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**COMMENTS ON PROPOSED RULE ON DoD MANDATORY DECLASSIFICATION
REVIEW (MDR) PROGRAM**

Docket ID: DOD-2010-OS-0043
Document No.: 2010-24094
75 FR 59176

To Whom It May Concern:

These comments are submitted on the proposed DoD MDR regulations, published on September 27, 2010, for incorporation into Title 32 of the Code of Federal Regulations.

Proposed § 222.5(b)(4)

§ 222.5 MDR processing procedures.

...

(b) MDR Requester Guidelines. Members of the public seeking the declassification of DoD documents under the provisions of section 3.5 of Executive Order 13526 shall:

...

(4) Include a statement that the requester understands that the request may incur processing charges in accordance with paragraph (j) of this section.

As an initial matter, this proposed rule contains no paragraph (j), and there appears to be no current paragraph (j) to which this could be referring.¹ While it is entirely reasonable for the DoD to amend this rule later to cover the issue of fees, it is improper for the DoD to include a reference *now* to a potential later amendment that will itself have to go through the notice and comment rulemaking procedure. It is far more reasonable to leave this subparagraph out of the current iteration and add it when the actual paragraph (j) is added to the rule.

On the general issue of fees, though, 31 U.S.C. § 9701(b)(2)(C) states that any charges must be in part based on the “public policy or interest served,” which in the case of declassification is great. MDR is a system by which government data that should no longer be classified is properly declassified. By its very nature, an agency determination to release data through MDR *is* a determination that such data has no right remaining classified. Therefore, while agencies are legally allowed to charge fees for MDR, such fees should be minimal in

¹ As 32 C.F.R. § 222 does not currently exist, we cannot determine if the DoD intends to migrate language from another regulation that does contain a paragraph (j) or propose a paragraph (j) in the future. The remainder of this discussion assumes the latter.

recognition of the great public interest in declassification of government records. Search fees should be relatively nonexistent due to the fact that MDR requesters must describe the records they seek with far greater specificity than FOIA requesters, and review fees are definitely out of the question, as the agency would in effect be placing a price on a citizen's right to ensure that only properly classified material remains classified. Minimal duplication fees could be reasonable, but in an age when agencies are supposed to give electronic records whenever possible, duplication fees are almost unnecessary by definition. Therefore, as a matter of public policy as well as pragmatic cost-benefit assessment, the DoD is strongly encouraged to follow the example of the Department of Homeland Security and the Office of Management and Budget and do away with the idea of MDR fees altogether. See 6 C.F.R. § 7.31 and 5 C.F.R. § 1312.37, respectively.

Proposed § 222.5(h)(2)-(3)

§ 222.5 MDR processing procedures.

...

(h) Denial of Information.

...

(2) When unclassified information is withheld because it is determined exempt from release pursuant to Exemptions 2 through 9 of the FOIA (whether or not classified information was also withheld within the same document), the DoD Component shall advise the requester that:

(i) Section 3.5(c) of Executive Order 13526 allows for the denial of information when withholding it is authorized and warranted under applicable law.

(ii) Unclassified information exempt from public release pursuant to one or more exemptions of the FOIA has been withheld.

(3) For the denial of unclassified information, the requester shall not be given MDR appeal rights because the MDR applies only to the denial of classified information and because the request was not processed under the FOIA.

It is entirely proper that a requester shall not be given MDR appeal rights for records withheld pursuant to FOIA exemptions. However, it is not proper for records to be withheld pursuant to FOIA exemptions as part of the MDR process without providing the proper appeal rights that accompany all FOIA withholding decisions.

§ C.4.4.2.1 of DoD 5200.1-R specifies that information that has been declassified shall be released to the requester "unless withholding is appropriate under applicable law." However, the FOIA exemptions are designed to function *within* a FOIA framework, complete with the opportunity for judicial review of any exemptions. Contrary to the sentiment expressed in Paragraph (3) above, the request *was* processed under the FOIA the instant that an agency official determined that FOIA exemptions applied. Therefore, the most effective treatment of such a request would be to provide the requester with *FOIA* appeal rights. Such a treatment would ensure that requesters received the appropriate level of due process, as well as reducing

the amount of duplicate requests submitted to the DoD; the only option left to a requester who seeks to challenge one of these determinations is to file a new FOIA request for the same material, wait for the DoD to invoke the same exemptions, and then file an appeal. A suggested revision to Paragraph (3) is:

(3) For the denial of unclassified information, the requester shall not be given MDR appeal rights because the MDR applies only to the denial of classified information. The information denied shall be considered to be denied under the FOIA, and the requester shall be given all appropriate FOIA appeal rights as though the withheld information were the subject of a FOIA request.

Thank you for the opportunity to submit these comments for your consideration.

Sincerely,

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