



DEPARTMENT OF DEFENSE
DIRECTORATE FOR FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

19 JAN 1999

Ref: Ref: 99-CORR-006

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: FOIA requests from the Stars and Stripes

It has come to our attention that another DoD component has received a FOIA request from the Stars and Stripes. This situation has been previously addressed as reflected by the attached memorandums dated December 31, 1993, and August 1, 1991.

Please advise your components once again that Stars and Stripes personnel, as representatives of a Federal Agency, may not request information under the FOIA.

A handwritten signature in black ink, appearing to read "A. H. Passarella", is positioned above the printed name.

A. H. Passarella
Director

Attachments:
As stated





OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301-1400

PUBLIC AFFAIRS

AUG 01 1991

Ref: 91-CORR-126

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: FOIA Requests from the Stars and Stripes Newspaper

Components are reminded that the Stars and Stripes Newspaper is an organization within the DoD, and as such, its personnel do not qualify as requesters under the FOIA.

A FOIA request can be made by "any person," which is defined in Title 5 USC 551(2), as "an individual, partnership, corporation, association, or public or private organization other than an agency." Department of Justice has further interpreted the definition to include foreign individuals, and foreign or domestic governments (state and local). The statute specifically excludes federal agencies from the definition. Therefore, a federal agency, or a representative of a federal agency may not serve a FOIA request on its own agency, or another federal agency.

Components receiving FOIA requests from representatives of the Stars and Stripes should inform them of this fact, and advise them to seek their information through official channels, apart from the FOIA.

A handwritten signature in black ink, appearing to read "W. M. McDonald", is positioned above the typed name.

W. M. McDonald
Director
Freedom of Information
and Security Review

From: Chad Garland chadgarland@msn.com
Subject: Fwd: Media Query Re: Stars and Stripes
Date: Apr 20, 2022 at 00:29:28
To: chadgarland@icloud.com

----- Forwarded message -----

From: **Gough, Susan L (Sue) CIV OSD PA (USA)** <susan.l.gough.civ@mail.mil>
Date: Wed, Nov 24, 2021 at 00:31
Subject: RE: Media Query Re: Stars and Stripes
To: Chad Garland <chadgarland@msn.com>

Chad,

We've provided you the relevant DoD policy references regarding the Freedom of Information Act and your position at Stars & Stripes. As a federal employee, your questions are going into issues that are more appropriately addressed by your chain of command at Star & Stripes and DMA.

Regards,

Sue Gough

Defense Press Operations

--

Chad Garland

Reporter/Photographer

(c) [443-745-3240](tel:443-745-3240) || chadgarland@msn.com

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From: Chad Garland chadgarland@msn.com
Subject: Fwd: [Non-DoD Source] Media Query Re: Stars and Stripes
Date: Apr 20, 2022 at 00:31:18
To: chadgarland@icloud.com

----- Forwarded message -----

From: **Chad Garland** <chadgarland@msn.com>
Date: Mon, Oct 18, 2021 at 22:29
Subject: Re: [Non-DoD Source] Media Query Re: Stars and Stripes
To: Gough, Susan L (Sue) CIV OSD PA (USA) <susan.l.gough.civ@mail.mil>

Hi Susan,

Thanks for working to get me this response. It raises a number of follow-up questions that I would be happy to discuss, but I can't agree to blanket background conditions. Because I would like on-the-record attributable responses, and given the complexity of the issue, I am sending my detailed follow-ups in advance and requesting a response/discussion by about November 6.

First, DoD's response states that "neither ... editorial independence nor DoDD 5122.11 exempt Stars & Stripes reporters from the statutory definition of 'person' in 5 USC § 551(2). **DoD policy does not supersede statute.**" Based on this, I will try to focus my follow-ups on DoD's adherence to the statutory requirements of the FOIA, the Privacy Act and Title 42 U.S. Code, as well as its enforcement of those statutes in keeping with the rights of free expression and equal protection enshrined in the First and Fourteenth Amendments of the U.S. Constitution — the supreme law of the land.

This is my understanding of DoD's position, based on its response and the provided memos:

- a. Through its use of the word "person" in 5 USC § 552, Congress established a statutory requirement that a federal agency **shall not** make records available to any *representative of a federal agency* who makes a records request under the Freedom of Information Act.
- b. Stars and Stripes reporters are for all intents and purposes *representatives of a federal agency* under **the statute**, not merely in spite of their editorial independence, but **because** they're members of the news media, whether they've self-identified for fee waiver purposes "or otherwise." Apparently, the statute establishes that because they're members of the news media, they have no personal interest in public records; and because their official duties involve news reporting, they can't claim personal exercise of press freedoms.

- c. As (a) and (b) are established by some statute or other, DoD has **no discretion** over these provisions. Thus, even the published rule 32 CFR § 246 / DoDD 5122.11 is immaterial, despite its express requirement that commands disregard a Stars and Stripes reporter's U.S. Government status, and its explicit guarantee that those reporters operate not under federal authority but the First Amendment with the identical rights of access to information, news and events as all other members of the free press.
- d. But **crucially**, the rules for outside employment given in DoD Directive 5500.07 allow an agency employee to override Congress's statutory definition of Stars and Stripes reporters as representatives of a federal agency if he or she gives the employee permission to file a FOIA request "in his or her individual capacity, not on behalf of S&S," **even if** the Stars and Stripes reporter self-identifies as a "representative of the news media" in the FOIA request itself.

1. Am I correctly understanding DoD's statutory obligations as the Government sees them?
2. When was the last time DoD consulted with the Department of Justice's Office of Information Policy on these statutory obligations, as regards Stars and Stripes reporters?
3. Can you point me to or provide me with the relevant statutory definition of "representative of a federal agency" or an equivalent term or phrase, as it pertains to the FOIA?

I have looked, but have found no definition of such a term or phrase anywhere in Title 5 USC. The definition of "agency" at 5 USC § 551(1) does not use this or any similar phrase, nor does Congress elaborate on such a phrase in Senate Report No. 752 (Nov. 19, 1945) or House Report No. 1980 (May 3, 1946), which are part of the legislative history of the Administrative Procedure Act of 1946 which defined "agency" and "person" as codified in 5 USC § 551. It also appears to be undefined (and indeed is never once used) in DoD's published FOIA rules in 32 CFR § 286, DoDD 5400.07, DoD Manual 5400.07 and the DoD FOIA Handbook. Nor does it get a definition in the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget in 1987, as amended in 2020, which first defined the term "representative of the news media" after the news-media waiver was created in 1986 and before the statutory definition was enacted in 2007. Nor do DoDD 5122.11, DoDD 5500.07, or DoD 5500.7-R appear to define such a phrase.

4. Regarding DoD's statement that any federal employee acting in their capacity as a private citizen may request records under FOIA only "**for their own private**,

personal use”:

- a. What provision of the statute grants DoD the authority to base disclosure decisions on any requester’s plans or intentions for requested records?
 - b. What published regulation, rule, instruction, directive or other guidance articulates DoD’s policy regarding a federal employee-as-private citizen making a FOIA request, such as rules about the time, place, fees and procedures such an employee must follow or the limits on the employee’s use of responsive records, consistent with the statutory requirement that such agency FOIA rules be published? *If not detailed or described in that issuance, please answer the below additional questions i through iv.*
 - i. In order to meet its statutory obligation not to disclose records to federal employees seeking information for other-than-personal uses, DoD would seem to have to first identify whether a FOIA request was made by a federal employee. What is the DoD FOIA program’s prescribed process for doing so?
 - ii. On what information that a FOIA requester is required to provide may DoD FOIA officials base a determination about whether the requester is a federal employee acting in a private capacity vs one acting in an official capacity?
 - iii. On what information that a FOIA requester is required to provide may DoD FOIA officials base a determination about whether the requester’s intended use of public records is personal or not?
 - iv. Is any federal employee filing a FOIA request in his or her individual capacity required to demonstrate prior approval to engage in outside employment when filing FOIA requests as commercial requesters or when seeking a fee reduction as educational or noncommercial scientific institution requesters?
 - c. What statutory provision authorizes DoD to restrict how a federal employee in his or her capacity as a private citizen may use information that has been publicly released under the FOIA?
 - d. In FY20, how many FOIA requests did DoD receive from federal employees or military service members acting in a personal capacity?
5. DoD’s response states that members of the news media, including freelance journalists, who file FOIA requests for information **“are not requesting that information in a private, personal capacity for personal use.”**
- a. What provision of the statute authorizes DoD to consider the news-media status of a requester as a basis for a **disclosure decision** or anything other than the procedural matters of fee assessments and expedited processing?

- b. What provision of statute or other published FOIA rule, directive, manual, handbook or other guidance establishes that self-identified members of the media are not requesting information in a private, personal capacity?
 - c. Are commercial requesters seeking information in a private, personal capacity for personal use? Are those who seek an educational or noncommercial scientific institution fee waiver?
 - d. Where does the statutory definition of “person” hinge on either the **news-media status** of the entity or the **type of use** such an entity may have for public records?
6. DoD’s response discusses requesters who “**otherwise self-identify as members of the media.**” The DA&M memo of March 4, 2021 directs FOIA officials to include self-identification in public forums and social media.
- a. What statute or other controlling law or regulation grants DoD FOIA officials the authority to look into any entity’s self-identification in public forums (or other First Amendment-protected activity) for the purposes of a FOIA decision?
 - b. As regards federal employees, what statute or other controlling law or regulation authorizes DoD FOIA officials to look into the self-identification or other free speech or publishing activities of those employees on social media and in public forums?
 - c. Where does the FOIA or another statute authorize DoD to predicate withholding of records on the public self-identification or other First Amendment activity of any entity?
 - d. Under the DoD FOIA program, for which types of entities do officials conduct inquiries into social media and/or public forum activities? Is it only Stars and Stripes reporters?
 - e. Respecting an agency's apparent statutory obligation to prevent any "representative of a federal agency" from using the FOIA, do DoD FOIA administrators also conduct inquiries into public forums and social media to determine whether a party filing a FOIA request has self-identified as a federal employee, agency official or other agency representative who might be subject to limits on his or her FOIA rights?
7. DoD’s response states that “a federal employee who submits a FOIA request in their personal, private capacity and subsequently uses the resulting federal agency information to produce news articles or other journalistic content **may also be subject to ethics guidance or policies specific to their employing organization.**”
- a. 5 C.F.R. § 2635.703 prohibits a federal employee from misusing or allowing

the misuse of *nonpublic* information gained “by reason of Federal employment.” What ethics rules or policies for Executive Branch employees, supplementary ethics rules for DoD employees, or guidance or policies governing Defense Media Activity or Stars and Stripes personnel would prohibit a subject employee from using *public* information gained by reason of his or her private, personal right under the FOIA for any legal purpose, (i.e., news articles or other journalistic content)?

- b. What other *possible* future government ethics violations unrelated to writing, speaking or publication are DoD FOIA officials authorized to consider in their disclosure decisions? Or are only First Amendment freedoms of concern?
 - c. Does DoD authorize its FOIA officials to withhold records from federal employees who they suspect *may* use public information obtained under FOIA to violate other federal, state or local laws or regulations other than ethics rules or policies (such as criminal activity)?
8. The DA&M memo of March 4, 2021, cites a supposed requirement under DoDD 5500.07 that any Stars and Stripes reporter filing a FOIA request “in his or her individual capacity, not on behalf of S&S” must obtain approval to engage in outside journalistic employment.
- a. Can you specify the paragraph number or page for this supposed requirement? I have found only one explicit reference to the FOIA in either DoDD 5500.07 or DoD 5500.7-R, but nothing stating a requirement that a DoD employee must obtain agency approval for engaging in outside employment before filing a FOIA request. Only certain employees (mandatory financial disclosure report filers) must gain prior approval before engaging in outside employment, and that outside employment is explicitly defined as compensated activity. Stars and Stripes reporters are not financial disclosure report filers and filing FOIA requests is not inherently a compensated activity, nor does the DA&M memo suggest the requirement is contingent on the Stars and Stripes reporter's claim to be engaged in outside employment.
 - b. The March 4 memo directs FOIA officials that if they receive a request from a Stars and Stripes reporter that “does not demonstrate S&S approval,” as required by DoDD 5500.07, the request should be closed as not proper. Under what statutory authority does DoD require that a FOIA requester acting “in his or her individual capacity” provide information about himself or herself other than contact information or — when seeking records about himself/herself — identify verification?

Thanks for your assistance,

Chad

Chad Garland
(c) 443-745-3240 || chadgarland@msn.com

On Fri, Oct 8, 2021 at 12:50 AM Gough, Susan L (Sue) CIV OSD PA (USA)
<susan.l.gough.civ@mail.mil> wrote:

Chad,

In accordance with federal law, “any person” can file a FOIA request; however, the law defines a “person” to exclude federal agencies (5 USC § 551(2)). DoD Manual 5400.07, *DoD FOIA Program*, also addresses the definition of a FOIA requester:

“FOIA requester. Any person, including a partnership, corporation, association, State or State agency, foreign government, foreign national, or a lawyer or other representative acting on behalf of any person who submits a FOIA request. **This definition specifically excludes agencies within the Executive Branch of the U.S. Government.**”

In accordance with that statute, federal employees may not submit requests for information under the Freedom of Information Act for agency records from their own or another federal agency if they are acting as a representative of a federal agency. Federal employees seeking such information must follow agency and inter-agency procedures for obtaining such information. The statute applies to all DoD employees, including Stars & Stripes reporters. This restriction is also addressed in DoDD 5122.11, Sec. E6.3.2.2.:

“Consistent with statutory requirements, information shall be made fully and readily available under the principles for the release of information to the media issued by the Secretary of Defense. A Government organization may not file a request for information against another Government organization under DoD Directive 5400.7 (reference (y)), which implements the Freedom of Information Act (FOIA) (reference (z)) in the Department of Defense, but it is the responsibility of all commands to honor the DoD Principles of Information, particularly regarding the intent of open access as described in

reference (y) when responding to queries from STARS AND STRIPES reporters.”

As Mr. Kirby stated, Stars & Stripes has complete editorial independence regarding what they publish, and as noted above OSD(PA) strongly encourages DoD Components to provide information to Stars & Stripes reporters as they would any other reporter, unless providing such information would involve the disclosure of classified national security information, would adversely affect national security, or would clearly endanger the lives of U.S. personnel.

However, neither that editorial independence nor DoDD 5122.11 exempt Stars & Stripes reporters from the statutory definition of “person” in 5 USC § 551(2). DoD policy does not supersede statute.

Any federal employee, in their capacity as a private citizen, may submit requests for information under the Freedom of Information Act for their own private, personal use. However, requestors who seek fee waivers as members of the news media or otherwise self-identify as members of the media, including independent or freelance journalists, are not requesting that information in a private, personal capacity for personal use. Such requesters must pay applicable costs just as any other person must. Additionally, a federal employee who submits a FOIA request in their personal, private capacity and subsequently uses the resulting federal agency information to produce news articles or other journalistic content may also be subject to ethics guidance or policies specific to their employing organization.

It has been DoD’s position for over 30 years that Stars & Stripes representatives are not authorized to file FOIA requests because Stars & Stripes is a component of the Defense Media Activity (DMA). Guidance to components to close any such FOIAs received as “not a proper FOIA request” has been issued by OSD over the years, including 1991, 1999, 2018, and 2021. We’re aware of references to guidance issued in 1993 that you asked about, but have yet to locate a copy of it. The guidance was typically issued in response to Stars & Stripes representatives filing FOIA requests with DoD components. Below and attached is a list of the guidance we are aware of that has been issued by OSD since the

early 1990s.

- (1) Aug. 1, 1991: Memo from OASD-Public Affairs, FOIA Requests from S&S Newspaper; memo can be found in the 1999 PDF file as an attachment.
- (2) Dec. 31, 1993: (unknown, unable to be located)
- (3) Jan 19, 1999: Memo from Directorate for Freedom of Information and Security Review, reissuing 12/31/1993 and 08/01/1991 guidance.
- (4) April 18, 2018: OCMO Directorate of Oversight and Compliance memo, FOIA Requests from the S&S
- (5) March 4, 2021: Guidance issued by me from our predecessor office (we reorganized a/o [Sep 1](#)).

Regarding your questions about the OSD/JS RSC denial of 107 requests from FY16 through FY20:

“From FY16 through FY20, other than exemptions and all other reasons, the OSD/JS FOIA RSC denied a total of 107 requests as an "improper request for other reason." Of that number, how many were denied because the requester did not demonstrate approval to engage in outside employment under DoD Directive 5500.7?”

Answer: When looking at the number of requests denied as “improper request for other reason” there were no instances, during FY16 to FY20, where the requests were denied because the requester did not demonstrate approval to engage in outside employment under DoD Directive 5500.7.

“How many of those 107 requests were denied as improper because the requester was a federal agency or representative of a federal agency?”

Answer: During FY16 through FY20, eight of the 107 requests denied as improper were denied because the requester was a federal agency or representative of a federal agency.

I understand this is a complex issue and OSD(PA) fully supports Stars & Stripes editorial independence. If you'd like to discuss this further, I can arrange a discussion with DoD officials, on background.

Regards,

Sue Gough

Department of Defense spokesperson

Defense Press Operations

From: Chad Garland <chadgarland@msn.com>

Sent: Monday, October 4, 2021 12:20 AM

To: Gough, Susan L (Sue) CIV OSD PA (USA) <susan.l.gough.civ@mail.mil>

Subject: Re: [Non-DoD Source] Media Query Re: Stars and Stripes

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Thanks, Susan. I look forward to the response on this matter.

Chad

Chad Garland

Reporter/Photographer

(c) 443-745-3240 || chadgarland@msn.com < Caution-mailto:chadgarland@msn.com >

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On Fri, Sep 24, 2021 at 7:08 PM Gough, Susan L (Sue) CIV OSD PA (USA) <susan.l.gough.civ@mail.mil < Caution-mailto:susan.l.gough.civ@mail.mil > >

wrote:

Hi Chad,

Sorry, I don't recall ever seeing an email on this from you back in June. I'll be your point of contact on this and will look into your questions.

Regards,

Sue Gough

Defense Press Operations

From: "Chad Garland" <chadgarland@msn.com < Caution-
<mailto:chadgarland@msn.com> > >

Date: Friday, September 24, 2021 at 7:00:37 AM

To: "OSD Pentagon PA Mailbox Duty Officer Press Operations"
<osd.pa.dutyofficer@mail.mil < Caution-<mailto:osd.pa.dutyofficer@mail.mil> > >

Subject: Re: [Non-DoD Source] Media Query Re: Stars and Stripes

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Good morning,

It has been 90 days since I emailed the below query. This query is related to a private, uncompensated project of mine apart from my duties with the Stars and Stripes, thus my use of private email. I have not received a response, nor do I appear to have been contacted about it. Forgive me if I missed any attempt to contact me, it's been a busy few months, as I'm sure it has been for you, too.

I am requesting a response to as many of the detailed questions below as possible **no later than October 6, 2021**. I am reengaging on this query today because just this week Mr. Kirby touted the "complete editorial independence" of the Stars and Stripes: "I think that's pretty remarkable. I don't know too many other places where you can find something like that. And having been a veteran myself, I just can't speak enough about how important 'Stripes' is to helping inform our men and women, and their families all over the world -- even in warzones."

I want to give DoD a full and fair opportunity to respond to this query and the issues my project will touch on, mainly involving allegations of news management and censorship of the Stars and Stripes, including violations of the private First Amendment and FOIA rights of its reporters as U.S. citizens. I am therefore providing the below details that my questions may be addressed as completely as possible.

According to my research and personal experience, despite "complete editorial independence," Stars and Stripes **reporters** remain the only individuals DoD has summarily disqualified from asserting FOIA right of access to public records over the past 30 years. See, e.g., DoD's policy memo of 4 March 2021 < Caution-https://open.defense.gov/Portals/23/Documents/FOIA/FOIA_Resources/DA&M_Memo_03-04-21.pdf < Caution-https://open.defense.gov/Portals/23/Documents/FOIA/FOIA_Resources/DA&M_Memo_03-04-21.pdf > > , signed by Ms. Lyn Kirby, imposing the unique requirement that Stars and Stripes reporter's must obtain the approval of a federal agency employee (a supervisor) to engage

in "outside journalistic employment" and must provide proof of that approval in order to make a FOIA request. This policy therefore limits the circumstances under which those select federal employees, in their "individual capacity," *may* seek records to all but those cases where they are allowed to perform moonlighting activities in return for compensation. In every other recognized circumstance under which a person's right of access under FOIA is curtailed, the law or the court narrowly tailors the exclusion to preserve the person's right of access to the maximum extent possible -- foreign governments/representatives of foreign governments are excluded *only when seeking records from the Intelligence Community*; fugitives from justice are excluded *only when seeking records pertaining to their fugitive status*; and persons subject to a waiver of access under a plea agreement are excluded *only when seeking the records to which access was waived*.

I have been denied records under FOIA in no fewer than 30 requests filed in the past 18 months, all of which cite my mere employment at the Stars and Stripes as the basis for the denial, despite the fact that I explicitly claimed to seek the records pursuant to my personal FOIA rights, using personal time, material, equipment, telecommunications services and property, and in almost all of them didn't even mention the Stars and Stripes except where the records themselves pertained to the Stars and Stripes (such as records related to the planned closure of the organization last fall).

The purported justification for DoD's policy regarding "Stars and Stripes personnel" is that the statutory definition of "person" under the FOIA does not include "agency" and therefore a federal agency or "representatives of a federal agency" may not submit a FOIA request. If DoD's reasoning for denying *editorially*

independent reporting staff of the Stars and Stripes the right to seek records under FOIA is in fact valid on this basis, DOD and all other Executive Branch agencies would be violating Congressional requirements of the law if they are not denying all requests from *all federal employees* under all circumstances according to the same principle. Yet DoD clearly does not do so -- several DoD websites even expressly state that federal civilians and service members have a personal and private right of access, which they may assert using personal and private time, material, resources, equipment and property. Somehow only those few DoD employees who are also members of the free press are excluded from these provisions.

Ms. Kirby's memo is purportedly meant to uphold DoDD 5500.7's ethics rules regarding approval to engage in "outside journalistic employment," yet it is not limited to those cases in which Stars and Stripes reporters are actually performing compensated personal services outside their duties at the Stars and Stripes, nor does it appear to apply to any other federal employee who might be performing "outside journalistic activity." It's based solely on whether or not the FOIA administrator is able to find the person's name on a list of Stars and Stripes reporters on the website [Caution-Caution-www.stripes.com](http://www.stripes.com) < Caution-<http://www.stripes.com> > < Caution-Caution-<http://www.stripes.com> > < Caution-<http://www.stripes.com> > > or in some self-identifying social media post. This would seem to violate well-established FOIA principles which do not permit agencies to establish identity-based requirements, inquiry into the identity or circumstances of requesters, predicate withholding on the plans or intentions a requester may or may not have, or differentiate between one "individual, partnership, corporation, association, or public or private organization" and another. Even more bizarre, the memo specifically refers to "reporters," but says nothing of someone like the organization's general council,

who as an attorney is an *actual* representative of a government agency and is forbidden under ethics rules from representing any other party in a matter before the Government.

As you might imagine, this is all very difficult to square with the purported "complete editorial independence" of the Stars and Stripes.

Questions. In addition to the questions I submitted previously (repeated here as 1-4), I would like to add the following questions 5 - 8 (my original query misnumbered the first four questions).

1. What is DoD's current policy regarding the handling of FOIA requests made by U.S. service members and federal civilian employees acting in a personal capacity? Where can this policy be found?

2. Since 2017, what (if any) policy memos or official/formal guidance has the Office of the Chief Management Officer (including the director of DPCLTD, Chief of FOIA policy, etc.) issued to FOIA Liaisons regarding DoD personnel or other U.S. Government personnel filing FOIA requests to obtain government information? Where can these policy memos be found?

3a. From FY16 through FY20, other than exemptions and all other reasons, the OSD/JS FOIA RSC denied a total of 107 requests as an "improper request for other reason." Of that number, how many were denied because the requester did not demonstrate approval to engage in outside employment under DoD Directive 5500.7?

3b. How many of those 107 requests were denied as improper because the requester was a federal agency or representative of a federal agency?

4. Please provide me with the December 31, 1993 memorandum from the DoD Directorate of Freedom of Information and Security Review regarding the use of FOIA by Stars and Stripes personnel.

5. How does DoD defend its March 2021 policy memo (or the ones from 1990, 1999 and 2018) denying Stars and Stripes reporters' access under FOIA as "representatives of a federal agency" when DoD Directive 5122.11, Paragraph E6.3.2.1 clearly states that components and commands may not use the U.S. Government status of Stars and Stripes reporters to deny them access to otherwise releasable information? Note that the same paragraph states that Stars and Stripes reporters have "the same right" to help and access as the commercial media who obviously have a right of help and access under the FOIA.

6. How does DoD propose to enforce this March 2021 (1990, 1999, 2018) policy equitably and in keeping with its purported requirements under the Act to prevent "federal agency" access without screening the identities of *all requesters* to identify those who are Stars and Stripes reporters as named on the website [Caution-Caution-www.stripes.com](http://www.stripes.com) < Caution-<http://www.stripes.com> > < Caution-Caution-<http://www.stripes.com> > < Caution-Caution-<http://www.stripes.com> > > ? Is there a list of people provided to FOIA administrators that they're to check against the website in order to limit the burden of searching? In either case, how would this not be an arbitrary and capricious

application of the law to target specific members of the free press?

7. Ms. Kriby's March 2021 memo suggests that a Stars and Stripes reporter would need agency approval to make a FOIA request "as a representative of the news media," which would seem to subject to agency review a civilian employee's private acts of gathering public information and commenting personally in speech or writing on matters of public importance -- in other words, their expression of First Amendment rights and other civil liberties. How does DoD square the fact that its top civil liberties official is seeking to quash such rights of the only DoD employees who even in their normal duties are formally disclaimed as independent and not representative of the Government?

8. Lastly, in light of these restrictions on the editorial staff of the Stars and Stripes and only on the editorial staff, even in their own private lives, when seeking information that would otherwise be releasable to even Vladimir Putin if he asked for it, how does DoD propose to call Stars and Stripes editorially independent?

I appreciate any help you can provide by October 6, 2021. After that date, I plan to begin publishing content that highlights these issues and sharing that content to my friends and professional colleagues at various news outlets and the organization Military Reporters & Editors.

Thanks,

Chad

Chad Garland

Reporter/Photographer

(c) [443-745-3240](tel:443-745-3240) || chadgarland@msn.com < Caution-mailto:chadgarland@msn.com > < Caution-Caution-mailto:chadgarland@msn.com < Caution-mailto:chadgarland@msn.com > >

On Sat, Jun 26, 2021 at 4:33 AM OSD Pentagon PA Mailbox Duty Officer Press Operations <osd.pa.dutyofficer@mail.mil < Caution-Caution-mailto:osd.pa.dutyofficer@mail.mil < Caution-mailto:osd.pa.dutyofficer@mail.mil%C2%A0%3c%C2%A0Caution-Caution-mailto:osd.pa.dutyofficer@mail.mil > > > wrote:

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Thanks.

Vr

Duty Officer

From: Chad Garland <chadgarland@msn.com < Caution-Caution-mailto:chadgarland@msn.com < Caution-mailto:chadgarland@msn.com%C2%A0%3c%C2%A0Caution-Caution-mailto:chadgarland@msn.com > > >

Sent: Friday, June 25, 2021 11:27 AM

To: OSD Pentagon PA Mailbox Duty Officer Press Operations <osd.pa.dutyofficer@mail.mil < Caution-Caution-mailto:osd.pa.dutyofficer@mail.mil < Caution-mailto:osd.pa.dutyofficer@mail.mil%C2%A0%3c%C2%A0Caution-Caution-mailto:osd.pa.dutyofficer@mail.mil > > >

Subject: [Non-DoD Source] Media Query Re: Stars and Stripes

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Hi there,

I'm a journalist working on a project about DoD's Freedom of Information Act program. I hope you can help me out with some answers to questions I have and some information I am seeking about the program's policies.

1. What is DoD's current policy regarding the handling of FOIA requests made by U.S. service members and federal civilian employees? Where can this policy be found?

2. Since 2017, what (if any) policy memos or official/formal guidance has the Office of the Chief Management Officer (including the director of DPCLTD, Chief of FOIA policy, etc.) issued to FOIA Liaisons regarding DoD personnel or other U.S. Government personnel filing FOIA requests to obtain government information? Where can these policy memos be found?

3a. From FY16 through FY20, other than exemptions and all other reasons, the OSD/JS FOIA RSC denied a total of 107 requests as an "improper request for other reason." Of that number, how many were denied because the requester did not demonstrate approval to engage in outside employment under DoD Directive 5500.7?

3b. How many of those 107 requests were denied because the requester was a federal agency or representative of a federal agency?

5. Please provide me with the December 31, 1993 memorandum from the DoD Directorate of Freedom of Information and Security Review regarding the use of FOIA by Stars and Stripes personnel.

Thank you,

Chad

Chad Garland

Reporter/Photographer

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Chad Garland

Reporter/Photographer

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From: Chad Garland chadgarland@msn.com
Subject: Fwd: [Non-DoD Source] Media Query Re: Stars and Stripes
Date: Apr 20, 2022 at 00:23:28
To: chadgarland@icloud.com

----- Forwarded message -----

From: **Gough, Susan L (Sue) CIV OSD PA (USA)** <susan.l.gough.civ@mail.mil>
Date: Fri, Oct 8, 2021 at 00:50
Subject: RE: [Non-DoD Source] Media Query Re: Stars and Stripes
To: Chad Garland <chadgarland@msn.com>

Chad,

In accordance with federal law, “any person” can file a FOIA request; however, the law defines a “person” to exclude federal agencies (5 USC § 551(2)). DoD Manual 5400.07, *DoD FOIA Program*, also addresses the definition of a FOIA requester:

“FOIA requester. Any person, including a partnership, corporation, association, State or State agency, foreign government, foreign national, or a lawyer or other representative acting on behalf of any person who submits a FOIA request. **This definition specifically excludes agencies within the Executive Branch of the U.S. Government.**”

In accordance with that statute, federal employees may not submit requests for information under the Freedom of Information Act for agency records from their own or another federal agency if they are acting as a representative of a federal agency. Federal employees seeking such information must follow agency and inter-agency procedures for obtaining such information. **The statute applies to all DoD employees, including Stars & Stripes reporters.** This restriction is also addressed in DoDD 5122.11, Sec. E6.3.2.2.:

“Consistent with statutory requirements, information shall be made fully and readily available under the principles for the release of information to the media issued by the Secretary of

Defense. A Government organization may not file a request for information against another Government organization under DoD Directive 5400.7 (reference (y)), which implements the Freedom of Information Act (FOIA) (reference (z)) in the Department of Defense, but it is the responsibility of all commands to honor the DoD Principles of Information, particularly regarding the intent of open access as described in reference (y) when responding to queries from STARS AND STRIPES reporters.”

As Mr. Kirby stated, Stars & Stripes has complete editorial independence regarding what they publish, and as noted above OSD(PA) strongly encourages DoD Components to provide information to Stars & Stripes reporters as they would any other reporter, unless providing such information would involve the disclosure of classified national security information, would adversely affect national security, or would clearly endanger the lives of U.S. personnel.

However, neither that editorial independence nor DoDD 5122.11 exempt Stars & Stripes reporters from the statutory definition of “person” in 5 USC § 551(2). DoD policy does not supersede statute.

Any federal employee, in their capacity as a private citizen, may submit requests for information under the Freedom of Information Act for their own private, personal use. However, requestors who seek fee waivers as members of the news media or otherwise self-identify as members of the media, including independent or freelance journalists, are not requesting that information in a private, personal capacity for personal use. Such requesters must pay applicable costs just as any other person must. Additionally, a federal employee who submits a FOIA request in their personal, private capacity and subsequently uses the resulting federal agency information to produce news articles or other journalistic content may also be subject to ethics guidance or policies specific to their employing organization.

It has been DoD’s position for over 30 years that Stars & Stripes representatives are not authorized to file FOIA requests because Stars & Stripes is a component of the Defense Media Activity (DMA). Guidance to components to close any such FOIAs received as “not a proper FOIA request” has been issued by OSD over the years, including 1991, 1999, 2018,

and 2021. We're aware of references to guidance issued in 1993 that you asked about, but have yet to locate a copy of it. The guidance was typically issued in response to Stars & Stripes representatives filing FOIA requests with DoD components. Below and attached is a list of the guidance we are aware of that has been issued by OSD since the early 1990s.

- (1) Aug. 1, 1991: Memo from OASD-Public Affairs, FOIA Requests from S&S Newspaper; memo can be found in the 1999 PDF file as an attachment.
- (2) Dec. 31, 1993: (unknown, unable to be located)
- (3) Jan 19, 1999: Memo from Directorate for Freedom of Information and Security Review, reissuing 12/31/1993 and 08/01/1991 guidance.
- (4) April 18, 2018: OCMO Directorate of Oversight and Compliance memo, FOIA Requests from the S&S
- (5) March 4, 2021: Guidance issued by me from our predecessor office (we reorganized a/o [Sep 1](#)).

Regarding your questions about the OSD/JS RSC denial of 107 requests from FY16 through FY20:

“From FY16 through FY20, other than exemptions and all other reasons, the OSD/JS FOIA RSC denied a total of 107 requests as an "improper request for other reason." Of that number, how many were denied because the requester did not demonstrate approval to engage in outside employment under DoD Directive 5500.7?”

Answer: When looking at the number of requests denied as “improper request for other reason” there were no instances, during FY16 to FY20, where the requests were denied because the requester did not demonstrate approval to engage in outside employment under DoD Directive 5500.7.

“How many of those 107 requests were denied as improper because the requester was a federal agency or representative of a federal agency?”

Answer: During FY16 through FY20, eight of the 107 requests denied as improper were denied because the requester was a federal agency or representative of a federal agency.

I understand this is a complex issue and OSD(PA) fully supports Stars & Stripes editorial independence. If you'd like to discuss this further, I can arrange a discussion with DoD officials, on background.

Regards,

Sue Gough

Department of Defense spokesperson

Defense Press Operations

From: Chad Garland <chadgarland@msn.com>

Sent: Monday, October 4, 2021 12:20 AM

To: Gough, Susan L (Sue) CIV OSD PA (USA) <susan.l.gough.civ@mail.mil>

Subject: Re: [Non-DoD Source] Media Query Re: Stars and Stripes

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Thanks, Susan. I look forward to the response on this matter.

Chad

Chad Garland

Reporter/Photographer

(c) [443-745-3240](tel:443-745-3240) || chadgarland@msn.com < Caution-mailto:chadgarland@msn.com >

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On Fri, Sep 24, 2021 at 7:08 PM Gough, Susan L (Sue) CIV OSD PA (USA) <susan.l.gough.civ@mail.mil < Caution-mailto:susan.l.gough.civ@mail.mil > >

wrote:

Hi Chad,

Sorry, I don't recall ever seeing an email on this from you back in June. I'll be your point of contact on this and will look into your questions.

Regards,

Sue Gough

Defense Press Operations

From: "Chad Garland" <chadgarland@msn.com < Caution-mailto:chadgarland@msn.com > >

Date: Friday, September 24, 2021 at 7:00:37 AM

To: "OSD Pentagon PA Mailbox Duty Officer Press Operations" <osd.pa.dutyofficer@mail.mil < Caution-mailto:osd.pa.dutyofficer@mail.mil > >

Subject: Re: [Non-DoD Source] Media Query Re: Stars and Stripes

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Good morning,

It has been 90 days since I emailed the below query. This query is related to a private, uncompensated project of mine apart from my duties with the Stars and Stripes, thus my use of private email. I have not received a response, nor do I appear to have been contacted about it. Forgive me if I missed any attempt to contact me, it's been a busy few months, as I'm sure it has been for you, too.

I am requesting a response to as many of the detailed questions below as possible **no later than October 6, 2021**. I am reengaging on this query today because just this week Mr. Kirby touted the "complete editorial independence" of the Stars and Stripes: "I think that's pretty remarkable. I don't know too many other places where you can find something like that. And having been a veteran myself, I just can't speak enough about how important 'Stripes' is to helping inform our men and women, and their families all over the world -- even in warzones."

I want to give DoD a full and fair opportunity to respond to this query and the issues my project will touch on, mainly involving allegations of news management and censorship of the Stars and Stripes, including violations of the private First Amendment and FOIA rights of its reporters as U.S. citizens. I am therefore providing the below details that my questions may be addressed as completely as possible.

According to my research and personal experience, despite "complete editorial independence," Stars and Stripes **reporters** remain the only individuals DoD has summarily disqualified from asserting FOIA right of access to public records over the past 30 years. See, e.g., DoD's policy memo of 4 March 2021 < Caution-https://open.defense.gov/Portals/23/Documents/FOIA/FOIA_Resources/DA&M_Memo_03-04-21.pdf < Caution-https://open.defense.gov/Portals/23/Documents/FOIA/FOIA_Resources/DA&M_Memo_03-04-21.pdf > > , signed by Ms. Lyn Kirby, imposing the unique requirement that Stars and Stripes reporter's must obtain the approval of a federal agency employee (a supervisor) to engage in "outside journalistic employment" and must provide proof of that approval in order to make a FOIA request. This policy therefore limits the circumstances under which

those select federal employees, in their "individual capacity," *may seek records to all but those cases where they are allowed to perform moonlighting activities in return for compensation. In every other recognized circumstance under which a person's right of access under FOIA is curtailed, the law or the court narrowly tailors the exclusion to preserve the person's right of access to the maximum extent possible -- foreign governments/representatives of foreign governments are excluded only when seeking records from the Intelligence Community; fugitives from justice are excluded only when seeking records pertaining to their fugitive status; and persons subject to a waiver of access under a plea agreement are excluded only when seeking the records to which access was waived.*

I have been denied records under FOIA in no fewer than 30 requests filed in the past 18 months, all of which cite my mere employment at the Stars and Stripes as the basis for the denial, despite the fact that I explicitly claimed to seek the records pursuant to my personal FOIA rights, using personal time, material, equipment, telecommunications services and property, and in almost all of them didn't even mention the Stars and Stripes except where the records themselves pertained to the Stars and Stripes (such as records related to the planned closure of the organization last fall).

The purported justification for DoD's policy regarding "Stars and Stripes personnel" is that the statutory definition of "person" under the FOIA does not include "agency" and therefore a federal agency or "representatives of a federal agency" may not submit a FOIA request. If DoD's reasoning for denying *editorially independent reporting staff* of the Stars and Stripes the right to seek records under FOIA is in fact valid on this basis, DOD and all other Executive Branch agencies would be violating Congressional requirements of the law if they are not denying all

requests from *all federal employees* under all circumstances according to the same principle. Yet DoD clearly does not do so -- several DoD websites even expressly state that federal civilians and service members have a personal and private right of access, which they may assert using personal and private time, material, resources, equipment and property. Somehow only those few DoD employees who are also members of the free press are excluded from these provisions.

Ms. Kirby's memo is purportedly meant to uphold DoDD 5500.7's ethics rules regarding approval to engage in "outside journalistic employment," yet it is not limited to those cases in which Stars and Stripes reporters are actually performing compensated personal services outside their duties at the Stars and Stripes, nor does it appear to apply to any other federal employee who might be performing "outside journalistic activity." It's based solely on whether or not the FOIA administrator is able to find the person's name on a list of Stars and Stripes reporters on the website [Caution-Caution-www.stripes.com](http://www.stripes.com) < Caution-<http://www.stripes.com> > < Caution-Caution-<http://www.stripes.com> > > or in some self-identifying social media post. This would seem to violate well-established FOIA principles which do not permit agencies to establish identity-based requirements, inquiry into the identity or circumstances of requesters, predicate withholding on the plans or intentions a requester may or may not have, or differentiate between one "individual, partnership, corporation, association, or public or private organization" and another. Even more bizarre, the memo specifically refers to "reporters," but says nothing of someone like the organization's general council, who as an attorney is an *actual* representative of a government agency and is forbidden under ethics rules from representing any other party in a matter before the Government.

As you might imagine, this is all very difficult to square with the purported "complete editorial independence" of the Stars and Stripes.

Questions. In addition to the questions I submitted previously (repeated here as 1-4), I would like to add the following questions 5 - 8 (my original query misnumbered the first four questions).

1. What is DoD's current policy regarding the handling of FOIA requests made by U.S. service members and federal civilian employees acting in a personal capacity? Where can this policy be found?

2. Since 2017, what (if any) policy memos or official/formal guidance has the Office of the Chief Management Officer (including the director of DPCLTD, Chief of FOIA policy, etc.) issued to FOIA Liaisons regarding DoD personnel or other U.S. Government personnel filing FOIA requests to obtain government information? Where can these policy memos be found?

3a. From FY16 through FY20, other than exemptions and all other reasons, the OSD/JS FOIA RSC denied a total of 107 requests as an "improper request for other reason." Of that number, how many were denied because the requester did not demonstrate approval to engage in outside employment under DoD Directive 5500.7?

3b. How many of those 107 requests were denied as improper because the requester was a federal agency or representative of a federal agency?

4. Please provide me with the December 31, 1993 memorandum from the DoD Directorate of Freedom of Information and Security Review regarding the use of FOIA by Stars and Stripes personnel.

5. How does DoD defend its March 2021 policy memo (or the ones from 1990, 1999 and 2018) denying Stars and Stripes reporters' access under FOIA as "representatives of a federal agency" when DoD Directive 5122.11, Paragraph E6.3.2.1 clearly states that components and commands may not use the U.S. Government status of Stars and Stripes reporters to deny them access to otherwise releasable information? Note that the same paragraph states that Stars and Stripes reporters have "the same right" to help and access as the commercial media who obviously have a right of help and access under the FOIA.

6. How does DoD propose to enforce this March 2021 (1990, 1999, 2018) policy equitably and in keeping with its purported requirements under the Act to prevent "federal agency" access without screening the identities of *all requesters* to identify those who are Stars and Stripes reporters as named on the website [Caution-
Caution-www.stripes.com](http://www.stripes.com) < Caution-[http://Caution-Caution-
www.stripes.com](http://www.stripes.com) > < Caution-Caution-<http://www.stripes.com> < Caution-[http://
www.stripes.com](http://www.stripes.com) > > ? Is there a list of people provided to FOIA administrators that they're to check against the website in order to limit the burden of searching? In either case, how would this not be an arbitrary and capricious application of the law to target specific members of the free press?

7. Ms. Kriby's March 2021 memo suggests that a Stars and Stripes reporter would need agency approval to make a FOIA request "as a representative of the news

media," which would seem to subject to agency review a civilian employee's private acts of gathering public information and commenting personally in speech or writing on matters of public importance -- in other words, their expression of First Amendment rights and other civil liberties. How does DoD square the fact that its top civil liberties official is seeking to quash such rights of the only DoD employees who even in their normal duties are formally disclaimed as independent and not representative of the Government?

8. Lastly, in light of these restrictions on the editorial staff of the Stars and Stripes and only on the editorial staff, even in their own private lives, when seeking information that would otherwise be releasable to even Vladimir Putin if he asked for it, how does DoD propose to call Stars and Stripes editorially independent?

I appreciate any help you can provide by October 6, 2021. After that date, I plan to begin publishing content that highlights these issues and sharing that content to my friends and professional colleagues at various news outlets and the organization Military Reporters & Editors.

Thanks,

Chad

Chad Garland

Reporter/Photographer

(c) [443-745-3240](tel:443-745-3240) || chadgarland@msn.com < Caution-mailto:chadgarland@msn.com > < Caution-Caution-mailto:chadgarland@msn.com < Caution-mailto:chadgarland@msn.com > >

On Sat, Jun 26, 2021 at 4:33 AM OSD Pentagon PA Mailbox Duty Officer Press Operations <osd.pa.dutyofficer@mail.mil < Caution-Caution-mailto:osd.pa.dutyofficer@mail.mil < Caution-mailto:osd.pa.dutyofficer@mail.mil%C2%A0%3c%C2%A0Caution-Caution-mailto:osd.pa.dutyofficer@mail.mil > > > wrote:

Received.

We'll route your query to the responsible desk officer and that person will be in touch.

Thanks.

Vr

Duty Officer

From: Chad Garland <chadgarland@msn.com < Caution-Caution-mailto:chadgarland@msn.com < Caution-mailto:chadgarland@msn.com%C2%A0%3c%C2%A0Caution-Caution-mailto:chadgarland@msn.com > > >

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Subject: \[Non-DoD Source\] Media Query Re: Stars and Stripes](mailto:osd.pa.dutyofficer@mail.mil)

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Thank you,

Chad

Chad Garland

Reporter/Photographer

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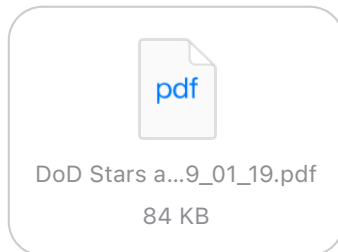
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OVERSIGHT AND
COMPLIANCE

OFFICE OF THE CHIEF MANAGEMENT OFFICER
9010 DEFENSE PENTAGON
WASHINGTON, DC 20301-9010

April 13, 2018

MEMORANDUM FOR DoD FOIA PUBLIC LIAISONS

SUBJECT: Freedom of Information Act (FOIA) Requests from the Stars and Stripes

It has come to our attention that a DoD Component received a FOIA request from the Stars and Stripes. This situation has been addressed by policy memoranda for at least 25 years, and this memorandum is again addressing this issue.

The FOIA states that a FOIA request can be made by "any person," which is defined at 5 U.S.C. §551 (2), as "individual, partnership, corporation, association, or public or private organization other than an agency." Because this statute specifically excludes federal agencies from the definition of "any person", a federal agency, or a representative of a federal agency, may not submit a FOIA request to a federal agency.

The Stars and Stripes is a component of the Defense Media Activity, and as such is a

federal agency. Accordingly, any representative of the Stars and Stripes cannot use the FOIA to gain access to DoD information. If you receive a request from the Stars and Stripes, you should close it as "not a proper FOIA request", and advise them that they should seek the information through another outside of the FOIA.

Please let me know if you have any questions.

Digitally signed by
HOGAN.JAMES
41
P.1032570441
Date: 2018.04.13 13:05:22
-0400'

James P. Hogan
Chief, DoD FOIA Policy



DPCLTD Me...1_03_04.pdf

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