



Communications and Information

FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

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This instruction establishes policies, procedures, and responsibilities for implementation of the USTRANSCOM Freedom of Information Act (FOIA) Program. It is applicable to all personnel assigned to USTRANSCOM. The USTRANSCOM Staff Judge Advocate (TCJA) will follow their Service regulations for information that is purely Service unique or generated apart from the joint arena. When records are originated while performing joint exercises or operations under USTRANSCOM's authority, the records are joint in nature and are under the cognizance of USTRANSCOM and this instruction. This instruction conforms to Federal law and Department of Defense (DOD) publications listed in Attachment 1, Section A and contain additional instructions and guidance affecting the USTRANSCOM FOIA Program. Use this publication in conjunction with those listed in Attachment 1, Section A. In any area of conflict, or clarity, 5 United States Code (U.S.C.) Section 552, as amended, and DOD policies take precedence. This instruction requires collecting and maintaining information protected by the Privacy Act of 1974 authorized by title 10 U.S.C. Section 8013. Send comments and suggested improvements to this instruction on Air Force (AF) Form 847, Recommendation for Change of Publication, to USTRANSCOM/TCJA-FO. The use of a name or mark of any specific manufacturer, commercial product, commodity, or service in this publication does not imply endorsement by USTRANSCOM. Ensure that all records created as a result of processes prescribed in this publication are maintained in accordance with USTRANSCOM Instruction 33-32, *USTRANSCOM Records Management Program*.

SUMMARY OF CHANGES: This instruction was revised for realignment under the Staff Judge Advocate

1. References, Abbreviations, Acronyms, and Terms. References, abbreviations, acronyms, and terms used in this instruction are listed in Attachment.

2. Public Information. The public has a right to information concerning the activities of its Government; however, the Government is equally committed to safeguarding national security, enhancing the effectiveness of law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy. A record requested by a member of the public who follows rules established by the DOD and USTRANSCOM shall not be withheld in

whole or in part unless the record is exempt from mandatory partial or total disclosure under the FOIA. USTRANSCOM Handbook 33-25, available on the USTRANSCOM World Wide Web (www) home page, gives the public a short, simple explanation of the FOIA and procedures for requesting USTRANSCOM records.

3. USTRANSCOM FOIA Program Responsibilities:

3.1. Initial Denial Authorities (IDAs) are USTRANSCOM Staff Judge Advocate (TCJA), and Deputy Staff Judge Advocate (TCJA-D).

3.2. Disclosure Authorities are IDAs and Chief, FOIA and Privacy Act (TCJA-FO).

3.3. FOIA officer for USTRANSCOM is the Chief, FOIA and Privacy (TCJA-FO). Responsibilities of the FOIA officer are:

3.3.1. Process all USTRANSCOM FOIA requests for signature of IDA or Disclosure Authority.

3.3.2. Maintain log of all FOIA requests by fiscal year.

3.3.3. Determine office of primary responsibility (OPR) for requested records/records search.

3.3.4. Coordinate interim/final responses with DOD agencies, other Government agencies, directorates, or direct reporting elements (DREs) having an interest in final decision.

3.3.5. Assess and collect appropriate fees according to DOD 5400.7-R.

3.3.5.1. All fees collected will be processed through the 375th Comptroller Squadron.

3.3.6. Maintain case files for each FOIA request and FOIA appeal.

3.3.7. Submit annual FOIA report and quarterly FOIA indexing requirements.

3.3.8. Publish and maintain a FOIA guide for requesters and place on USTRANSCOM public web page.

3.3.9. Refer issues of unusual significance, precedent setting, or otherwise requiring special attention or guidance to the Director, Freedom of Information and Security Review, 1155 Defense Pentagon, Washington DC 20301-1155 for evaluation.

3.4. The OPR for the functional area of requested records will review the request/records search to determine if requested records exist.

3.4.1. The OPR will review the requested records and identify the releasable portions for each record.

3.4.2. When the OPR originates a record or portion of a record from several sources, a position letter will be provided identifying the original sources. The FOIA officer will

coordinate with the original source's FOIA office. The coordination packages will be directed back to the originating agency for consolidation and final recommendation to disclose/deny such records.

3.4.3. OPRs will provide a position letter recommending total release, no record, or partial or full denial of requested records. If denial is recommended, the position letter must contain the applicable exemption, justification for denial, and a sound legal basis for the denial. The use of a FOIA exemption should be on sound footing, both factually and legally, whenever requested information is withheld.

3.5. Office of the Staff Judge Advocate (TCJA):

3.5.1. Reviews all FOIA request actions.

3.5.2. Provides a written legal opinion discussing the legal sufficiency of the proposed actions whenever a case is appealed.

3.5.3. Reviews and provides advice and written legal opinions, when necessary.

3.6. Public Affairs (TCPA) reviews all FOIA request actions in order to be aware of any potential sensitive subjects.

3.7. Force Protection (TCJ3-FP) reviews all classified FOIA request actions, and provides a security review of classified records, if applicable.

3.7.1. This review is provided by the DD Form 254, Security Classification Specification guides, and/or downgrading procedures against sanitized records when all or portions of the classified records have been determined releasable to the requester.

3.7.2. Assists TCJA-FO in reviewing FOIA requested information for declassification.

4. FOIA Request. A written request for agency records that reasonably describes the record(s) sought, made by any person, including a member of the public (U.S. or foreign citizen/entity), 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 is considered a FOIA request. Requesters should also indicate a willingness to pay fees associated with the processing of their request or, in the alternative, why a waiver of fees may be appropriate. Written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically. Requests received by facsimile or electronically must have a postal mailing address included. The request is considered properly received when these conditions have been met and the request arrives in the USTRANSCOM FOIA Office, TCJA-FO, 508 Scott Drive, SCOTT AFB IL 62225-5357. FOIA requests received in directorates/DREs will be immediately forwarded (original letter and envelope) to the FOIA officer (TCJA-FO). *NOTE: Time limit does not begin until the request reaches the FOIA office that services the OPR of the requested records.*

4.1. Prompt Action on FOIA Requests. Generally, when a member of the public complies with the procedures in paragraph 4 for obtaining USTRANSCOM records, and after the request is received by TCJA-FO, prompt action will be taken to provide a final response determination within the statutory 20 working days. If a significant number of requests or the complexity of the requests prevents a final response within the statutory time period, USTRANSCOM shall advise the requester of this fact in an interim response and explain how the request will be responded to within its multitrack processing system (see paragraph 5).

4.1.1. Final Response Determination. A final response determination is notification to the requester that the records are released, or will be released on a certain date, or the records are denied under the appropriate FOIA exemption, or the records cannot be provided for one or more "other" reasons.

4.1.2. Interim Response. Interim responses include acknowledgement of receipt of the request, negotiations with the requester concerning the scope of the request, the response time frame, and/or fee agreements. Such actions do not constitute a final response.

4.1.3 Response Time Limit. If a request fails to meet minimum requirements as set forth in this instruction, the command FOIA officer shall inform the requester how to perfect or correct the request. The statutory 20 working day time limit applies upon receipt of a perfected or corrected FOIA request. NOTE: Only the FOIA officer or that individual's designee or legal staff will communicate directly with the requester.

5. Multitrack Processing. When a significant number of pending requests prevents a response determination being made within the statutory 20 working days, requests shall be processed in a multitrack processing system, based on the date of receipt, the amount of work and time involved in processing the request, and whether the request qualifies for expedited processing. Requesters may limit the scope of the request in order to qualify for the fastest queue.

5.1. Simple Requests. Requests that are processed within the statutory 20 working days or sooner. USTRANSCOM has a processing queue for simple requests based on a first-in, first-out concept.

5.2. Complex Requests. USTRANSCOM has a processing queue for requests based on complexity (search time involved to locate responsive records, review of responsive records, referral of responsive records to other agencies for review, and/or designation of fee category).

5.3. Expedited Requests. USTRANSCOM has an expedited processing queue for requests indicated as such and demonstrating a compelling need for the information. Expedited requests will be processed as soon as practicable. Notice of the determination as to whether to grant expedited processing in response to a requester's compelling need shall be provided to the requester within ten calendar days.

5.3.1. *Compelling need* means that failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.

5.3.2. *Compelling need* also means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.

5.3.3. *Urgently needed* means that the information has a particular value that will be lost if not disseminated quickly.

5.3.4. *Other Reasons for Expedited Processing.* Other reasons that merit expedited processing are an imminent loss of substantial due process rights and humanitarian needs (promote the welfare and interests of mankind).

6. Use of Exemptions. It is USTRANSCOM's policy to make records publicly available, unless the record qualifies for exemption under one or more of the nine exemptions. Discretionary disclosures are discouraged; however, if discretionary decisions are made to disclose information protected under the FOIA, they should be made only after full and deliberate consideration of the institutional commercial and personal privacy interests that could be implicated by disclosure of the information.

6.1. *Exemption 1 (5 U.S.C. 552 (b)(1)).* Records properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulation are exempt from release. Although material is not classified at the time of the FOIA request, a classification review may be undertaken to determine whether the information should be classified. There is no discretion regarding its release.

6.2. *Exemption 2 (5 U.S.C. 552 (b)(2)).* Only those matters “related solely to the internal personnel rules and practices of the agency” are eligible for protection under this exemption.

6.3. *Exemption 3 (5 U.S.C. 552 (b)(3)).* Records concerning matters that a statute specifically exempts from disclosure. The USTRANSCOM FOIA officer (TCJA-FO) maintains a list of 5 U.S.C. 552 (b)(3) statutes used within DOD. There is no discretion regarding release.

6.4. *Exemption 4 (5 U.S.C. 552 (b)(4)).* Records containing trade secrets, commercial or financial information received in confidence in connection with loans, bids, contracts, or proposals set forth in or incorporated by reference in a contract entered into between the respective agency and the offeror that submitted the proposal, as well as other information received in confidence or privileged, such as trade secrets, inventions, discoveries, or other proprietary information submitted strictly on a *voluntary* basis, absent any exercised authority prescribing criteria for submission are exempt from release. There is no discretion regarding release.

6.5. *Exemption 5 (5 U.S.C. 552 (b)(5)).* Records containing information considered privileged

in litigation, primarily under the deliberative process privilege, are exempt from release. In order to qualify for this exemption, records must be both deliberative in nature (internal advice, recommendations, and subjective evaluations,) as well as part of a decision-making process. Also potentially exempted are records pertaining to the attorney-client privilege and the attorney work-product privilege. This exemption is entirely discretionary.

6.6. Exemption 6 (5 U.S.C. 552 (b)(6)). Records containing information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person whom the information is about, would result in a clearly unwarranted invasion of personal privacy, are exempt from release. Release of information about an individual contained in a Privacy Act System of Records that would constitute a clearly unwarranted invasion of privacy is prohibited and could subject the releaser to civil and criminal penalties. This exemption shall not be used in an attempt to protect the privacy of a deceased person, but it may be used to protect the privacy of the deceased person's family if disclosure would rekindle grief, anguish, pain, embarrassment, or even disruption of peace of mind of surviving family members. Included in Exemption 6 are lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the DOD to include active duty personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. There is no discretion regarding release.

6.7. Exemption 7 (5 U.S.C. 552 (b)(7)). Records or information compiled for law enforcement purposes; i.e., civil, criminal, or military law, including the implementation of Executive Orders or regulations issued pursuant to laws, are exempt from release. Information that, if released, could constitute an unwarranted invasion of personal privacy of a living person, including surviving family members and/or could reasonably be expected to endanger the life or physical safety of an individual, is denied under this exemption. There is limited discretion regarding release of certain parts of Exemption 7. (See DoD 5400.7-R para. C 3.2.1.7 for further information).

6.8. Exemption 8 (5 U.S.C. 552 (b)(8)). Records containing information relating to the examination, operation, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions are exempt from release. (*This exemption is not normally applicable to DoD.*)

6.9. Exemption 9 (5 U.S.C. 552 (b)(9)). Records containing geological and geophysical information and data (including maps) concerning wells are exempt from release. (*This exemption is not normally applicable to DoD.*)

7. Reasons for Not Releasing a Record. The following are reasons for not complying with a FOIA request:

7.1. No Records. A reasonable search of files failed to identify responsive records.

7.2. Referrals. The request is transferred to another DOD/Federal Agency for action.

7.3. *Request Withdrawn.* The requester withdraws the request.

7.4. *Fee-Related Reason.* The requester is unwilling to pay fees associated with a request, the requester is past due in the payment of fees from a previous FOIA request, or the requester disagrees with the fee estimate.

7.5. *Records Not Reasonably Described.* A record has not been described with sufficient specifics to enable the agency to locate it by conducting a reasonable search.

7.6. *Not a Proper FOIA Request for Some Other Reason.* The requester has failed unreasonably to comply with procedural requirements, other than fee-related, imposed by agency policy.

7.7. *Not an Agency Record.* The information requested is not a record within the meaning of the FOIA and this instruction.

7.8. *Duplicate Request.* The request is a duplicate request (a requester asks for the same information more than once). This includes identical requests received via different means (e.g., e-mail, facsimile, mail, and courier) at the same or different times.

7.9. *Other (Specify).* Any other reason a requester does not comply with published policy and procedures other than those outlined in this instruction.

8. *Non-Responsive Information in Responsive Records.* USTRANSCOM shall interpret FOIA requests liberally when determining which records are responsive to the requests. When non-responsive information is contained in responsive records, the USTRANSCOM FOIA officer will take the following procedures.

8.1. Consult with the requester and seek the requester's concurrence to deletion of non-responsive information without a FOIA exemption. The interim/final response letter to the requester will reflect this concurrence.

8.2. *Unclassified Records.* If the responsive record is unclassified and the requester does not agree to deletion of non-responsive information without a FOIA exemption, USTRANSCOM will release all non-responsive and responsive information that is not exempt. For non-responsive information that is exempt, the requester is notified that even if the information were determined responsive, it would likely be exempt under (appropriate exemption(s)). The requester is advised of the right to request this information under a separate FOIA request.

8.3. *Classified Records.* If the responsive record is classified and the requester does not agree to deletion of non-responsive information without a FOIA exemption, USTRANSCOM will release all unclassified responsive and non-responsive information that is not exempt. If the non-responsive information is exempt, the procedures in paragraph 8.2 will be followed. Classified non-responsive information will be reviewed for declassification/release only at the time a separate FOIA request is received.

9. Reading Room and Records Availability. The TCJA-FO operates the USTRANSCOM Reading Room which contains USTRANSCOM directives, instructions, manuals, regulations, pamphlets, handbooks, and select documents that have been requested several times under FOIA (these are called FOIA Processed (a) (2) Records). The FOIA Electronic Reading Room is available at the following location: <http://www.transcom.mil>. Select FOIA at the top of the menu bar the select reading room from the menu bar on the left side.

10. For Official Use Only (FOUO). Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public protected by one or more FOIA Exemptions 2 through 9, shall be considered FOUO. No other material shall be considered FOUO. FOUO is not authorized as an anemic form of classification to protect national security interests. Contact TCJ3-FP for additional information on marking, releasing, transmitting, safeguarding, and disposing of FOUO records.

11. Appeals. If the USTRANSCOM Initial Denial Authorities decline to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated appellate authority. A copy of the letter denying the initial request should accompany the appeal. Such appeals will contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, and for no record determinations when the requester considers such responses adverse in nature. Appellate authority for USTRANSCOM is the Director, Administration and Management and Washington Headquarters Services, Directorate for Freedom of Information and Security Review, Room 2C757, 1155 Defense Pentagon, Washington DC 20301-1155.

12. Fee Categories. The FOIA allows fees to be charged to certain types of requesters, but it also provides that waivers or reductions in fees be given if disclosing the information is in the public interest. Public interest is defined as "information that significantly enhances the public's knowledge of the operations and activities of a government agency." The FOIA requires that requesters be placed into one of the following categories:

12.1. Commercial. The term "commercial use" request refers to a request from, or on behalf of, one who seeks information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. Fees for commercial requesters are limited to reasonable standard charges for document search, review, and duplication. Requesters must reasonably describe the records sought.

12.2. Educational or Non-Commercial Scientific Institution or News Media. Requesters in this category should indicate a willingness to pay duplication charges in excess of 100 pages if more than 100 pages of records are requested.

12.2.1. Educational Institution. The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an

institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

12.2.2. *Non-Commercial Scientific Institution.* The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

12.3. *News Media.* 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 who make their product available for purchase or subscription by the general public. These examples are not meant to be all-inclusive. 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.

12.4. *All Other Requesters.* Requesters who do not qualify in the categories above are considered "other" requesters, and normally make requests for agency records for their personal use. "Other" requesters receive two hours search, all review costs, and duplication of the first 100 pages at no cost.

12.5. All requesters should submit a willingness to pay fees regardless of the fee category; however, this does not mean they will be charged fees. Except for commercial requesters whose fees total more than \$15, waivers are always considered. Fee waivers may be granted when disclosure of the records is in the public's interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government. The following factors are weighed in making a fee waiver determination:

12.5.1. Subject of the request.

12.5.2. Informative value of the information to be disclosed.

12.5.3. Contribution to an understanding of the subject by the general public likely to result from the disclosure.

12.5.4. Significance of the contribution to public understanding.

12.5.5. Disclosure of the information is not primarily in the commercial interest of the requester.

12.5.6. Ability of the requester to disseminate the information.

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Attachment:
Glossary of References, Abbreviations, Acronyms, and Terms

Attachment 1**GLOSSARY OF REFERENCES, ABBREVIATIONS, ACRONYMS, AND TERMS****Section A--References**

Title 5, United States Code, Section 552, Freedom of Information Act, as amended.

DOD Directive 5400.7, DOD Freedom of Information Act Program.

DOD 5400.7-R, DOD Freedom of Information Act Program.

Section B--Abbreviations and Acronyms

AF – Air Force

DOD – Department of Defense

DREs – Direct Reporting Elements

FOIA – Freedom of Information Act

FOUO – For Official Use Only

IDA – Initial Denial Authority

OPR – Office of Primary Responsibility

TCC – Transportation Component Command

TCJ3-FP – Force Protection

TCJA – Staff Judge

TCPA – Public Affairs

TCJ6-RII – Resources Information Communications and Records Management Team

U.S.C. – United States Code

USTRANSCOM – United States Transportation Command

WWW – World Wide Web

Section C--Terms:

Administrative Appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority of an agency to reverse a decision to withhold all or part of a requested record; deny a request for waiver or reduction of fees; or questioning the adequacy of the search when no records are located.

Agency Record. The products of data compilation, such as all books, papers, maps, and photographs, machine readable materials, inclusive of those in electronic form or format, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law in connection with the transaction of public business and in possession and control of originating agency at the time the FOIA request is made.

Appellate Authority. The head of an agency having jurisdiction for this purpose over the record. For USTRANSCOM, the Appellate Authority is the Director, Administration and Management and Washington Headquarters Services, Directorate for Freedom of Information and Security Review.

Denial. A determination made by an initial denial authority not to disclose requested records which are in the agency's possession and control; a decision not to waive or reduce fees; or a decision that no records exist.

Determination. The decision to disclose or deny all or part of a record requested by the public; the decision not to waive or reduce fees; or the decision that no records exist.

Disclosure. Providing access to, or a copy of, the requested record.

Electronic Record. Records (including e-mail) that are created, stored, and retrievable by electronic means.

FOIA Officer. The command representative assigned the responsibility for managing the FOIA program (in USTRANSCOM, TCJA-FO).

FOIA Request. A written request for Government records that reasonably describes the record(s) sought, made by any person, including a member of the public, an organization, or a business.

FOR OFFICIAL USE ONLY. Information that has not been given a security classification pursuant to the criteria of an Executive Order, but which may be withheld from the public for one or more of the reasons cited in FOIA Exemptions 2 through 9. No other material shall be considered or marked FOUO.

Full Denial. A determination that a requested record in its entirety will not be released.

Initial Denial Authority. An official who has been granted authority by the head of an agency to withhold records requested under the FOIA for one or more of the nine categories of records exempt from mandatory disclosure (in USTRANSCOM, TCJA and TCJA-D).

Non-Responsive Information. Portion(s) of an agency record that is not responsive to the subject of the FOIA request. With large electronic storage media, only the data which is directly associated with the specific recorded "information" on the tape, disk, or media constitutes the record. Only those items in that "informational area" are considered in determining what is responsive or non-responsive. All other data on the tape, disk, or media are considered other records and are not considered under the FOIA request.

Office of Primary Responsibility. Directorate or direct reporting element which has physical custody and originated the requested records and provides a recommendation on release of the requested material.

Partial Denial. A determination that a portion(s) of a requested record will not be released.

Public Interest. The interest in obtaining official information that sheds light on an agency's performance of its statutory duties because the information falls within the statutory purpose of the FOIA to inform citizens about what their Government is doing.

Responsive Information. Portion(s) of an agency record that is responsive to the subject of the FOIA request.

Search. The time expended to locate a requested record or a specific section of a record. This includes telephone, manual, or computer searches conducted to find and retrieve a record.

Statutory Time Limit. The 20 workdays imposed by the FOIA to inform the requester of the initial decision on releasability. The time limit begins when the FOIA officer receives a request that reasonably describes the records requested and satisfactorily addresses fee issues.

Workday. An official duty day (does not include Saturdays, Sundays, legal Federal holidays, and hazardous weather conditions where administrative leave is granted for the full duty day.)