

Template for Agency FOIA Regulations

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This template supplements OIP's [Guidance for Agency FOIA Regulations](#). The template contains guidelines addressing the key elements to be addressed in each section, as well as sample language. Some guidelines are labeled as “Customer Service,” to designate provisions that agencies are encouraged to include to promote good FOIA customer service. There are some provisions that restate requirements detailed in the FOIA or in OMB Fee Guidelines, and those are flagged as “Included for emphasis.” Finally, some items are noted as providing “Helpful explanation” for agencies and the public.

This template will be updated as needed by OIP to reflect changes in law and policy. Please contact OIP with any questions about the template.

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I. General

Provide any general guidance, such as scope of the rule and other authorities to be consulted

Sample language:

(a) This subpart contains the rules that agencies follow in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with agencies’ Privacy Act regulations as well as under this subpart.

(b) As referenced in this subpart, “component” means each separate bureau, office, division, commission, service, center, or administration within an agency that is responsible for processing FOIA requests. The rules described in this regulation that apply to agencies also apply to components.

II. Proactive Disclosures

Describe where proactively disclosed records and their related indices are located

Provide for periodic updating

***Customer Service:* Offer assistance to requesters in locating posted material**

Sample language:

Records that the FOIA requires agencies to make available for public inspection in an electronic format may be accessed through each agency's website. Each agency is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each agency must ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. Each agency has a FOIA Requester Service Center or FOIA Public Liaison who can assist individuals in locating records particular to an agency. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>.

III. Requirements for Making Requests

Provide instructions/requirements for mechanics of making requests, including:

- Where the request should be sent
- What methods are available (email, online portal, etc.)
- What contact information the requester should provide

Provide any special requirements for requesters seeking records on:

- Themselves, or
- Other individuals

Provide any other requirements for describing the records sought, such as any requirement to designate a location, timeframe, case number, etc.

***Included for emphasis:* The right of the requester to specify preferred format of requested records**

***Customer Service:* Offer resources to aid a requester in making a request, such as a FOIA contact, or FOIA Public Liaison**

When requests do not reasonably describe the records sought:

- Describe the agency's obligation to inform the requester why a particular request is insufficient

- Describe the consequences to the requester for failing to reasonably describe the records

Customer Service: Offer the services of a FOIA contact or FOIA Public Liaison to assist requesters in correcting a request that does not reasonably describe the records sought

Sample language:

(a) General information. (1) To make a request for records, a requester should write directly to the FOIA office of the agency that maintains the records sought. A request will receive the quickest possible response if it is addressed to the FOIA office of the agency that maintains the records sought. Each agency FOIA office is listed at <http://www.foia.gov/report-makerequest.html>, and any additional requirements for submitting a request to the agency are listed in/at ____. Many agency websites contain instructions for submitting FOIA requests and other resources to assist requesters in determining where to send their requests.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements as determined by the agency.

(3) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. § 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, the agency can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) Description of records sought. Requesters must describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Requesters should refer to ____ for additional, agency-specific requirements. Before submitting their requests, requesters may contact the agency's FOIA contact or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. If after receiving a request the agency determines that it does not reasonably describe the records sought, the agency must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such

a request may discuss their request with the agency's FOIA contact or FOIA Public Liaison. If a request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(c) Requests may specify the preferred form or format (including electronic formats) for the records you seek. Agencies will accommodate your request if the record is readily reproducible in that form or format.

(d) Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist the agency in communicating with them and providing released records.

IV. Responsibility for Responding to Requests

Describe who will respond to the request

Designate standard "cut-off" date for searches

***Helpful explanation:* If applicable, advise that records excluded from the FOIA under subsection (c) are not considered responsive to a request**

***Included for emphasis:* Describe handling of misdirected requests (i.e., routing) if applicable**

Describe consultation, referral, and applicable coordination procedures

Include any applicable procedures for handling classified information

Sample language:

(a) In general. The agency or component that first receives a request for a record and maintains that record is the agency or component responsible for responding to the request. In determining which records are responsive to a request, an agency ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the agency must inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. § 552(c), is not considered responsive to a request.

(b) Authority to grant or deny requests. The head of an agency or designee is authorized to grant or to deny any requests for records that are maintained by that agency.

(c) Re-routing of misdirected requests. Where a decentralized agency component's FOIA office determines that a request was misdirected within the agency, the receiving component's FOIA office must route the request to the FOIA office of the proper component(s) within the agency.

(d) Consultation, referral, and coordination. When reviewing records located by an agency in response to a request, the agency will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the agency must proceed in one of the following ways:

(1) Consultation. When records originated with the agency processing the request, but contain within them information of interest to another agency or other Federal Government office, the agency processing the request should typically consult with that other entity prior to making a release determination.

(2) Referral. (i) When the agency processing the request believes that a different agency or component is best able to determine whether to disclose the record, the agency typically should refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the agency processing the request and the originating agency jointly agree that the agency processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever an agency refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) Coordination. The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if an agency locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the agency that

received the request should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the agency that originally received the request.

(e) Classified information. On receipt of any request involving classified information, the agency must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the receiving agency must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the agency must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(f) Timing of responses to consultations and referrals. All consultations and referrals received by the agency will be handled according to the date that the first agency received the perfected FOIA request.

(g) Agreements regarding consultations and referrals. Agencies may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

V. Timing of Responses to Requests

Included for emphasis: Address timing of responses for misdirected requests

Provide for multi-track processing of requests, with, at a minimum, a separate track for requests granted expedited processing

Included for emphasis: Describe what happens when “unusual circumstances” are encountered, including aggregating requests when appropriate

Provide procedures for adjudicating requests for expedited processing, including:

- Establishing any additional standards for expedition
- Describing the requirements for seeking expedited processing such as when it can be sought, where the request for expedition should be sent, and what it is required to contain

- Describing the agency's obligations in response to such expedition requests, and
- Detailing what occurs when expedition is granted or denied

Sample language:

(a) In general. Agencies ordinarily will respond to requests according to their order of receipt. The information located at www.foia.gov/report-makerequest.html contains a list of all agencies and components that are designated to accept requests. In instances involving misdirected requests that are re-routed pursuant to § 4(c) of this subpart, the response time will commence on the date that the request is received by the proper component's office that is designated to receive requests, but in any event not later than 10 working days after the request is first received by any component's office that is designated by these regulations to receive requests.

(b) Multitrack processing. All agencies must designate a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (e) of this section. Agencies may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors an agency may consider are the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. Agencies must advise requesters of the track into which their request falls and, when appropriate, should offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(c) Unusual circumstances. Whenever the agency cannot meet the statutory time limit for processing a request because of "unusual circumstances," as defined in the FOIA, and the agency extends the time limit on that basis, the agency must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the agency estimates processing of the request will be completed. Where the extension exceeds 10 working days, the agency must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The agency must make available its designated FOIA contact or its FOIA Public Liaison for this purpose. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>. The agency must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(d) Aggregating requests. To satisfy unusual circumstances under the FOIA, agencies may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Agencies cannot aggregate multiple requests that involve unrelated matters.

(e) Expedited processing. (1) The agency must process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;

(iii) or as determined by the agency, and described in section ____.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) and (ii) of this section must be submitted to the agency or component of the agency that maintains the records requested. Requests based on paragraphs (e)(1)(iii) should be submitted in accordance with the agency's requirements as described in section _____. When making a request for expedited processing of an administrative appeal, the request should be submitted to the agency's office that adjudicates appeals.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request — one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. As a matter of administrative discretion, an agency may waive the formal certification requirement.

(4) An agency must notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority,

placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, the agency must act on any appeal of that decision expeditiously.

VI. Responses to Requests

Customer Service: Provide for e-communication with requesters

Provide for acknowledgment of requests

Customer Service:

- Summarize subject of request in the acknowledgement
- Delineate that agency will provide estimated dates of completion upon request
- Describe that agency may provide interim releases if voluminous records are requested

Describe agency obligations when there is a full grant of the requested records, including availability of FOIA Public Liaison to offer assistance

Describe agency obligations when there is an adverse determination, including:

- Defining what an adverse determination is, and
- Specifying the content of the denial letter from the agency, including:
 - Name/title of responsible official
 - Brief statement of reasons for denial
 - Estimate of volume of withheld material unless such volume is indicated otherwise (such as through markings), or if providing such an estimate would harm an interest protected by an exemption
 - Statement that the denial can be appealed and appeal requirements
 - Statement notifying the requester of the assistance available from the agency's FOIA Public Liaison and the dispute resolution services offered by OGIS

Included for emphasis: Describe that documents will be marked with the applicable exemption(s) when released in part

If applicable, specify that before excluding records under subsection (c) of the FOIA, the agency will:

- First confer with the Office of Information Policy, DOJ, to obtain approval and
- Maintain administrative records of the process of obtaining such approval

Sample language:

(a) In general. Agencies, to the extent practicable, will communicate with requesters having access to the Internet electronically, such as email or web portal.

(b) Acknowledgments of requests. An agency must acknowledge the request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process. Agencies must include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) Estimated dates of completion and interim responses. Upon request, the agency will provide an estimated date by which the agency expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the agency may provide interim responses, releasing the records on a rolling basis.

(d) Grants of requests. Once the agency determines it will grant a request in full or in part, it must notify the requester in writing. The agency must also inform the requester of any fees charged under § 10 of this subpart and must disclose the requested records to the requester promptly upon payment of any applicable fees. The agency must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(d) Adverse determinations of requests. If the agency makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(e) Content of denial. The denial must be signed by the head of the agency or designee and must include:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the agency in denying the request;
- (3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and
- (4) A statement that the denial may be appealed under § 8(a) of this subpart, and a description of the appeal requirements.
- (5) A statement notifying the requester of the assistance available from the agency's FOIA Public Liaison and the dispute resolution services offered by OGIS.
- (f) Markings on released documents. Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted must also be indicated on the record, if technically feasible.
- (g) Use of record exclusions. (1) In the event that an agency identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. § 552(c), the agency must confer with Department of Justice, Office of Information Policy, to obtain approval to apply the exclusion.
- (2) Any agency invoking an exclusion must maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

VII. Confidential Commercial Information

Submitter notice procedures are required to be established by notice and comment rulemaking in accordance with Executive Order 12,600.

Provide procedures for submitters of confidential, commercial information to designate, at time of submission or thereafter, information they claim could reasonably be expected to cause substantial competitive harm if disclosed

Provide, if desired, for:

- Expiration date for such designations and/or

- Classes of information to be treated as if so designated

Provide procedures for notifying submitters whenever the agency determines it may be required to disclose records:

- Designated by the submitter, or
- Disclosure of which the agency has reason to believe could reasonably be expected to cause substantial competitive harm to the submitter

Such predisclosure notification procedures should:

- Afford the submitter a reasonable amount of time to object to the disclosure
- Provide, whenever the agency disagrees with the objections, that the agency will give the submitter a written statement briefly explaining why the objections to disclosure are not sustained
- Provide that such explanation be provided a reasonable number of days prior to a specified disclosure date
- Provide for notification to the submitter if a FOIA requester brings suit to compel disclosure
- Describe exceptions to the notice requirement
- Provide for notification to the requester whenever notice and an opportunity to object to disclosure is provided to the submitter and whenever a final decision is given to the submitter

Sample language:

(a) Definitions.

(1) Confidential commercial information means commercial or financial information obtained by the agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

(2) Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) Designation of confidential commercial information.

A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) When notice to submitters is required.

(1) The agency must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the agency determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The agency has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the agency may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) Exceptions to submitter notice requirements. The notice requirements of this section do not apply if:

(1) The agency determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12,600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, the agency must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) Opportunity to object to disclosure.

(1) The agency must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide the agency a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The agency is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) Analysis of objections. The agency must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) Notice of intent to disclose. Whenever the agency decides to disclose information over the objection of a submitter, the agency must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the agency intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(h) Notice of FOIA lawsuit. Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the agency must promptly notify the submitter.

(i) Requester notification. The agency must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

VIII. Appeals

Provide requirements for making an administrative appeal, including:

- Mechanics of how and where to submit the appeal

- Who will make the agency's determination
- Any special handling for classified information

Provide requesters with at least 90 days after the date of the agency response to file an administrative appeal

Delineate what is required in an appeal determination, including:

- Reasons for affirmance, including any exemptions asserted
- Notice of right to seek judicial review
- Notice of dispute resolution services offered by OGIS

Customer service:

- Describe that an appeal ordinarily is required before a requester can seek judicial review
- Advise that an appeal ordinarily will not be adjudicated if request becomes the subject of litigation
- Explain that dispute resolution is voluntary and that if agency agrees to participate in the dispute resolution services offered by OGIS, it will actively engage to resolve the dispute.

Sample language:

(a) Requirements for making an appeal. A requester may appeal any adverse determinations to the agency's office designated to receive FOIA appeals ("FOIA Appeals Office"). Examples of adverse determinations are provided in § 6(d) of this subpart. Requesters can submit appeals by mail or online in accordance with the following requirements: ___ or on the agency's website. The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the agency determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) Adjudication of appeals. (1) The head of the agency's FOIA Appeals Office or designee will act on behalf of the agency's Chief FOIA Officer on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the FOIA Appeals Office must take appropriate action to ensure compliance with applicable classification rules.

(c) Decisions on appeals. The agency must provide its decision on an appeal in writing. A decision that upholds an agency's determination in whole or in part must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the dispute resolution services offered by the Office of Government Information Services (OGIS) of the National Archives and Records Administration as a non-exclusive alternative to litigation. If an agency's decision is remanded or modified on appeal, the agency will notify the requester of that determination in writing. The agency will then further process the request in accordance with that appeal determination and will respond directly to the requester.

(d) Engaging in dispute resolution services provided by OGIS. Dispute resolution is a voluntary process. If an agency agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(e) When appeal is required. Before seeking review by a court of an agency's adverse determination, a requester generally must first submit a timely administrative appeal.

IX. Preservation of Records

Provide for preservation of all correspondence associated with a request, as well as all requested records, under appropriate records schedules

Prohibit destruction or modification of records while they are subject to a pending request, administrative appeal, or lawsuit

Sample language:

Each agency must preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General

Records Schedule 4.2 of the National Archives and Records Administration. Agencies must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

X. Fees

All agencies' fee regulations must comply with OMB's Fee Guidelines

Customer service and included for emphasis:

- Describe overall construct for assessing fees
- Provide that agency will ensure that searches, review, and duplication are conducted in most efficient and least expensive manner

Describe how fee payments are to be made

Provide definitions of fee categories and types of fees that can be assessed

- *Helpful explanation:* Provide examples

Describe how the various fees are charged

- Establish agency-wide duplication, search, and review charges
- Establish threshold amount for assessing fees in first instance
- *Customer service:* Before assessing fees associated with creating a new computer program, ensure that requester is first notified and agrees to pay such fees
- Inform public that search fees can be assessed even if no records are ultimately located or are all exempt from disclosure
- *Added for emphasis:* State that agency will honor requester's preference for receiving a document in a particular format whenever agency can readily reproduce the document in that format
- *Added for emphasis:* State restrictions on assessing certain fees if agency fails to comply with FOIA's time limits and no unusual or exceptional circumstances exist
- *Added for emphasis:* State that non-commercial use requesters will receive first 100 pages of duplication and first two hours of search without charge

If records are stored at a Federal Records Center operated by NARA, consider providing for assessment of retrieval fees as provided in NARA's Transactional Billing Rate Schedule

Provide for notice to requester when estimated fee is above \$25.00

- *Customer service:* For non-commercial use requesters, require that such notice informs the requester that he/she is entitled to receive two hours of search and 100 pages of duplication without charge
- *Customer service:* Provide a breakdown of the fee estimate for search, review, and duplication

Describe impact on request (i.e., tolling) and steps requester must take in response to a fee estimate that is above \$25

- *Customer service:* Offer services of FOIA Public Liaison or other FOIA contact to assist requester in reformulating request to meet his/her needs at lower cost

Provide for:

- Handling of fees for other services, if applicable
- Charging of interest
- Aggregating requests for the purposes of fees
- Advance payments
- Other statutes specifically providing for fees

Describe how and when requesters can request a waiver of fees

Detail the factors the agency will analyze in determining whether to grant the fee waiver request

- *Customer service:* Allow requesters an opportunity to provide explanatory material on whether they have a commercial interest in the requested information

Sample language:

(a) In general. Agencies will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: (1) commercial use requesters, (2) non-commercial scientific or educational institutions or news media requesters, and (3) all other requesters. Different fees are assessed depending on the category. Requesters may seek a fee waiver. Agencies must consider requests for fee waiver in accordance with the requirements in subsection (k). To resolve any fee issues that arise under this section, an agency may contact a requester for additional information. Agencies must ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. An agency ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or by another method as determined by agency.

(b) Definitions. For purposes of this section:

(1) Commercial use request is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. An agency's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. Agencies will notify requesters of their placement in this category.

(2) Direct costs are those expenses that an agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (i.e., the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) Duplication is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(4) Educational institution is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. Agencies may seek verification from the requester that the request is in furtherance of scholarly research and agencies will advise requesters of their placement in this category.

Example 1. A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2. A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3. A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) Noncommercial scientific institution is an institution that is not operated on a “commercial” basis, as defined in paragraph (b)(1) of this section 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. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. Agencies will advise requesters of their placement in this category.

(6) Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 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 that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, agencies can also consider a requester’s past publication record in making this determination. Agencies will advise requesters of their placement in this category.

(8) Review is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 7 of this subpart, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(9) Search is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve

information from electronic records.

(c) Charging fees. In responding to FOIA requests, agencies will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, agencies should not add any additional costs to charges calculated under this section.

(1) Search. (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Agencies will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. Agencies may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: ___.

(iii) Agencies will charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. An agency must notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by an agency at a Federal records center operated by the National Archives and Records Administration (NARA), agencies will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) Duplication. Agencies will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. Agencies must honor a requester's preference for receiving a record in a particular form or format where the agency can readily reproduce it in the form or format requested. Where photocopies are supplied, agencies will provide one copy per request at the cost of ____. For copies of records produced on tapes, disks, or other media, agencies will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, agencies will charge the direct costs.

(3) Review. Agencies will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, i.e., the review conducted by an agency to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs

associated with an agency's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) Restrictions on charging fees. (1) When an agency determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2)(i) If an agency fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in (d)(2)(ii)-(iv).

(ii) If an agency has determined that unusual circumstances as defined by the FOIA apply and the agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If an agency has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, an agency may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The agency must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the agency must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5. U.S.C. § 552(a)(6)(B)(ii). If this exception is satisfied, the component may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, agencies must provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.

(e) Notice of anticipated fees in excess of \$25.00. (1) When an agency determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the agency must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the agency will advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If the agency notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. Agencies are not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the agency estimates that the total fee will exceed that amount, the agency will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The agency will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) Agencies must make available their FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) Charges for other services. Although not required to provide special services, if an agency chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) Charging interest. Agencies may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. § 3717 and will accrue from the billing date until payment is received by the agency. Agencies must follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) Aggregating requests. When an agency reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the agency may aggregate those requests and charge accordingly. Agencies may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, agencies will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(i) Advance payments. (1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, an agency cannot require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(2) When an agency determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. An agency may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 calendar days of the billing date, an agency may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the agency may require that the requester make an advance payment of the full amount of any anticipated fee before the agency begins to process a new request or continues to process a pending request or any pending appeal. Where an agency has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which an agency requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the agency's fee determination, the request will be closed.

(j) Other statutes specifically providing for fees. The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the agency must inform the requester of the contact information for that program.

(k) Requirements for waiver or reduction of fees. (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) An agency must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i)-(iii) are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. Agencies will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, agencies will consider the following criteria:

(A) Agencies must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the agency must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) are satisfied and any commercial interest is not the primary interest furthered by the request. Agencies ordinarily will presume that when a news media requester has satisfied factors (i) and (ii) above, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the agency and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

XI. Other Rights and Services

Sample language:

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

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