹

Additionally, inclusion of these definitions limits possible interpretations of what the public may come to recognize as materials or records due to advances in technology or the continuing evolution of language. For these reasons, EPIC recommends that the agency broaden these terms to include technological or linguistic developments.

However, it is unclear that if by omitting these terms in the proposed regulations, the agency intends to delete them from its definitions. In the proposed regulations, the DLA makes clear whether a specific proposed subpart is intended to supplement and/or adopt the existing regulation;¹² the DLA should do the same when a proposed subpart is intended to replace an existing regulation in part or in its entirety.

⁶ 32 C.F.R. § 1285.3(a)-(b) (2011).

⁷ 32 C.F.R. § 1285.3(d).

⁸ 32 C.F.R. § 1285.3(j).

⁹ 32 C.F.R. § 1285.3(k).

¹⁰ *E.g.* 32 C.F.R. § 1285.3(b)(2) (parroting 5 U.S.C. § 552(a)(2)(B) (2009) verbatim).

¹¹ *Compare* 5 U.S.C. § 552(a)(2)(A) (stating that “final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases” are subject to FOIA) *with* 32 C.F.R. § 1285.3(b)(1) (defining material subject to FOIA in part as “Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases . . . that may be cited, used, or relied upon as precedents in future adjudications) (emphasis added)

¹² *See, e.g.*, Proposed Rule, 77 Fed. Reg. at 62, 470 (stating that proposed § 300.2 “supplements 32 C.F.R. part 286 to accommodate specific requirements of the DLA FOIA Program. For all FOIA issues not covered by this part, the rules set forth in 32 C.F.R. part 286 will govern.”) *and* Proposed Rule, 77 Fed. Reg. at 62, 471 (stating that proposed § 300.4 “adopts and supplements the DOD FOIA Program policy and procedures codified at 32 C.F.R. part 286, Subpart A, General Provisions and Subpart B, FOIA Reading Rooms and 32 C.F.R. part 285.”).

Therefore, EPIC suggests that DLA add the following language after the underlined heading “§ 300.3 Definitions”:

DLA deletes and replaces 32 CFR part 1285.3 with 32 CFR part 300.3. Any definitions not included within this subpart will be omitted from the finalized rule.

By including this language, the agency clarifies which terms will be included in the agency’s regulation and which terms will be abandoned in the interest of facilitating a wider array of FOIA requests.

Proposed 32 C.F.R. § 300.3(a). Definition of “Administrative Appeal”

Under the current regulations, 32 C.F.R. § 1285.3(c), the agency defines “administrative appeal” as:

A request made under the FOIA by a member of the general public asking the appellate authority to reverse an initial denial authority’s decision to withhold all or part of a requested record, to review a “no record found” determination, to reverse a decision to deny a request for waiver or reduction of fees, or to review a category determination for fee assessment purposes.

Under the proposed regulations, 32 C.F.R. § 300.3(a), “administrative appeal” is defined as:

A written request by a member of the public, made under the FOIA, to DLA’s Appellate Authority requesting reversal of an adverse determination.

Although the proposed regulation broadens the scope of what constitutes an administrative appeal, the proposed regulation does not clarify whether an agency’s failure to make a determination or respond to a FOIA request within the statutory time limit is appealable. The FOIA’s time limit is essential in ensuring requestors receive information in a timely manner, while ensuring that agencies are accountable to the

public. Moreover, the specific example provided in the original provision remind both the agency and the requester as to what may constitute an adverse determination.

The agency should revise this part of the proposed regulations as follows. First, the agency should make clear that failure to make a determination within the statutory time limit is an appealable offense. Proposed 32 C.F.R. § 300.3(a) should be revised as follows:

A written request by a member of the public, made under the FOIA, to DLA's Appellate Authority requesting reversal of an adverse determination or failure to make a determination within the FOIA's statutory time limits.

Second, the agency should clarify that the list provided for adverse determinations is not exhaustive. Therefore, 32 C.F.R. § 300.3(b) should be revised as follows:

Adverse Determination. Adverse determinations include, but are not limited to decisions that: Withhold all or part of a requested record; deny a fee category claim by a requester; deny a request for waiver or reduction of fees; deny requesters challenge of fee estimates; denies a request for expedited processing; state that no records were located; or what the requester believes is adverse in nature.

Together, these changes allow FOIA requesters to take advantage of the administrative appeal process, which will ensure that government activities are subject to public scrutiny without administrative or temporal barriers. If however, the agency chooses to adopt the regulatory language it proposes, it would leave the door open to new barriers to access, contrary to the federal statute and case law, and outside of the agency's rulemaking authority.

Proposed 32 C.F.R. § 300.3(d). Definition of "Consultation"

Under the proposed regulations, "consultation" is defined as:

The process whereby a document is sent to another DLA or DOD Component or Federal Agency to obtain recommendations on the releasability of the document and is returned to the originator for further action.

Although the previous regulations provide no definition from of the term “consultation,” the clear language of the FOIA indicates that the agency by proposing such an open-ended basis for “consultation.”

While the FOIA mentions “consultation” under a clause permitting the extension of the FOIA’s time limits for “unusual circumstances,”¹³ the statute allows for consultation delays only if “the other agency [has] a *substantial interest* in the determination of the request” or if the request is “among two or more components of the agency [that have a] *substantial subject-matter interest* therein.”¹⁴ The statute further restricts the determination of unusual circumstances by authorizing the use of this extension “only to the extent *reasonably necessary* to the proper processing of the particular requests”¹⁵ Clearly, Congress intended to limit agencies’ ability to seek an extension under “unusual circumstances” and included language in the statute to safeguard from arbitrary and capricious declarations of “unusual circumstances.”¹⁶

However, the DLA now proposes through its rulemaking that consultation may be sought whenever *any* DLA component, DOD component, or other federal agency has the ability to make recommendations about the FOIA request. Thus, the agency proposes to impermissibly broaden the scope of when a federal agency can seek “consultation,” leave

¹³ 5 U.S.C. § 552(a)(6)(B)(iii)(III).

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.* § 552(a)(6)(B)(iii) (emphasis added).

¹⁶ Additionally, the statute limits extensions for “unusual circumstances” to ten working days. *See* 5 U.S.C. § 552(a) (6) (B).

routine requests vulnerable to delays, and build barriers to the release of information that sheds light on the government's activities. Therefore, the proposed definition for "consultation" should be amended as:

The process whereby it is reasonably necessary for a document under consideration for FOIA release to be sent to and reviewed by another DLA or DOD Component or Federal Agency that has a substantial subject-matter interest in the requested document and it is reasonably necessary to obtain recommendations on the releasability of the document and returned to the originator for further action.

By adding this language, the DLA will keep intact the balance Congress sought between the timely release of pertinent information and the reasonably substantial interest another federal agency may have in the dissemination and publication of relevant documents.¹⁷

Proposed 32 C.F.R. § 300.3(e). Definition of "Defense Freedom of Information Program Office ("DFOIPO")"

The agency's proposed changes to its FOIA rule would amend the definition section to include the previously undefined Defense Freedom of Information Program Office:

The office responsible for the formulation and implementation of DOD policy guidance for FOIA.

The definition then gives a website where the public can find more information about the DFOIPO. The website refers to the Defense Freedom of Information Policy Office, but the proposed regulations refer to the Defense Freedom of Information Program Office. The DLA should therefore revise the proposal to refer to the "Defense Freedom of Information Policy Office," and not the "Defense Freedom of Information Program Office" because the DFOIPO is "not a Requester Service Center," and FOIA requests

¹⁷ *Id.* at §552 (a)(6)(B)(iii)(III).

should not be sent to the office.¹⁸ Furthermore, although much of the information included on DLA's FOIA/Privacy website is also included on the DFOIPO's website, the latter web location is cluttered with other DOD component information and buried under a complex tapestry of links embedded in PDFs and other web pages. As a result, finding DLA-specific information that would be most helpful to a FOIA requester is a confusing, difficult and unnecessarily burdensome process. Additionally, unless the agency can articulate a substantive reason for including the DFOIPO definition, EPIC suggests that DLA amend the definition of DFOIPO as follows:

The office that is responsible for formulating, promulgating and directing DOD policy guidance for the DLA FOIA Program and other FOIA programs under other DOD components and agencies. For information about offices within DLA responsible for processing FOIA requests, refer to sections (j) through (n) of this subpart. For more information about DFOIPO refer to <http://www.dod.mil/pubs/foi/dfoipo/>.

By providing this suggested language, the DLA clarifies that DFOIPO does not have administrative control over DLA FOIA requests or appeals and outlines that the office is the centralized agency for creating FOIA guidelines for all DOD agencies and components.

Proposed 32 C.F.R. § 300.3(g). Definition of “DLA Component”

The current regulation on DLA activity, 32 C.F.R. § 1285.3(f), states:

An element of DLA authorized to receive and act independently on FOIA requests. A DLA activity has its own FOIA manager, initial denial authority, and office of counsel.

Under the proposed 32 C.F.R. § 300.3(g), DLA Component is defined as:

¹⁸ DEFENSE FREEDOM OF INFORMATION PROGRAM OFFICE (DFOIPO), <http://www.dod.mil/pubs/foi/dfoipo/> (last visited Dec. 3, 2012).

DLA Components consist of Headquarters Organizations, Primary Level Field Activities, Defense Business Services, Regional Commands, and other Organizational entities. A description of DLA Components can be found at www.dla.mil.

The agency proposes delegating to the Heads of DLA Components the authority to withhold information requested under the FOIA pursuant to the FOIA exemptions and to confirm that no records were located in response to a request (§ 300.4(n)). The Heads of DLA Components may further delegate their initial denial authority to their delegates.¹⁹ Thus, this broad definition of DLA Components to include all organization entities within the DLA will grant limitless authority to any delegate within the DLA to deny FOIA requests. Extending initial denial authority beyond those authorized to receive and act independently on FOIA requests in the existing regulation risks compromising the integrity of a quality review of FOIA requests. Therefore, the agency should not adopt its proposed language, and instead maintain the current regulation.

Proposed 32 C.F.R. § 300.3(l). Definition of “FOIA Request”

Under the current regulations, 32 C.F.R. § 1285.3(h), the agency defines “FOIA Request” as:

A written request for records made by any person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA, DoD 5400.7-R, DLAR 5400.14, this rule, or DLA activity supplementing regulations or instructions.

Under the proposed regulations, 32 C.F.R. § 300.3(l), “FOIA Request” is defined as:

A written request for DLA records that reasonably describes the record(s) sought; indicates a willingness to pay processing fees, asks for their statutory entitlement (if applicable), or requests a fee waiver; includes a postal mailing address, and contact information. A FOIA request meeting these conditions, arriving at the DLA FOIA Requester Service Center in

¹⁹ Proposed Rule, 77 Fed. Reg. at 62,471.

possession of the requested records, is considered perfected or properly received at which time the statutory time limit for response begins. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically.

This proposed definition would impose unlawful requirements upon FOIA requesters and is contrary to the spirit of the FOIA and open government. Requiring FOIA requesters to show “a willingness to pay processing fees,” is in direct contradiction to the FOIA. 5 USC § 552(a)(4)(A)(v) states:

No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

The FOIA does not allow agencies to deny a request, much less consider it unsatisfactory, based on failure to show “a willingness to pay processing fees.” This new regulation would have the practical effect of allowing the agency to deny processing any request, likely a large number, failing to meet this criterion. Preventing the request from being “perfected” would also allow the agency to delay the start of the statutory deadline for making a determination on the request. Additionally, the agency makes no mention of any policy that would inform requesters, either before or after a request has been submitted, of this new requirement.

Further, this proposed regulation would only trigger the start of the statutory time period once the request was received by “the DLA FOIA Requester Service Center in possession of the requested records.” This requirement is contradictory to the FOIA. 5 USC § 552(a)(6)(A)(ii) only requires requesters to submit requests to “the appropriate component of the agency.” It also states that the time limit shall begin “not later than ten days after the request is first received by any component.” The proposed regulation would attempt to dictate a potentially endless waiting period wherein the statutory time

limits never begin. This change would have the additional impact of allowing for records to be deleted or removed after the FOIA request is received, but before it is perfected.

This is contrary to the purpose and spirit of the FOIA.

Instead of the proposed rule change, the agency should retain its current definition of “FOIA Request.”

Proposed 32 C.F.R. § 300.4(a). General Policy

Under the current regulation, 32 C.F.R § 1285.2:

DLA 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 DLA record... shall be withheld only when it is exempt from mandatory public disclosure under the FOIA.

Under the proposed regulation, 32 C.F.R. § 300.4(a), the agency states:

DLA policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning DLA activities, balanced with the need for security, public and private interests of the American people, and adherence to other requirements of law and regulation. A DLA record... shall not be withheld, in whole or in part, unless the record is exempt from mandatory, partial, or total disclosure under the FOIA.

The proposed changes provide the agency with greater discretion to deny FOIA requests by allowing the agency to determine when granting a FOIA request would conflict with undefined “security, public and private interests” and unspecified “law and regulation.” This policy change raises significant challenges for FOIA requesters by providing the agency with unharnessed discretion to weigh the balance of open government information and the various alleged countervailing security concerns. In addition, the language of the proposed changes appears to allow the agency to withhold in whole those records that may only be partially withheld. The agency’s obligations to comply with the

FOIA are set out in statute and it is not for the agency to add additional factors or considerations in the processing of FOIA requests.

The DLA should not adopt the proposed changes, and should instead keep the current text intact. The current language is more favorable to FOIA requesters because it provides the public with a maximum amount of accurate and timely information concerning DLA activities, subject to the exemptions articulated in the FOIA statute.

Proposed 32 C.F.R. § 300.4(b). Customer Service

EPIC approves of the agency's proposal to adopt a "customer service" policy. Mandating the adoption of Executive Order 13392 is a definite benefit for FOIA requesters and the public in general because it encourages government oversight, transparency, and accountability. EPIC specifically approves of the mandate that "the Components shall provide . . . information about the status of a person's FOIA request and an estimated date on which the DLA Component will complete the request." Communicating an estimated date to a FOIA requester has the potential to alleviate one of the main concerns requesters often have: how long until records are released? Additionally, the proposed minimum requirements set forth in subsection (b)(1) for FOIA Requester Service Center web sites should assist FOIA requesters, as well as foster open government in accordance with the spirit of the FOIA.

Proposed 32 C.F.R. § 300.4(c). Creating a Record

Under the current regulation, 32 C.F.R. § 1285.2:

(h) Creating a record. (1) A DLA activity... may compile a new record when doing so would result in a more useful response to the requester or be less burdensome to the activity provided the requester does not object. The 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.

(2) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when responding to a FOIA request for electronic data where creation of a record, programming, or particular format are questionable, DLA activities should apply a standard of reasonableness. In other words, if the capability exists to respond to the request and the effort would be a business-as-usual approach, then the request should be processed. However, when the request need not be processed where the capability to respond does not exist without expenditure of resources, thus not being a normal business-as-usual approach.

Under the proposed regulation:

(1) A record must exist and be in the possession and control of DLA at the time the search begins to be considered subject to this part and the FOIA.

(2) With respect to electronic data, the issue of whether records are actually created or merely extracted from an existing database is not always readily apparent. Consequently, when processing FOIA requests for electronic data, if the DLA Component has the capability to respond to the request, and the effort is reasonable and would be a business as usual approach, then the request should be processed. FOIA requests for electronic data will not be processed when:

(i) Processing a request would cause a significant interference with the operation of the DLA Component's automated system, require a significant amount of programming effort or require extensive complex programming to merge files of disparate data formats.

(ii) Creating computer programs and/or purchasing additional hardware (i.e., to extract electronic mail that has been archived) is needed.

With this change, the agency proposes regulations that significantly limit the circumstances under which the DLA will process a FOIA request. First, current regulations allow the agency to compile a new record when doing so would be of use to the requester and not entirely burdensome to the agency. The proposed regulations restrict this option by requiring that the records exist in control of the DLA at the time the search begins. It is not always readily apparent at the time the search begins whether such records exist. Furthermore, by mandating that the record must exist at the time "the search begins" rather than at the time of the request, the agency creates a time window

following the FOIA request in which records may no longer be under the control of the DLA (or destroyed through a routine records purge), and thus the agency will deny the FOIA request. The proposed amendments should be eliminated, and the agency should retain the current language.

Second, the amendments propose denying any request for electronic data when it involves “a significant programming effort.” Many programming efforts are not at odds with what may be considered “business as usual” conduct under the current regulations in which FOIA requests may be processed. The proposed amendments outlining the circumstances when FOIA requests for electronic data will be processed further restrict the DLA’s ability to grant FOIA requests, and should be eliminated.

Proposed 32 C.F.R. § 300.4(d). Adoption of 32 CFR 286.4(i). Referral Policy

The proposed changes amend the policy section to revise the DLA’s referral policy. The proposed policy adopts 32 C.F.R. § 286.4(i) for the DLA. Generally, these changes impermissibly broaden the instances when the DLA must refer a document to another DOD component in violation of the FOIA.

Section 300.4(i) Referrals: (proposed adoption of 32 C.F.R. § 286.4(i)(1):

This section of the DOD’s FOIA policy covers two subjects: 1) DOD’s preference for having the originator of a record make the determination of its releasability and 2) DOD process for referring requests when the requested component possess no records. Because this section is lengthy and contains two distinguishable subject matters, EPIC will address the two proposed sections in turn and suggest that the agency divide this section into two separate parts as well.

The DLA proposes to adopt the following process for FOIA referrals:

The DoD FOIA referral policy is based upon the concept of *the originator of a record making a release determination* on its information. If a DoD Component receives a request for records originated by another DoD Component, it should contact the DoD Component to determine if it also received the request, and if not, *obtain concurrence from the other DoD Component to refer the request*. In either situation, the requester shall be advised of the action taken, *unless exempt information would be revealed*. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DoD Components from the responsibility of making a release decision on a record should the requester object to referral of the request and the record. Should this situation occur, DoD Components should coordinate with the originator of the information prior to making a release determination. 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 DoD Component has reason to believe it has the requested record. Prior to notifying a requester of a referral to another DoD Component, the DoD Component receiving the initial request *shall consult with the other DoD Component to determine if that DoD Component's association with the material is exempt. If the association is exempt, the DoD Component receiving the initial request will protect the association and any exempt information without revealing the identity of the protected DoD Component*. The protected DoD Component shall be responsible for submitting the justifications required in any litigation. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DoD Components making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address.²⁰

Although the DOD may wish to create a policy that only the originator of a document or record may make a determination concerning its release, the FOIA restricts federal agencies from placing such a restriction unless another agency or component has a *substantial* subject matter interest in the document.²¹ While the originator of a record may have a subject matter interest in a document, that interest is not necessarily per se substantial to warrant automatic referral under the FOIA.

²⁰ 32 C.F.R. § 286.4(i)(1) (emphasis added).

²¹ 5 U.S.C. § 552(a)(6)(B)(iii)(III).

There are a number of reasons a requester may elect to obtain a document from a non-originator agency, and because Congress did not proscribe a requester from doing so through the FOIA, the DLA may not prevent a requester from obtaining a record in this manner through this regulation.

Additionally, an agency's failure to notify a requester where her request has been referred, regardless of the agency's reasoning for doing so, would frustrate the requester's ability to meaningfully pursue the processing of her request. At present, there is no precedent for an agency to withhold information concerning the identity of other agencies to which a request is referred. If the DLA adopts this regulation, requesters could never appeal nonresponses from the clandestine agency because requesters would not know to which agency the DLA referred the FOIA request. And if requesters cannot exhaust their administrative remedies, they cannot challenge an agency's decision in court. In essence, this provision would permit certain agencies to evade judicial and administrative review. Because the proposed change would frustrate requesters' ability to meaningfully pursue requests, to seek administrative remedies, and to obtain judicial review as discussed above, the proposed changes to the current regulation should be removed.

Therefore, the DLA should not adopt 32 C.F.R § 286.4(i)(1), unless it is revised to read as follows:

(A) If a DLA Component receives a request for records originated by another DoD Component, it may contact the DoD Component to determine if it also received the request. In either situation, the requester shall be advised of the action taken. While referrals to originators of information result in obtaining the best possible decision on release of the information, the policy does not relieve DLA Components from the responsibility of making a release determination on a record should the requester object to referral of the request and the record.

(B) A request received by a DLA Component possessing no records responsive to a request shall be referred routinely to another DoD Component, if the other DoD Component has reason to believe it has the requested record. Any DoD Component receiving a request that has been misaddressed shall refer the request to the proper address and advise the requester. DoD Components making referrals of requests or records shall include with the referral, a point of contact by name, a telephone number, and an e-mail address.

Section 300.4(i) Referrals: (proposed adoption of 32 CFR § 286.4(i)(2):

The agency proposes to replace 32 C.F.R § 1285.2(j)(2)(i) with adopted language from § 286.4(i)(2). The language states in part:

A DoD Component shall refer for response directly to the requester, a FOIA request for a 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.

The construction of this sentence is confusing and possibly purposefully obscuring.²² By adopting this language, the DLA seeks to create a requirement mandating that records within its possession, but not created by the DLA, *must be* forwarded to the agency or component that created the record. This is an impermissible narrowing of the FOIA that imposes a temporal and administrative hurdle to FOIA requestors seeking documents.

The FOIA makes no mention of requiring an agency to refer a request for records it has in its possession, and creating such a requirement goes beyond the authority provided to the agency by the statute. Therefore, the DLA should revise the proposed changes to the regulation as follows:

²² A less confusing construction would be “If a person requests a record that is within the possession of the requested DOD component, but originated in another DOD Component, the DOD Component who received the request shall refer the FOIA request to the DOD Component that originated the record. The DOD Component that originated the record shall be responsible for responding to the FOIA requester.”

If a person or entity requests a record that is *not* within the possession of the requested DLA component, and originated in another DOD Component, the DLA Component which received the request shall refer the FOIA request to the DOD Component that originated the record, and inform the requester of the referral. The DOD Component that originated the record shall be responsible for responding to the FOIA requester.

The same subpart in the proposed regulation continues:

Whenever a record or a portion of a record is referred to another DoD Component or to a Government Agency outside of the DoD for a release determination and direct response, the requester shall be informed of the referral, *unless it has been determined that notification would reveal exempt information*. Referred records shall only be identified to the extent consistent with security records.²³

As discussed supra, there is no precedent for an agency to withhold information concerning the identity of a component agency to which a request is referred, and this provision would in essence prevent requesters from appealing nonresponses from the referral agencies. The DLA should not adopt this provision.

Section 300.4(i) Referrals: (proposed adoption of 32 C.F.R. § 286.4(i)(3):

32 C.F.R §1285.2(j)(2)(iii) states:

A DLA activity may 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 DLA activity that created the record. In such situations, provide the record and a release recommendation on the record with the referral action.²⁴

The proposed changes adopt 32 C.F.R § 286.4(i)(3), which states:

A DoD Component may refer a request for a record that it originated to another DoD Component or agency when the other DoD Component or agency has a *valid interest* in the record, or the record was created for the use of the other DoD Component or agency. In such situations, provide the

²³ 32 C.F.R. § 286.4(i)(2) (emphasis added).

²⁴ 32 C.F.R. § 1285.2(j)(2)(iii) (emphasis added).

record and a release recommendation on the record with the referral action. Ensure you include a point of contact with the telephone number. An example of such a situation²⁵

The proposed changes could delay a requester from receiving information by lowering the threshold of when a non-originating component can provide recommendations on referral and release – from components or agencies with an equally valid interest in the document to an agency or component with merely any valid interest in the document.

This change exists solely to provide an agency another loophole to delay the timely response and determination of a request beyond the significant subject matter interest authorized in the FOIA. Therefore, EPIC recommends the DLA revert to the current language of the regulation used in 32 C.F.R § 1285.2(j)(2)(iii).

Section 300.4(i) Referrals: (proposed adoption of 32 CFR § 286.4(i)(7)):

The proposed adoption of 32 C.F.R § 286.4(i) would amend the current policy to include language previously omitted from the current regulation. Section 286.4(i)(7) reads as follows:

(7) DoD Components that receive requests for records of the National Security Council (NSC), the White House, or the White House Military Office (WHMO) shall process the requests. DoD records in which the NSC or White House has a concurrent reviewing interest, and NSC, White House, or WHMO records discovered in DoD Components' files shall be forwarded to the Directorate for Freedom of Information and Security Review (DFOISR). The DFOISR shall coordinate with the NSC, White House, or WHMO and return the records to the originating agency after coordination.

As explained above, the FOIA creates no obligation for an agency subject to the FOIA to refer or delay the release of a document that the agency has in its possession simply

²⁵ The section then goes on to list two examples, which have been omitted.

because the agency did not create the document. Therefore, it is impermissible for the DLA to promulgate rules seeking to have this effect.

The DLA should omit all but the first sentence of 32 C.F.R. § 286.4(i)(7) before adopting it in the final rule.

Proposed 32 C.F.R. § 300.5. General

Under the current regulation, 32 C.F.R. § 1285.5(g)(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.

Under the proposed regulation, § 300.5:

§ 300.5 will adopt the Department of Defense FOIA Program regulations codified at 32 C.F.R. part 286, Subpart C, Exemptions, which is included in Appendix I.

The current rule states that an agency is justified in withholding a record when “[t]he record is denied in accordance with procedures set forth in the FOIA and this rule.” The proposed rule simply adopts the exemptions and procedures set out in the Department of

Defense FOIA regulations codified at 32 C.F.R. part 286, Subpart C, Exemptions, which are more restrictive than that of other agencies. EPIC notes that the Department of Defense FOIA regulations provide an exemption that “[c]omponents shall neither confirm nor deny the existence or nonexistence of the record being requested” when “the existence or nonexistence of a record would itself reveal classified information.”²⁶ However, these regulations neglect to describe the types of documents that would be subject to such an exemption.

Proposed 32 C.F.R. § 300.6(a)(2). FOIA Request Processing – *General*

Under the current regulation, 32 C.F.R. § 1285.2(m):

Requesters who seek records about themselves which are contained in a Privacy Act system of records and who cite or imply the FOIA or both Acts will have their requests processed under the time limits of the FOIA and the exemption and fee provisions of the Privacy Act.

Under the proposed regulation, 32 C.F.R. § 300.6(a)(2), the agency states:

When personally identifying information in a record is requested by the subject of the record or the subject’s representative, and the information is contained within a Privacy Act system of records, the request will be processed under both the FOIA and the Privacy Act. DLA Components must comply with the provisions of DOD 5400.11-R, C.3.1.3 to confirm the identity of the requester (<http://www.privacy.defense.gov/files/540011r.pdf>).

This proposed revision poses a number of problems that are contrary to the purposes of the FOIA and will frustrate the efforts of FOIA requesters.

First, the proposed regulation abandons the current language that serves to remind the agency that, notwithstanding the applicability of the Privacy Act, the agency must still process the request “under the time limits of the FOIA.” This change will allow the

²⁶ 32 CFR § 286.12(a)(1) (2012).

agency to abdicate the statutory time limits imposed by the FOIA and unjustifiably delay the processing of requests under the guise of taking time to comply with the additional requirements of the Privacy Act, which itself sets forth no time limits for agency responses.

Second, the proposed revision retains a problem that exists in the current regulation: it will at times *require* the agency to unnecessarily delay the processing of FOIA requests. The regulation requires the agency to apply both the FOIA and the Privacy Act regardless of the agency's determination under the FOIA; however, the Privacy Act should only be applied if the agency decides to withhold responsive records under the FOIA. Since any record properly requested under the FOIA and not exempt under one or more of the FOIA's nine exemptions *must* be disclosed – and since, as the D.C. Circuit has observed, “the Privacy Act is not a FOIA exemption”²⁷ – the disclosure of information releasable under the FOIA does not violate the Privacy Act. The proposed revision to the regulation should take the opportunity to remedy this problem and streamline the processing of requests to which application of the Privacy Act is unnecessary.

Third, EPIC notes that the website link providing “the provisions of DOD 5400.11-R, C3.1.3,” is broken; that is, there is no content at that web address. This will unnecessarily frustrate FOIA requesters attempting to discern how the agency will process a request for records that contain personally identifying information. And notwithstanding the broken web link, the proposed regulation is woefully uninformative of any requirements or constraints imposed upon FOIA requesters by the “the provisions

²⁷ *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Dep't of Justice*, 503 F. Supp. 2d 373 (D.D.C. 2007).

of DOD 5400.11-R, C3.1.3.” This vague citation to a series of letters and numbers fails to even identify what type of document it refers to, making it extremely difficult for all but the expert FOIA requester to locate and research these additional provisions.

Any additional constraints imposed by those cited provisions will allow the agency to delay and/or deny requests that implicate those provisions, and the FOIA requester would not have been provided an adequate means of identifying and thus avoiding those constraints. Therefore, the proposed regulation should clearly explain the relevant affect of the cited provisions or, at the very least, provide a meaningful way of identifying and locating “DOD 5400.11-R, C3.1.3.”

The agency’s proposed regulation should be revised to remedy these problems:

When personally identifying information in a record is requested by the subject of the record or the subject’s representative, and the information is contained within a Privacy Act system of records, and the agency has decided not to disclose the record under the FOIA, the request will be processed under both the FOIA and the Privacy Act. Components must comply with the provisions of Section C3.1.3 of DOD directive 5400.11-R, which can be found at [insert valid web address here].

Proposed 32 C.F.R. § 300.7. FOIA Request Processing Procedures -- Receipt and Control

Under the current regulation, 32 C.F.R. § 1285.5(d):

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.

Under the proposed regulation, 32 C.F.R. § 300.7(a)(2), FOIA officers will:

Screen the request for defects in the description, the requester category, the fee declaration, and full postal address. If the request is not perfected, the request is placed on hold and the FOIA Officer will notify requesters

of any such defects and provide assistance to help remedy the defects. When a DLA FOIA Requester Service Center receives a request for records that clearly belong to an agency outside of DOD, the requester shall be told these are not agency records and, if possible, provide the name of the agency that may hold the records. No referral of the request is made outside of DOD.

The proposed regulation increases the burden on requesters to produce errorless requests in order to receive timely determinations. The current rule tolls the initial ten-day time limit only if the FOIA manager must consult with the requester regarding errors relating to “payments in arrears,” “faulty description,” “requester category and fees,” and “justification for fee waivers.” 32 C.F.R. § 1285.5(d)(i)-(iv). Whereas the current rule tolls the time limit only if a defect is so great that the FOIA manager must consult with the requester, the proposed rule would place the request “on hold” as soon as any defect in “the description, the requester category, the fee declaration, [or] the full postal address” is detected. The proposed rule emphasizes that even immaterial defects will toll the time limit, and it explicitly places the burden on the requester to “perfect[]” the request even before receiving notice of any error. Moreover, by adding “full postal address” to the list of items that must be perfect for the request to be timely processed, the proposed rule targets errors more likely to be made by novice requesters than by repeat, institutionalized requesters. The net result of these changes is to permit needless delays in determinations on requests that contain immaterial errors.

EPIC recommends that the segment of proposed 32 C.F.R. § 300.7(a)(2) addressing tolling the 10-day time limit due to defects in the original FOIA request be revised as follows:

Screen the request for defects in the description, the requester category, the fee declaration, and payments in arrears. 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 regarding an above-mentioned defect in order to process the request, the 10-day time limit will be tolled and will not begin or resume until the requester has satisfactorily addressed the defect.

Adopted in this form, the new rule will facilitate communication between FOIA managers and requesters to promote the efficient processing of requests. If a request is so defective that a FOIA manager cannot process it without consulting with the requester, the ten-day time limit will be tolled until the requester addresses the defect. By reserving processing delays only for those requests that contain significant defects, EPIC's recommendation would minimize the risk of unnecessary delays due to immaterial imperfections in the request.

The proposed rules also reduce the likelihood that misdirected requests will reach their intended location and produce releasable information. Proposed rule 300.7(a)(2) replaces the current rule's instructions to refer misdirected requests to the correct "DLA activity, DOD component, or Federal agency" under appropriate circumstances, § 1285.2(j)(1), with an absolute prohibition on referrals outside the DOD. If a requester seeks information clearly held outside of the DOD, the proposed rules would entitle him only to a response stating that the requested documents are "not agency records." Under the proposed rules, the FOIA officer would tell the requester which agency possesses the requested materials "if possible." However, a FOIA requester who receives the minimum required response would not know if he should resubmit his request with a different agency or discontinue his search because the documents simply do not exist. The following sentences be struck from proposed 32 C.F.R. § 300.7(a)(2):

When a DLA FOIA Requester Service Center receives a request for records that clearly belong to an agency outside the DOD, the requester shall be told these are not agency records and, if possible, provide the

name of the agency that may hold the records. No referral of the request is made outside of DOD.

Instead, section 1285.2(j)(1) should continue to control referral procedures, and that the sentence “The DLA activity will notify the requester of the referral,” be added to section 1285.2(j)(1) after the sentence, “A DLA activity having no responsive records to an FOIA request *shall* refer the request to another DLA activity, DoD component, or Federal agency if, after consultation with such activity, component, or agency, the intended recipient confirms that it has the requested record.” EPIC recommends that “shall” replace “may” in the previous sentence, as noted in italics.

Proposed rule 300.7(a)(2) exceeds the scope of DLA’s authority because they permit the dissemination of potentially misleading information regarding the existence of requested documents. The proposed rule will undermine the FOIA’s primary objective of openness by insinuating that misdirected records do not exist, thus discouraging some requesters from continuing their search for documents in another location. However, by maintaining section 1285(j)(1) with only minimal changes, the DLA will provide requesters with accurate information about whether sought-after records (1) are in another location or (2) do not exist. The proposed regulations’ outright ban on referrals outside the DOD is also a step backward, as it removes all discretion from FOIA officers regarding such referrals and will delay the requester’s receipt of responsive documents. EPIC’s proposals will help ensure that requesters receive the information to which they are entitled without misdirection or delay.

Proposed 32 C.F.R. § 300.7(b). FOIA Request Processing Procedures – *Multi-track Processing*

There is no exact analogue to proposed section 300.7(b) in the Defense Logistics Agency's current FOIA litigation; processing on different "tracks" is simply not provided for. The closest match is 32 C.F.R. § 1285.2(f), entitled "Prompt action on requests":

[A compliant] request shall receive prompt attention; a reply shall be dispatched within 10 working days unless a delay is authorized. When a DLA activity has a significant number of requests, e.g., 10 or more, the requests shall be processed in order of receipt. However, this does not preclude an activity from completing action on a request which can be easily answered, regardless of its ranking within the order of receipt upon a showing of exception need or urgency.

The proposed regulation, 300.7(b), is as follows:

DLA components shall process requests according to their order of receipt. A DLA component uses three processing tracks by distinguishing between simple, complex, and expedited requests based on the need to search from multiple directorates/locations; the need to search for and review a voluminous amount of records; and/or the need to consult with other DLA or DoD Components. Requesters are notified in the acknowledgment letter of the track the request is placed in. Requests placed in the simple track can reasonably expect that their request will be completed within the statutory time limit for responding to requests. Requesters placed in the complex track may be given an opportunity to narrow or modify the scope of their request in order to qualify for faster processing within the specified limits of DLA's simple tracking. Expedited processing must be requested and 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 processing, the proper component shall decide whether to grant expedited processing and shall notify the requester of the decision. If a request for expedited processing is granted the request shall be given priority and processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

There are a number of reasons this change is not only undesirable, but prohibited: First, the regulations contradict the express statutory time limit in the FOIA, so the DLA lacks

the authority to promulgate them.²⁸ Second, the regulations essentially reduce the “unusual circumstances” provision of the FOIA to a nullity. Third, the regulations are vague and unclear, creating uncertainty for requesters as well as agency personnel.

The agency cannot dismiss FOIA’s mandatory time limit so casually. The DLA, like any other federal agency, has twenty days to either notify the requester of that it will not comply with request or produce the requested documents, absent “unusual circumstances.”²⁹ The proposed regulation concedes only that those whose requests are “placed in the simple track” might “reasonably be completed within the statutory time limit” of twenty days; we can only assume that requests on the “complex” track need not pay attention to the FOIA’s deadline.

“Congress intended that individuals receive information from the government promptly,” *Oglesby v. U.S. Dep’t of Army*, 920 F. 2d 57, 65 (D.C. Cir. 1990), and the statutory deadline furthers that intention. Because this regulation directly contravenes a Congressionally enacted statutory provision, it is “in excess of statutory jurisdiction, authority, or limitations,” making its promulgation “unlawful[.]”³⁰ If a request is resource-intensive or requires coordinating multiple components, DLA can often informally negotiate with requesters for more time to comply with requests, something the agency’s current regulations already contemplate.³¹ However, a proper subject for *negotiations* cannot be the proper subject for *regulations*. Transforming the mandatory into the

²⁸ 5 U.S.C. § 552(a)(6)(A).

²⁹ See 5 U.S.C. § 552(a)(6)(A)(i) (twenty-day time limit); *id. at* §. 552(B) (“unusual circumstances”).

³⁰ 5 U.S.C. § 706(2)(C),

³¹ See 32 C.F.R. 1285.5(j)(2).

permissive mitigates what little leverage the FOIA requester already has when negotiating with massive, secretive agencies like the DLA.

In addition, contravening the statutory deadline reduces the FOIA’s “unusual circumstances” provision into a nullity. If such circumstances arise—like the need to contact outside offices, consult with other agencies, or handle an especially voluminous request—this provision allows for an extension of up to ten days.³² The criteria the agency sets out in 300.7(b) to determine whether a request warrants processing on a separate track due to complexity are essentially the same as the criteria that constitute unusual circumstances. The only relevant difference is that instead of a ten-day extension, the proposed regulation seems to promulgate an indefinite, and quite possibly infinite, extension of time to comply. By writing a more “relaxed” version of the § 552(B) into the proposed regulation, the DLA essentially proposes the wholesale derogation of § 552(B), a result at odds with the express language of the statute, not to mention common sense.

Not only is the 300.7(b) beyond DLA’s authority to enact, it is also less clear than the current regulation. Absent a “request which can be easily answered,” which might move up in line, 32 C.F.R. § 1285.2(f) specified that when an agency “activity” has ten or more requests, they “shall be processed in order of receipt.” In contrast, the proposed regulation only enumerates only vague factors like “the need to search for and review a voluminous amount of records” and “the need to search from multiple directorates/locations” used to determine whether a request is properly put on the “simple” or “complex” track. These vague guidelines not only create uncertainty for a person making a request (who might want to tailor it to the agency’s guidelines for faster

³² See 5 U.S.C. § 552(B).

processing), they also create uncertainty for the agency personnel who are deciding what track to place a specific request. And because DLA personnel presumably have little incentive to process requests expeditiously, the vague guidelines will probably be manipulated to place requests on the complex track whenever possible.

While the DLA can choose an internal process for differentiating between various requests and embed that process in regulations, it *cannot* use that process to supplant a statute. And it *should not* use that process to reduce clarity and efficiency by introducing uncertainty into the process. Section 300.7(b) should not be promulgated at all, but, should the DLA adopt the multi-track processing regulation, EPIC proposes instead the following rule change:

DLA components shall process requests according to their order of receipt. A DLA component uses three processing tracks by distinguishing between simple, complex, and expedited requests based on the need to search from more than two multiple directorates/locations; the need to search for and review over two-thousand pages of records; and/or the need to consult with more than one DLA or DoD Component. Requesters are notified in the acknowledgment letter of the track the request is placed in. All requests will be processed within the statutory deadline. Requesters placed in the complex track may be given an opportunity to narrow or modify the scope of their request in order to qualify for faster processing within the specified limits of DLA's simple tracking. Expedited processing must be requested and 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 processing, the proper component shall decide whether to grant expedited processing and shall notify the requester of the decision. If a request for expedited processing is granted the request shall be given priority and processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

The above changes add more specificity to the regulation, reducing uncertainty for requesters and agency personnel alike. They also clarify that the DLA's multi-track

system is not meant to override the statutory deadline, which makes the regulations lawful.

Proposed 32 C.F.R. § 300.7(d). FOIA Request Processing Procedures – *Misdirected Requests*

Under the current regulation, 32 C.F.R. § 1285.5(k):

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.

Under the proposed regulation, 32 C.F.R. § 300.7(d):

Misdirected requests. Misdirected requests shall be forwarded promptly to the FOIA Office of the DLA or DoD Component with the responsibility for the records requested within 10 working days. A misdirected request is a request received by one of DLA or DoD FOIA Offices but is actually seeking records maintained by another DLA or DoD Component. The receiving FOIA Office shall route the request to the proper DLA or DoD FOIA Office and the response time will commence on the date that the request is received by the proper FOIA Office, but not later than ten working days after the request is first received by any DLA or DoD FOIA Office. FOIA requests are not forwarded outside of DOD.

Consistent with EPIC's comments to proposed section 300.7(a)(2), EPIC recommends that proposed section 300.7(d) maintain the language in current section 1285.5(k) that directs FOIA officers to forward misdirected requests to the appropriate DLA activity, DOD component, or Federal agency. EPIC supports the proposed change appearing in 300.7(d) that establishes a 10-day deadline for forwarding misdirected requests. EPIC recommends that DLA should adopt proposed section 300.7(d) in the following form:

Misdirected requests. Misdirected requests shall be forwarded promptly to the FOIA Office of the DLA, DOD Component or Federal agency with the responsibility for the records requested within 10 working days. A misdirected request is a request received by one of DLA or DoD FOIA Offices but is actually seeking records maintained by another DLA or

DoD Component. The receiving FOIA Office shall route the request to the proper DLA or DoD FOIA Office and the response time will commence on the date that the request is received by the proper FOIA Office, but not later than ten working days after the request is first received by any DLA or DoD FOIA Office. FOIA requests are not forwarded outside of DOD.

Proposed 32 C.F.R. § 300.8. (“Initial Determination”)

A) Initial Denial Authority (IDA)

Under the current regulation, 32 C.F.R. § 1285.3(i):

Initial denial authority (IDA). An official who has been granted authority by the Director, DLA, to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure or to issue a "no record" determination. These include the Directors (or equivalent) of HQ DLA Primary Staff Elements (PSE's) and the Commanders (or equivalent) of PLFA's. For fee waiver and requester category determinations, the initial denial authority is the FOIA manager or head of the FOIA unit.

Under the proposed regulation, section 300.8:

The initial determination is whether to make a record available in response to a FOIA request. A full release may be made by an official knowledgeable of the record, with authority to determine that no harm would come from release. Adverse determinations (refer to Sec. 300.3 (b)) must be made by the designated Initial Denial Authority (IDA). By this regulation, the Director, DLA, delegates to Heads of DLA Components (see Sec. 300.3 (h)) the designation of IDA. The designation of IDA may be further delegated by the Heads of DLA Components to their Deputies. The IDA shall review all recommendations for withholding information and whether the criteria for withholding under one or more FOIA exemptions are met. DLA has IDAs throughout the agency; and each IDA will make the determination for records within their area of functional responsibility. If a request involves records from more than one functional area, consultation will be done with all responsible IDAs but will be signed by the IDA assigned the primary responsibility for processing the request.

The proposed rule requires that if the request is denied by an “official knowledgeable of the record,” then a final adverse determination “must be made by the designated Initial Denial Authority,” who is responsible for making determinations “for records within their area of functional responsibility.” The original rule does not explicitly state that IDAs are responsible for “records within their area of functional responsibility” and leaves open the possibility that an IDA unfamiliar with certain documents may nonetheless make a determination as to whether those documents are exempted by FOIA. EPIC supports the amendment because it ensures that FOIA officers are making determinations only about those documents falling within a functional area which they are specifically responsible for and, therefore, (presumably) knowledgeable about within DLA. This may also lead increase the accuracy, specificity and consistency of adverse determinations.

The proposed change also states that, “if a request involves records from more than one functional area, consultation will be done with all IDA’s [...]”. This ensures that the entire initial determination, not just the parts within the functional area of the designated IDA, will be given the same level of care and consideration. However, the coordination involved in a joint consultation among multiple IDAs may increase the processing time for some FOIA requests, and the agency should take appropriate measures to facilitate joint consultations involving multiple IDAs so as to avoid delay or backlog.

B) Reasonable Segregability

Under the current regulation, 32 C.F.R. § 1285.5(g)(2):

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.

Under the proposed regulation, section 300.8(b):

The FOIA requires that any reasonably segregable portion of a record must be released after appropriate application of the Act's nine exemptions. Segregation is not reasonable when it would produce an essentially meaningless set of words and phrases, or even sentences which taken separately or together have minimal or no information content.

The current rule requires that a response to a request denied in whole must advise the requester that segregation was not reasonable. By doing so, it allows the requester to challenge the response by filing an administrative appeal on the grounds of reasonable segregability. The proposed rule, however, eliminates any mention of such required notice. By denying a request in full without explaining that a request was denied on the grounds of reasonable segregability, the proposed rule denies the requester the statutory right to appeal. Furthermore, once a requester challenges a denial on the basis of segregability, "the agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information."³³ However, if the DLA is not required to disclose to a requester that the request was denied on segregability grounds, a requester could never challenge the agency's segregability analysis, and the agency would completely circumvent its burden of having to demonstrate that withheld documents contain no reasonably segregable responsive material.

³³ *Mokhiber v. U.S. Dep't of Treas.*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004), citing *Army Times Pub. Co. v. Dep't of Air Force*, 998 F.2d 1067, 1068 (D.C. Cir. 1993); *Mead Data Central, Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

Whereas the current rule does not define what might be a reasonable segregation, the proposed rule gives DLA the authority to delineate what is “reasonably segregable,” depending on whether a segregation results in “an essentially meaningless set of words and phrases” or “sentences which taken separately or together have minimal or no information content.” With this proposed change, the agency has drastically and unnecessarily narrowed the circumstances under which a requester will receive responsive documents. The reasonableness of segregation should not depend on the DLA’s determination that a “set of words and phrases” is meaningless or has “minimal or no information content.” Furthermore, “the agency bears the burden of demonstrating that withheld documents contain no reasonably segregable factual information.”³⁴ Therefore, the DLA has to prove that the documents do not contain reasonable segregable portions; the unprecedented and arbitrary standard of not disclosing “an essentially meaningless set of words” violates the FOIA. Such a determination should be left to the requester, who alone may determine whether documents hold “minimal or no information content” for the purposes of his request. This change, taken together with the adopted regulations in § 300.5 allowing the DLA to invoke a “refusal to confirm or deny” the existence or nonexistence of certain documents, grant the DLA dangerously broad authority to deny an unprecedented number of FOIA requests without ever explaining its grounds for denial. Instead, EPIC proposes that, when a document is denied in whole, the DLA must disclose to the requester that segregation was not reasonable and give the requester the opportunity to appeal.

³⁴ *Id.*

EPIC proposes that the original language be reinstated so that “. . . 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.”³⁵ This language protects the DLA from disclosing exempted information, while allowing a requester to access all responsive information to which he is entitled by statute. Furthermore, the DLA should adopt a new definition of “reasonably segregability” that does not hinge on the DLA’s own unchecked determination of what constitutes “an essentially meaningless set of words and phrases” or “minimal or no information content.”

Proposed 32 C.F.R. § Section 300.9. Appeals

Proposed subsection (a) states:

An appeal can be made as a result of an initial determination that is considered by the requester to be an adverse determination (see 300.3 (b)).

This proposed language disregards the right to file an appeal when the agency fails to make *any* determination at all. The definition of “adverse determination” in proposed § 300.3(b) also does not discuss the scenario in which a requester receives no determination. New language should be added to proposed § 300.9(a) that explicitly recognizes the right of a requester to file an appeal when the agency fails to make a proper determination within the statutory deadline. By comparison, other federal agencies explicitly recognize this right in their FOIA regulations. *See, e.g.*, 34 C.F.R. § 5.40(b) (noting that a requester seeking records from the Department of Education has the right to an appeal if “the requester has received no determination” within twenty working days).

To recognize this right of appeal, the proposed subsection should be revised as:

³⁵ 32 C.F.R. § 1285.5(g)(2) (2012).

A requester may appeal any determination that the requester considers an adverse determination. A requester may also appeal if the requester has not received a determination within twenty working days.

Proposed subsection (b) states:

An appeal must be made in writing to DLA's Appellate Authority and must be postmarked within 30 calendar days from the date of the initial determination letter. The General Counsel serves as DLA's appellate authority. The appeal should include reasons for reconsideration and a copy of the initial determination letter. [The proposed rule then lists the e-mail address, fax number, and mailing address for appeals.]

This proposed subsection contains two substantive changes from the current DLA regulations. First, it seeks to change the window of time in which requesters may file an appeal from sixty days to thirty days. Second, it seeks to designate DLA's General Counsel as the agency's Appellate Authority for all administrative appeals.

The agency's proposal to shorten the appeal window to thirty calendar days would be highly detrimental to FOIA requesters. Crafting an administrative appeal is often complicated and may require extensive legal research. The current time window of sixty days from the date of the agency's determination, *see* 32 C.F.R. § 1285.5(i)(5)(i), (m)(2)(i), preserves the requesters' interest in retaining ample time to write appeals and the agency's interest in efficiently disposing of old requests. Shortening that window to thirty days would create a significant burden on requesters—especially because the clock is triggered on the date of the determination letter (not on the date that the requester *receives* the letter), raising the possibility that unanticipated delays in delivery could shorten the time window even further.³⁶ Moreover, it is in the agency's interest to grant

³⁶ It is noteworthy that the procedures for calculating requester deadlines and agency deadlines are asymmetrical: The requester's clock for filing an appeal is measured in *calendar* days and is triggered on *the date of the agency's letter*, whereas the government's clock for responding to

requesters adequate time to craft thoughtful, well-considered appeals because doing so will cut down on frivolous or poorly written appeals. Accordingly, the current sixty-day window should be retained. Proposed subsection (b) should be revised by replacing the phrase “30 calendar days” with “60 calendar days.”

The proposed rule’s designation of the DLA General Counsel as the appellate authority is a positive change. The appellate authority, of course, is a critical position in the FOIA regulatory scheme. The current regulations state that the DLA Director “or his designee” serves as the appellate authority for all appeals, except for fee waivers and category determinations, for which the appellate authority is the Staff Director of the Office of Administration.³⁷ There are two problems with the current regulations. First, the elaborate system under which various individuals can serve as the appellate authority—the Director, the Director’s designee, or the Staff Director—raises the possibility of inconsistent and unpredictable application of the FOIA rules. Second, the provision allowing the Director’s designee to act as the appellate authority is too vague; it does not specify, for instance, that the designee have any familiarity with the FOIA. The proposed rule simplifies and improves the current rule by designating the General Counsel as the appellate authority for all administrative appeals. Moreover, the General Counsel is more likely than the Director or the Staff Director to be familiar with the agency’s legal requirements under the FOIA. Accordingly, this proposed change in section 300.9(b) should be adopted.

requests is measured in *working* days and is triggered on *the day that the agency receives the request*.

³⁷ See 32 C.F.R. § 1285.3(e).

Proposed 32 C.F.R. § 300.11 General Fees and Fee Waivers

The DLA proposes to adopt current fees that are published in 32 C.F.R. § 286.

Section 286.28(b)(5) currently states:

(5) The term “review” refers to the process of examining documents located in response to a 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 that 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.

The final sentence permitting additional costs to accrue on account of the agency’s failure to adequately assess all possible exemptions should be removed. Additional fees impose an unnecessary burden on the requester when it is the agency’s responsibility to address all relevant exemptions initially.

Section. 286.28(d)(3)(i)(B) further states:

(A) 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 determinate whether disclosure is meaningful, and shall inform the public on the operations or activities of the Department of Defense. While the subject of a request may contain information that concerns operations or activities of the Department of Defense, 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 previously released record that has been heavily redacted, 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 Department of Defense 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 Department of Defense.

The following phrase should not be adopted: “the balance of which may contain only random words, fragmented sentences, or paragraph headings.” Under a presumption of openness and assuming the information is releasable, the agency should not determine whether piecemeal language is relevant to the requester. That should be up to the requester and any additional language relevant to the request should be released regardless of the agency’s perception of irrelevance.

Section 286.28(d)(3)(i)(B) states:

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 indigence are insufficient without demonstrating the capacity to further disclose the information in a manner that 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.**

The bolded portion of the regulation should be removed. In the internet age, an individual can post a video on YouTube for the first time and receive 2 million hits in a short time span. The same is true for bloggers, particularly bloggers writing about questionable governmental activity. The ability to inform the public is magnified through the lens of the World Wide Web. An individual should meet only minimal requirements regarding the ability to inform the public because she has the capacity to reach a wide audience at his fingertips. If the agency disagrees and would like specific qualifications for bloggers

and internet posters (i.e. number of followers, posts, etc.) then the agency should be clear in a proposed change to the regulation so that the public can have an opportunity to properly reject such inhibitive proposals.

32 C.F.R. § 286.28(d)(3)(ii)(B) currently reads (in relevant part):

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 interests 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. (Emphasis added.)

The presumptive of openness, as required under the current administration, should replace any balancing test between interests. This presumptive openness is clear in the following section (d)(4) requiring components to rule in favor of the requester if the balancing test cannot be clearly resolved. This language should be removed as well, and in its place should just be a presumptive openness.

The provisions set out at 32 C.F.R. §286.28 (e)(2)(i)(A), (e)(2)(iv), and (e)(2)(x) currently require the agency to notify or contact the requester but do not include time restrictions. Both portions of the regulation should include either 1) a 20 business day response requirement or 2) a 30 calendar day response requirement. A 30 calendar day requirement would be most consistent with the language of the statute under (e)(1)(i)(A).

32 C.F.R. § 286.28 (e)(2)(iii) currently reads:

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

The following language should be removed: “the requester shall be so informed.” Instead, the agency rule should say simply “the requester shall be informed the request is denied.” This clear language requiring the agency to formally deny the request when it will not process the request allows the requester to understand the options upon a formal denial rather than just “being informed.” Moreover, the requester should be advised of appeal rights.

32 C.F.R. § 286.28 (e)(7)(i) currently reads:

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.

This provision recognizes “representative of the news media” may use a wide variety of technologies to information the public. However, the phrases “electronic dissemination of newspapers through telecommunications services” and the definition of a “freelance” journalist are particularly dated. EPIC recommends that this provision be revised as follows:

The term “representative of the news media” refers to any person actively gathering information 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 print, broadcast and webcast news services available for purchase or subscription by the general public, or available to the general public by means of an online search

32 C.F.R. § 286.30(a) currently reads:

Fees for technical data. 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. DoD 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 costs 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 § 286.29 of this subpart for other types of information released under the FOIA.

The word “higher” should be replaced with “lower” to decrease the burden on the requester. Additionally, the regulation should explicitly include an initial two-hour time allotment as applied to technical data during which the requester is not charged.

32 C.F.R. § 286.30(b)(3) currently reads:

The Component determines in accordance with § 286.28(d)(1), that such a waiver is in the interest of the **United States**.

As a reminder, section 286.28(d)(1) states, “Documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in

paragraph (e) of this section 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.” “United States” should be replaced with “public.” It is possible to interpret the current language as requiring the agency to look to the interest of the government rather than the public. The language, in accordance with the cited subsection, should be consistent and clear.

Many of the Proposed Changes in the FOIA Regulations Are Not Only Contrary to Law but also to the Express Statements of the President and the Attorney General

Many of the agency’s proposed changes directly contravene the President’s statement on the transparency of the federal government. On January 21, 2009, President Obama issued a memorandum on the Freedom of Information Act, transparency and open government, and announced his intention to make the federal government more transparent.³⁸

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.³⁹

The President made clear the importance of open and accountable government: “We will achieve our goal of making this administration the most open and transparent

³⁸ President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Freedom of Information Act, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/; President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Jan. 21, 2009, http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

³⁹ *Id.*

administration in history not only by opening the doors of the White House to more Americans, but by shining a light on the business conducted inside it.”⁴⁰

Attorney General Eric Holder has also made clear a “presumption of openness” governing federal records.⁴¹ And Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, stated that the Committee “will continue to do its part to advance freedom of information, so that the right to know is preserved for future generations.”⁴²

Conclusion

As stated above, EPIC recommends that the Defense Logistics Agency revise the proposed regulations, remove the new barriers to access to government information, and incorporate new procedures that ease, not burden, the public’s efforts to learn about the activities of its government. As currently written, several of the DLA’s proposed revisions are contrary to the Freedom of Information Act, exceed the scope of the agency’s rulemaking authority, and should be revised as indicated.

Respectfully submitted,

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⁴⁰ *Id.*

⁴¹ Attorney General Eric Holder, Memorandum for the Heads of Executive Departments and Agencies re: Transparency and Open Government, Mar. 19, 2009, <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

⁴² Statement Of Senator Patrick Leahy, Committee On The Judiciary, Hearing On “Advancing Freedom Of Information In The New Era Of Responsibility,” Sept.30, 2009, <http://leahy.senate.gov/press/200909/093009b.html>.