

#### §4.11

(b) Appeals shall be decided by the Assistant General Counsel for Administration (AGC-Admin), except that appeals from requests initially denied by the AGC-Admin shall be decided by the General Counsel. Appeals should be addressed to the AGC-Admin, or the General Counsel if the records were initially denied by the AGC-Admin. The address of both is: U.S. Department of Commerce, Office of General Counsel, Room 5875, 14th Street and Constitution Avenue NW, Washington, DC 20230. Both the letter and the appeal envelope should be clearly marked "Freedom of Information Appeal". The appeal must include a copy of the original request, the initial denial, if any, and a statement of the reasons why the records requested should be made available and why the initial denial, if any, was in error. No opportunity for personal appearance, oral argument or hearing on appeal is provided.

(c) Upon receipt of an appeal involving records initially denied on the basis of FOIA exemption (b)(1), the records shall be forwarded to the Deputy Assistant Secretary for Security (DAS) for a declassification review. The DAS may overrule previous classification determinations in whole or in part if continued protection in the interest of national security is no longer required, or no longer required at the same level. The DAS shall advise the AGC-Admin, or the General Counsel, as appropriate, of his or her decision.

(d) If an appeal is granted, the person who filed the appeal shall be immediately notified and copies of the releasable documents shall be made available promptly thereafter upon receipt of appropriate fees determined in accordance with §4.11.

(e) If no determination on an appeal has been sent to the requester within the twenty working day period specified in §4.6(b) or the last extension thereof, the requester is deemed to have exhausted all administrative remedies with respect to the request, giving rise to a right of judicial review under 5 U.S.C. 552(a)(6)(C). If the requester initiates a court action against the Department based on the provision in this paragraph, the administrative appeal process may continue.

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(f) The determination on an appeal shall be in writing and, when it denies records in whole or in part, the letter to the requester shall include:

(1) A brief explanation of the basis for the denial, including a list of the applicable FOIA exemptions and a description of how they apply;

(2) A statement that the decision is final for the Department;

(3) Notification that judicial review of the denial is available in the district court of the United States in the district in which the requester resides, or has his or her principal place of business, or in which the agency records are located, or in the District of Columbia; and

(4) The name and title or position of the official responsible for denying the appeal.

#### §4.11 Fees.

(a) *In general.* Components shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except when fees are limited under paragraph (d) of this section or when a waiver or reduction of fees is granted under paragraph (k) of this section. A component shall collect all applicable fees before sending copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. Components shall determine, whenever reasonably possible, the use to which a requester will put the requested records. If it appears that the requester will put the records to a commercial use, or if a component has reasonable cause to doubt a requester's asserted non-commercial use, the component shall provide the requester a reasonable opportunity to submit further clarification.

(2) *Direct costs* means those expenses a component incurs in providing a particular service. Such expenses would include, for example, the labor costs of

the employee performing the service (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits). Not included in direct costs are overhead expenses such as the costs of space, heating, or lighting of the facility in which the service is performed.

(3) *Duplication* means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies may take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others. A component shall honor a requester's specified preference of form or format of disclosure if the component can reproduce the record in the requested form or format with reasonable effort.

(4) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester 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 scholarly research rather than for a commercial use.

(5) *Noncommercial scientific institution* means an institution that is not operated on a "commercial" basis, as that term is 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. To be in this category, a requester 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 rather than for a commercial use.

(6) *Representative of the news media, or news media requester* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the pub-

lic. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only if they can qualify as disseminators of "news") that make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but components shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

(7) *Review* means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure, for example, redacting it and marking any applicable exemptions. Review costs are recoverable even if a record ultimately is not disclosed. Review time does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Components shall ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(c) *Fees*. In responding to FOIA requests, components shall charge the fees summarized in chart form in paragraphs (c)(1) and (c)(2) of this section and explained in paragraphs (c)(3) through (c)(5) of this section, unless a waiver or reduction of fees has been granted under paragraph (k) of this section.

(1) The four categories and chargeable fees are:

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Category	Chargeable fees
(i) Commercial Use Requesters .....	Search, Review, and Duplication.
(ii) Educational and Non-commercial Scientific Institution Requesters.	Duplication (excluding the cost of the first 100 pages).
(iii) Representatives of the News Media .....	Duplication (excluding the cost of the first 100 pages).
(iv) All Other Requesters .....	Search and Duplication (excluding the cost of the first 2 hours of search and 100 pages).

(2) Uniform fee schedule.

Service	Rate
(i) Manual search .....	Actual salary rate of employee involved, plus 16 percent of salary rate.
(ii) Computerized search .....	Actual direct cost, including operator time.
(iii) Duplication of records:	
(A) Paper copy reproduction .....	\$.16 per page
(B) Other reproduction (e.g., computer disk or printout, microfilm, microfiche, or microform).	Actual direct cost, including operator time.
(iv) Review of records (including redaction) .....	Actual salary rate of employee conducting review, plus 16 percent of salary rate.

(3) *Search.* (i) Search fees shall be charged for all requests—other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media—subject to the limitations of paragraph (d) of this section. Components shall charge for time spent searching even if they do not locate any responsive records or if they withhold any records located as entirely exempt from disclosure. Search fees shall be the direct costs of conducting the search by the involved employees.

(ii) For computer searches of records, requesters will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (d)(1) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (d)(3) of this section) are entitled to the cost equivalent of two hours of manual search time without charge.

(4) *Duplication.* Duplication fees shall be charged to all requesters, subject to the limitations of paragraph (d) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be \$.16 cents per page. For copies produced by computer, such as tapes or printouts, components shall charge the direct costs, including operator time, of producing the copy. For other forms of duplication, components shall charge the direct costs of that duplication.

(5) *Review.* Review fees shall be charged to requesters who make a commercial use request. Review fees shall be charged only for the initial record review, in which a component determines whether an exemption applies to a particular record at the initial request level. No charge shall be imposed for review at the administrative appeal level for an exemption already applied. However, records withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies, and the costs of that review are chargeable. Review fees shall be the direct costs of conducting the review by the involved employees.

(d) *Limitations on charging fees.*

(1) No search fee shall be charged for requests from educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) No search fee or review fee shall be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, components shall provide without charge:

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

(ii) The first two hours of search (or the cost equivalent).

(4) If a total fee calculated under paragraph (c) of this section is \$20.00 or less for any request, no fee shall be

charged. If such total fee is more than \$20.00, the full amount of such fee shall be charged.

(5) The provisions of paragraphs (d) (3) and (4) of this section work together. This means that for requesters other than those seeking records for a commercial use, no fee shall be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than \$20.00.

(e) *Notice of anticipated fees over \$20.00.* If a component determines or estimates that the total fee to be charged under this section will be more than \$20.00, the component shall notify the requester of the actual or estimated fee, unless the requester has stated in writing a willingness to pay a fee as high as that anticipated. If only a portion of the fee can be estimated readily, the component shall advise the requester that the estimated fee may be only a portion of the total fee. If the component has notified a requester that the actual or estimated fee is more than \$20.00, the component shall not consider the request received for purposes of calculating the time limit in §4.6(b) to respond to a request, or process it further, until the requester agrees to pay the anticipated total fee. Any agreement to pay should be memorialized in writing. A notice under this paragraph shall offer the requester an opportunity to contact Departmental personnel to discuss modifying the request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Apart from the other provisions of this section, if a component decides, as a matter of administrative discretion, to comply with a request for special services, the component shall charge the direct cost of providing them. Such services could include certifying that records are true copies or sending records by other than ordinary mail.

(g) *Charging interest.* Components shall charge interest on any unpaid bill starting on the 31st calendar day following the date of billing the requester. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and accrue from the date of the billing until the component receives payment. Components shall take all

steps authorized by the Debt Collection Act of 1982, as amended by the Debt Collection Improvement Act of 1996, to effect payment, including offset, disclosure to consumer reporting agencies, and use of collection agencies.

(h) *Aggregating requests.* If a component reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the component may aggregate those requests and charge accordingly. Among the factors a component shall consider in deciding whether to aggregate are the closeness in time between the component's receipt of the requests, and the relatedness of the matters about which the requests are made. A component may generally presume that multiple requests that involve related matters made by the same requester or a closely related group of requesters within a 30 calendar day period have been made in order to avoid fees. If requests are separated by a longer period, a component shall aggregate them only if a solid basis exists for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

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

(2) If a component determines or estimates that a total fee to be charged under this section will be more than \$250.00, the component shall not consider the request received for purposes of calculating the time limit in §4.6(b) to respond to a request, or process it further, until it receives payment from the requester of the entire anticipated fee.

(3) If a requester has previously failed to pay a properly charged FOIA fee to any component or other Federal agency within 30 calendar days of the date of billing, a component shall require the requester to pay the full amount

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due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the component begins to process a new request or continues to process a pending request from that requester. For purposes of calculating the time limit in §4.6(b) to respond to a request, the component shall not consider the request received until it receives full payment of all applicable fees and interest in this paragraph.

(4) Upon the completion of processing of a request, if a specific fee is determined to be payable and appropriate notice has been given to the requester, a component shall make records available to the requester only upon receipt of full payment of the fee.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute (except for the FOIA) that specifically requires an agency to set and collect fees for particular types of records. If records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, components shall inform requesters how to obtain records from those sources. Provision of such records is not handled under the FOIA.

(k) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request will be furnished without charge, or at a charge reduced below that established under paragraph (c) of this section, if the requester asks for such a waiver in writing and the responsible component determines, after consideration of information provided by the requester, that the requester has demonstrated that:

(i) 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

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, components shall consider the following factors:

(i) *The subject of the request:* whether the subject of the requested records concerns the operations or activities of

the Government. The subject of the requested records must concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed:* whether the disclosure is “likely to contribute” to an understanding of Government operations or activities. The disclosable portions of the requested records must be meaningfully informative about Government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure:* whether disclosure of the requested information will 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 and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media satisfies this consideration. Merely providing information to media sources is insufficient to satisfy this consideration.

(iv) *The significance of the contribution to public understanding:* whether the disclosure is likely to contribute “significantly” to public understanding of Government operations or activities. The public’s understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.

(3) To determine whether the second fee waiver requirement (i.e., that disclosure is not primarily in the commercial interest of the requester) is met, components shall consider the following factors:

(i) *The existence and magnitude of a commercial interest:* whether the requester has a commercial interest that would be furthered by the requested disclosure. Components shall consider

any commercial interest of the requester (with reference to the definition of “commercial use request” in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure:* whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.” A fee waiver or reduction is justified if the public interest standard (paragraph (k)(1)(i) of this section) is satisfied and the public interest is greater than any identified commercial interest in disclosure. Components ordinarily shall presume that if a news media requester has satisfied the public interest standard, the public interest is the primary interest served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market Government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) If only some of the records to be released satisfy the requirements for a fee waiver, a waiver shall be granted for those records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (3) of this section, insofar as they apply to each request.

### Subpart B—Privacy Act

#### § 4.21 Purpose and scope.

(a) This subpart establishes policies and procedures for implementing the Privacy Act of 1974, as amended (5 U.S.C. 552a). The main objectives of the subpart are to facilitate full exercise of rights conferred on individuals under the Act, and to protect the privacy of individuals on whom the Department maintains records in systems of records under the Act.

(b) The Department shall act promptly and in accordance with the Act upon receipt of any inquiry, request or appeal from a citizen of the United States

or an alien lawfully admitted for permanent residence into the United States, regardless of the individual’s age. Further, the Department shall maintain only such information on individuals as is relevant and necessary to the performance of its lawful functions; maintain that information with such accuracy, relevancy, timeliness, and completeness as is reasonably necessary to assure fairness in determinations made by the Department about the individual; obtain information from the individual to the extent practicable; and take every reasonable step to protect that information from unwarranted disclosure. The Department shall maintain no record describing how an individual exercises rights guaranteed by the First Amendment unless expressly authorized to do so by statute or by the individual about whom the record is maintained, or unless to do so is pertinent to and within the scope of an authorized law enforcement activity. An individual’s name and address shall not be sold or rented by the Department unless such action is specifically authorized by law.

(c) This subpart applies to all components of the Department. Components may promulgate supplementary orders and rules not inconsistent with this subpart.

(d) The Assistant Secretary for Administration is delegated responsibility for maintaining this subpart, for issuing such orders and directives internal to the Department as are necessary for full compliance with the Act, and for publishing all required notices concerning systems of records.

(e) Matters outside the scope of this subpart include:

(1) Requests for records that do not pertain to the requester, or to the individual about whom the request is made if the requester is the parent or guardian of the individual;

(2) Requests involving information pertaining to an individual that is in a record or file but not within the scope of a system of records notice published in the FEDERAL REGISTER;

(3) Requests to correct a record if a grievance procedure is available to the individual either by regulation or