

## § 1004.6

period, the Authorizing Official will inform the requester of the reason for the delay; the date on which a determination may be expected to be made; that the requester can seek remedy through the courts, but ask the requester to forego such action until a determination is made.

(5) Nothing in this part shall preclude the Authorizing Official and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement will be confirmed in writing and will clearly specify the total time agreed upon.

### § 1004.6 Requests for classified records.

(a) All requests for classified records and Unclassified Controlled Nuclear Information will be subject to the provisions of this part with the special qualifications noted below.

(b) All requests for records made in accordance with this part, except those requests for access to classified records which are made specifically pursuant to the mandatory review provisions of Executive Order 12356 or any successor thereto, may be automatically considered a Freedom of Information Act request.

(c) Concurrence of the Director of Classification is required on all responses involving requests for classified records. The Director of Classification will be informed of the request by either the Freedom of Information Officer or the Authorizing Official to whom the action is assigned, and will advise the office originating the records, or having responsibility for the records, and consult with such office or offices prior to making a determination under this section.

(d) The written notice of a determination to deny records, or portions of records, which contain both classified material and other exempt material, will be concurred in by the Director of Classification who will be the Denying Official for the classified portion of such records in accordance with §§ 1004.5(c) and 1004.7(b)(2). If other DOE officials or appropriate officials of other agencies are responsible for denying any portion of the record, their names and titles or positions will be listed in the notice of denial in accord-

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ance with §§ 1004.5(c) and 1004.7(b)(2) and it will be clearly indicated what portion or portions they were responsible for denying.

(e) Requests for DOE records containing classified information received from another agency, and requests for classified documents originating in another agency, will be coordinated with or referred to the other agency consistent with the provisions of § 1004.4(f). Coordination or referral of information or documents subject to this section will be effected by the Director of Classification (in consultation with the Authorizing Official) with the appropriate official of the other agency.

### § 1004.7 Responses by authorizing officials: Form and content.

(a) *Form of grant.* Records requested pursuant to § 1004.4 will be made available promptly, when they are identified and determined to be nonexempt under this Regulation, the Freedom of Information Act, and where the applicable fees are \$15 or less or where it has been determined that the payment of applicable fees should be waived. Where the applicable fees exceed \$15, the records may be made available before all charges are paid.

(b) *Form of denial.* A reply denying a request for a record will be in writing. It will be signed by the Denying Official pursuant to § 1004.5 (b) or (c) and will include:

(1) *Reason for denial.* A statement of the reason for denial, containing a reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.

(2) *Persons responsible for denial.* A statement setting forth the name and the title or position of each Denying Official and identifying the portion of the denial for which each Denying Official is responsible.

(3) *Segregation of nonexempt material.* A statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied.

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(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