November 29, 2010

VIA REGULATORY PORTAL AND ELECTRONIC MAIL

Federal Docket Management System Office
1160 Defense Pentagon
Room 3C843
Washington, D.C. 20301-1160

Re: Proposed Rule: DoD Freedom of Information Act (FOIA) Program
(RIN number 0790-AI51; 75 Fed. Reg. 60397 (September 30, 2010)

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association (the Section), I am submitting comments on the above-referenced proposed rule issued by the Department of Defense ("DoD"): DoD Freedom of Information Act (FOIA) Program (hereafter “Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed in this comment letter are only on behalf of the Section of Public Contract Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and,

1. The Honorable Thomas C. Wheeler, a member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2. This letter is available in pdf format at: http://www.abanet.org/contract/regscomm/home.html under the topic “Freedom of Information.”
therefore, should not be construed as representing the policy of the American Bar Association.

Comments

The Section commends DoD for updating its policies to align with Executive Order 13392. The Section offers one suggestion regarding DoD’s proposed policy statement to assist DoD with its efforts.

DoD proposes to revise the policy section of the DoD FOIA regulations to state:

(a) Promote transparency and accountability by adopting a presumption in favor of disclosure in all decisions involving the FOIA and responding promptly to requests in a spirit of cooperation.

32 C.F.R. § 285.3.

The Section’s concern is that the above language may give the impression that the presumption in favor of disclosure is a new regulatory policy, reflecting a change in the FOIA statute or its exemptions. In fact, the scope of the disclosure obligation and the exceptions to disclosure are well-established and contained in the FOIA statute, the implementing regulations, and a substantial body of interpreting case law. In order to ensure that the Proposed Rule does not send an unintended signal that exceptions to disclosure under the FOIA statute have changed, we recommend that the language be revised as follows:

(a) Promote transparency and accountability through a presumption in favor of disclosure in all decisions involving the FOIA and responding promptly to requests in a spirit of cooperation.

32 C.F.R. § 285.3.

Conclusion

Thank you for your consideration of this suggestion. The Section is available to provide additional information or assistance as you may require.
Respectfully submitted,

Donald G. Featherstun
Chair, Section of Public Contract Law

cc: Carol N. Park Conroy
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Council Members, Section of Public Contract Law
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