

## Department of Energy

## § 1004.8

(4) *Adequacy of search.* Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 30 calendar days to the Office of Hearings and Appeals.

(5) *Administrative appeal.* A statement that the determination to deny documents made within the statutory time period, may be appealed within 30 calendar days to the Office of Hearings and Appeals.

### § 1004.8 Appeal of initial denials.

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with §1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees consistent with §1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) *Elements of appeal.* The appeal must be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585 and both the envelope and letter must be clearly marked "Freedom of Information Appeal." The appeal must contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed, must be submitted with the appeal.

(c) *Receipt of appeal.* An appeal will be considered to be received for purposes of 5 U.S.C. 552(a)(6) upon receipt by the appeal authority. Documents delivered after regular business hours of the Office of Hearings and Appeals are considered received on the next regular business day.

(d) *Action within 20 working days.* (1) The appeal authority will act upon the

appeal within 20 working days of its receipt, except that if unusual circumstances (as defined in §1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the appeal authority may extend the time for final action for an additional 10 working days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued.

(3) If no determination on the appeal has been issued at the end of the 20-day period or the last extension thereof, the requester may consider his administrative remedies to be exhausted and seek a review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be issued within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be issued, and of his right to seek judicial review in the United States district court in the district in which he resides or has his principal place of business, the district in which the records are situated, or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(4) Nothing in this part will preclude the appeal authority and a requester from agreeing to an extension of time for the decision on an appeal. Any such agreement will be confirmed in writing by the appeal authority and will clearly specify the total time agreed upon for the appeal decision.

(e) *Form of action on appeal.* The appeal authority's action on an appeal will be in writing and will set forth the reason for the decision. It will also contain a statement that it constitutes final agency action on the request and that judicial review will be available either in the district in which the requester resides or has a principal place of business, the district in which the records are situated, or in the District

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of Columbia. Documents determined by the appeal authority to be documents subject to release will be made promptly available to the requester upon payment of any applicable fees.

(f) *Classified records and records covered by section 148 of the Atomic Energy Act.* The Secretary of Energy or his designee will make the final determination concerning appeals involving the denial of requests for classified information or the denial of requests for information falling within the scope of section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

### § 1004.9 Fees for providing records.

(a) *Fees to be charged.* The DOE will charge fees that recoup the full allowable direct costs incurred. The DOE will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The DOE may contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, the DOE will ensure that the ultimate cost to the requester is no greater than it would be if the DOE itself had performed these tasks. In no case will the DOE contract out responsibilities which the FOIA provides that only the agency may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees. Where the DOE can identify documents that are responsive to a request and are maintained for public distribution by other agencies such as the National Technical Information Service and the Government Printing Office, the Freedom of Information Officer will inform requesters of the procedures to obtain records from those sources.

(1) *Manual searches for records.* Whenever feasible, the DOE will charge for manual searches for records at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search.

(2) *Computer searches for records.* The DOE will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that por-

tion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary.

(3) *Review of records.* The DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges will be assessed only for the initial review (i.e., the review undertaken the first time the DOE analyzes the applicability of a specific exemption to a particular record or portion of a record. The DOE will not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(4) *Duplication of records.* The DOE will make a per-page charge for paper copy reproduction of documents. At present, the charge for paper to paper copies will be five cents per page and the charge for microform to paper copies will be ten cents per page. For computer generated copies, such as tapes or printouts, the DOE will charge the actual cost, including operator time, for production of the tape or printout. For other methods of reproduction or duplication, we will charge the actual direct costs of producing the document(s).

(5) *Other charges.* It shall be noted that complying with requests for special services such as those listed below is entirely at the discretion of this agency. Neither the FOIA nor its fee structure cover these kinds of services. The DOE will recover the full direct costs of providing services such as those enumerated below to the extent that we elect to provide them:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail, etc.

(6) *Restrictions on assessing fees.* With the exception of requesters seeking