



This document is scheduled to be published in the Federal Register on 09/22/2014 and available online at <http://federalregister.gov/a/2014-22186>, and on FDsys.gov

BILLING CODE: 7515-01U

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1250

[FDMS No. NARA-14-0003]; Agency No. NARA-2014-057

RIN 3095-AB73

NARA Records Subject to FOIA

AGENCY: National Archives and Records Administration.

ACTION: Final rule.

SUMMARY: NARA has revised our regulations governing Freedom of Information Act (FOIA) access to NARA's archival holdings and NARA's own operational records. The revisions include clarification as to which records are subject to the FOIA, NARA's authority to grant access, and adjustments to our FOIA procedures to incorporate changes resulting from the OPEN FOIA Act of 2009, the OPEN Government Act of 2007, and the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA). The rule affects individuals and organizations that file FOIA requests for access to NARA operational records and archival holdings.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kimberly Keravuori, by telephone at 301-837-3151, by e-mail at regulations_comments@nara.gov, or by mail at Kimberly Keravuori, Regulations Program Manager; Strategy Division (SP), Suite 4100; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001.

SUPPLEMENTARY INFORMATION: On August 4, 2013, NARA published a proposed rule in the Federal Register (78 FR 47245) for a 60-day comment period. This proposed rule clarified which records are subject to the FOIA and NARA's authority to grant access, and made adjustments to our FOIA procedures to incorporate changes resulting from the OPEN FOIA Act of 2009, the OPEN Government Act of 2007, and the Electronic Freedom of Information Act Amendments of 1996 (EFOIA).

The public comment period closed on October 4, 2013. We received four sets of comments on the proposed rule; three from individuals and one from the Center for Effective Government. We appreciate the thoughtfulness and detail reflected in the comments it received. We have reviewed all of the submitted comments, considered carefully the suggestions for revision, and made certain changes on the basis of these comments. The comments are also addressed in narrative form below.

In the course of reviewing the proposed rule and addressing those comments, we also proposed to make additional substantive revisions beyond those addressed in the comments, to further clarify definitions and timing. Therefore, we published those new substantive revisions in the Federal Register (79 FR 35127) on June 19, 2014, for a second round of public comment. The comment period ended on July 21, 2014, and we received no new comments during this round. The revisions from both rounds, and the comments received, have been compiled and addressed together in this final regulation.

Presumption of Openness (§ 1250.2)

One comment suggested that NARA's presumption of openness must be backed by processes that are realistic and operable. We thank the commenter for this statement.

We take it to heart and believe that NARA's core mission of providing access truly backs

up the presumption of openness. However, we have re-titled and re-worded this provision to more directly reflect this.

Original Classification Authority (§ 1250.3)

A commenter had several questions regarding the definition of original classification authority, including whether contractors are included, who the designated subordinates are, and what occurs if the director of ISOO position is not filled. NARA's FOIA program follows the Executive order and the ISOO regulations at 32 CFR 2001 to define original classification authority. It is outside the scope of the FOIA program and FOIA regulations to define the term differently here, or to address any issues with that definition. We have added a reference to the ISOO regulations so that readers may understand where the definition comes from and seek any additional detail that may be contained there.

Mandatory Declassification Review (MDR) versus FOIA (originally § 1250.8(d); now (§ 1250.10 (d))

NARA's proposed regulations included the option for requesters to consider using the Mandatory Declassification Review (MDR) process instead of FOIA if they are requesting access to national security classified information. One comment suggested that NARA should add an explanation of why a requester might choose the MDR.

Although the subject is too detailed to set out in this regulation, we added a reference to our FOIA Guide, which thoroughly explains the pros and cons of each process and the differences between the two.

Access to executive branch records at the National Personnel Records Center (NPRC) (originally § 1250.10 (b); now § 1250.8 (b))

One commenter suggested that NARA should inform requesters where they can find information about the provisions under which the NPRC processes FOIA requests. We have added citations to the NPRC section of NARA's web site where information on how we process requests can be found, and a citation to the Department of Defense's FOIA regulations for more information on its requirements. Another comment correctly pointed out that the proposed regulations at § 1250.10(b) (now (§ 1250.8 (b))) erroneously referred to "§ 1250.208" of NARA's regulations. However, that section does not exist. We have corrected the reference, which was § 1250.20 in our submitted draft, but seems to have inadvertently been changed when posting online.

Available records (§ 1250.12)

Four comments concerned § 1250.12, "What types of records are available in NARA's FOIA library?" The comments recommended that NARA add specific language to state that NARA would establish categories of records to disclose and post regularly, proactively identify and disclose additional records, release copies of records previously released under FOIA, regularly post logs describing the requests we have received and processed, and that NARA provide a subscription service (such as RSS or e-mail) to notify individuals when new records are posted.

NARA's FOIA Library is for operational records. We have already established and disclose categories of records not only through the FOIA Library, but also through our other products. For example, we post records schedules for the Federal Government on our web site and have published finding aids to our archival records in our Online Public Access (OPA) database, through which members of the public can also access some archival records. We believe more detailed language in the regulation would be

confusing to researchers and requesters because NARA's archival holdings (as opposed to operational records) are open and available, but are not all available online. We also believe the categories set forth in § 1250.12(b) (with the additions below) are sufficient to cover the records we release specifically as FOIA Library items that are not already elsewhere on NARA's web site. Based on the comments and suggestions, we have added language to §§ 1250.12(b)(4) and (6) to add categories of operational records that have been requested three or more times, that are likely to become the subject of subsequent FOIA requests, and NARA's FOIA logs. In addition, we added to the presumption of openness section (§ 1250.2) a new title and a stronger statement that we proactively identify and disclose additional records whenever possible.

We are not able to provide a subscription service due to insufficient manpower and resources.

What to include in FOIA requests (§ 1250.20(c))

One commenter suggested that NARA revise this section to read "Mark both your letter and envelope, *or the subject line of your email*, with the words 'FOIA Request.'" (Emphasis in original.) We have made this revision.

Where to submit (§ 1250.22)

Two comments were received about § 1250.22, "Where do I send my FOIA request?"

One comment suggested that NARA revise the proposed language to emphasize promptly rerouting requests to appropriate agency offices, to read, "Your request will be considered received when it reaches the proper office's FOIA staff, but in any event not later than ten days after the request is first received." The second comment suggested that NARA include a telephone number to call and ask for mailing addresses of NARA's

FOIA customer service centers. We have made these revisions, although with slightly different language than that proposed. In addition, to make finding the correct contact information easier, we have restructured the information into a table.

How requests are processed (§ 1250.26)

NARA received ten comments on § 1250.26, “How will NARA process my FOIA request?” (now titled, “How does NARA process my FOIA request?”). When addressing all of the comments related to § 1250.26, it became evident that there was a lot of confusion with regard to this section due to NARA’s multi-track processing. So we have substantially reorganized and modified the section to address both the apparent overall concerns as well as the specific comments submitted. This included breaking down the original paragraph (a) into several paragraphs; re-ordering the original paragraphs with headings so the multi-track processing is clearer; and changing some of the wording to increase clarity.

One comment suggested that NARA adopt a policy to communicate with requesters by e-mail where appropriate, and adjust the regulation accordingly. A second comment suggested revising the section to state, “NARA will acknowledge all FOIA requests as soon as possible,” and providing an automated acknowledgment when possible.

We declined the recommendation that we respond by e-mail *unless* a requester asks that we not do so. NARA receives many requests from individuals without regular e-mail access, such as prisoners. We think it would be a burden on requesters to have to state that they do not want to correspond by e-mail. However, we have added language to indicate that we will respond by e-mail if a requester submits requests by e-mail or indicates a preference for that form of communication. We also declined to revise the

regulation to state we would process requests as soon as possible; instead, we retain the statutory period of 20 working days. Although we do respond as soon as possible, merely indicating “as soon as possible” would leave the end date open. Because of NARA’s decentralized FOIA processing, it is not feasible for us to provide an automated acknowledgment of requests at this time.

Two comments suggested adding provisions to the section. One suggested adding, “Within 10 days of receiving a request, NARA will reroute requests received by any NARA FOIA office to the appropriate NARA FOIA office for the records requested. NARA will notify the requester of the office to which it rerouted the request and provide contact information for that office. If NARA reroutes a request, the time period for processing the request begins when the appropriate FOIA office receives the request, or 10 days after any NARA FOIA office first received the request, whichever is earlier.”

The other suggested adding a description of NARA’s multi-track processing system to distinguish between simple and complex tracks and to provide a requester with an opportunity to limit the scope of their request to qualify for faster processing.

In response to the first comment, we added similar language to the suggested language, but placed it in § 1250.22 instead of § 1250.26. Section 1250.22 addresses where to send FOIA requests, including the office that would forward any misrouted requests to other offices, so the recommended language was more appropriate there. We did not add suggested language to include notifying the requester of the office to which a request has been forwarded. We have tried implementing this workflow in the past. However, we found that this process impeded the ability to process the request in a timely fashion. We also revised the regulation at § 1250.26 to better describe our multi-track processing,

including making substantial revisions to the organization and wording of the part.

Two additional comments recommended adding to the section to address clarification and contact processes before denying requests. One suggested adding, “If NARA has any uncertainty regarding an aspect of the request, NARA will attempt to communicate with the requester to clarify the scope of his or her FOIA request.” The second comment proposed, “Requests must reasonably describe the records sought. If NARA determines that a request does not reasonably describe the records sought, NARA will contact the requester to seek clarification. NARA may toll the time limits for processing in order to make one such request, in which case the time limits resume upon NARA’s receipt of a response from the requester. NARA will provide at least 30 days for the requester to respond to a request for clarification. If the request has not been clarified after 30 days, NARA will deny the request for not reasonably describing the records sought and will provide the requester with the opportunity to appeal under the procedures in Subpart D.” An additional comment also suggested that NARA should rigorously attempt to contact requesters through different methods of communication to confirm that any requests should be administratively closed prior to doing so.

We added the following language to address the first comment and the first part of the second comment, at § 1250.26(b): “Requests must reasonably describe the records sought. If we determine that a request does not reasonably describe the records sought, or if we are uncertain about another aspect of the request, we contact you to ask for clarification.” At § 1250.26(d), we added language about tolling and the time period in which a requester must respond to a clarification request. However, we provided the requester with 60 calendar days in which to respond instead of the recommended 30

calendar days. This has been NARA's practice and we believe the additional time helps to ensure that requesters have sufficient time to respond. This longer period is also in line with five other cabinet-level departments. NARA does rigorously attempt to contact requesters, using different methods when possible. We feel the 60 days provides more opportunity to contact requesters who don't initially respond. In addition, NARA's Office of Government Information Services (OGIS) has observed some issues with appeal timeliness at agencies that have 30-day appeal windows.

Another comment recommended that we revise the section to prevent the destruction of requested records by adding, "NARA will maintain copies of records that are the subject of a pending request, appeal, or lawsuit under the FOIA. NARA will also preserve all correspondence pertaining to FOIA requests until disposition is authorized under the National Archives and Records Administration's General Records Schedule 14." We agree with this proposal and have included a new section, §1250.14, to reflect this request.

One comment suggested that NARA revise a sentence in § 1250.26(b)(1) (now § 1250.26(g)(1)) to state that unusual circumstances include the need to "search for and collect the records from field facilities, *other than the facility to which the requester originally sent the request.*" (Emphasis in original) We declined to adopt this suggestion because it does not accurately reflect the situation in which collection from field facilities would occur. Instead, we revised the provision to apply unusual circumstances to requests involving one or more field facilities.

The last two comments involved suggestions regarding the Presidential Records Act, one suggesting that NARA include a citation to the implementing Executive order, and the

other asking questions about the length of time for the Presidential notification period.

We have chosen not to include the citation to the Executive order, or to state in the regulation the length of the notification period (which is currently 30 days). Because the Executive order can change with Presidential administrations, adding a citation (which may be incorrect in the next administration) or time period here would not provide additional clarity in the long term. Instead, we let requesters know the current notification period in our acknowledgment letter. Requesters can also look up the appropriate notification period in the applicable Executive order at the time of their request.

Expedited processing (§ 1250.28)

One comment suggested that NARA should revise the proposed regulations at the second sentence of § 1250.28(a) to state, “We *will* grant expedited processing if a requester can show:” (Emphasis in original) In response, we have changed the provision to read: “NARA processes requests and appeals on an expedited basis whenever we determine that one or more of the following criteria exist:”

Responding to requests (§ 1250.30)

Five comments recommended revisions to § 1250.30, “How will NARA respond to my request?” (now titled, “How does NARA respond to my request?”). One suggested adding a statement that NARA will use plain language in its communications. Another suggested releasing records on a rolling basis if the request involves voluminous material or multiple locations. And the third comment suggested language that NARA would, whenever possible, include the quantity of withheld information, and the exemption involved, on any record in which information is deleted or redacted. The fourth comment

suggested striking the word “may” from § 1250.30(b) to state that NARA denial letters will explain which exemptions apply. NARA adopted all of these suggestions. The last comment suggested that NARA include in the final rule a reference to the legal obligation to release segregable releasable portions of otherwise exempt records. NARA has done so in § 1250.30(c).

Copy format (§ 1250.38)

One commenter suggested that NARA should explain why it proposes to delete § 1250.38 of the regulations. NARA did not intend to delete this section and has added it back in.

Fees and fee waivers (§§ 1250.50, 1250.52, 1250.54, 1250.56)

The nature of the comments received on Subpart C (fees) and other sections demonstrated confusion between archival and operational records, which is an issue unique to NARA in the FOIA realm. As a result, we have restructured this subpart to further emphasize the difference between archival and operational records. We also revised the table of contents to reflect this change. In addition, the definitions at §§ 1250.3(a) and (l) have been amended to further emphasize the difference between the two.

We have also made revisions based on specific comments. Four comments involved fees, addressing §§ 1250.50, 1250.52, and 1250.54. One comment suggested that NARA not charge any fees if the total costs for processing the request are \$50 or less. We have considered the suggestion, but decline to raise the no-fee threshold to \$50. We feel this is excessive, particularly in a time period in which Federal budgets are being cut and taxpayers are concerned about the use of their money. We feel it would be fiscally

irresponsible to allow free copies to this extent. However, we agree that the previous \$15 threshold is out of date, and have thus raised the limit to \$25. This amount is also in line with requesters' authorized 100 free pages of copies. The second and third comments both suggested that NARA reduce its duplication fees to \$0.10 per page. We also decline to adopt this suggestion. NARA self-serve copiers are all set to charge the standard \$0.25 per copy, and the machines charge this rate for self-serve copies, whether the copies are part of a FOIA request or not. (See 36 CFR 1258.6 for information about how these rates are set.) NARA cannot alter that fee for FOIA self-serve copies. Because a person can make self-serve copies for \$0.25, it is unreasonable to charge the same or less for copies when NARA staff makes the copies. As a result, NARA charges \$0.05 for the convenience of having a staff member make copies instead, raising the cost to \$0.30 when we make copies. The fourth comment suggested that NARA not charge a processing fee if it takes longer than the time limit in 5 U.S.C. 552(a)(6) to process that request. We revised the regulation to include this provision.

Three additional comments addressed fee waivers in § 1250.56. Two comments suggested that NARA revise the proposed language to state that, in addition to determining substantial public interest in release of the documents, it will determine if the request "primarily" furthers the requester's commercial interests before denying a fee waiver. The third comment suggested adding language to provide NARA with discretion to waive fees in additional circumstances. We revised these provisions as suggested.

Appeals (§ 1250.72)

Three comments were submitted on § 1250.72, "How do I file an appeal." One comment suggested stating that all appeals must be received within 60 days of receipt of NARA's

denial letter. We have agreed to make this change despite the fact that we have encountered no problems with people being able to meet the current 35-day time period for appeals. The second comment suggested adding, “For appeals submitted via mail, you should mark both your letter and envelope with the words ‘FOIA Appeal.’ If possible, include the tracking number for your request or a copy of your initial request and NARA's denial.” We have made this revision, except for the words “if possible.” If appellants do not submit a tracking number or copy of the original request, we will not be able to determine which request they are appealing. One or the other of these items must be included for identification. The final comment suggested that NARA change the appeal time from calendar days to working days because the appeal would not be able to be received if we were not working. We decline to make the change. This provision sets out the timeframe within which a requester must submit an appeal. If we are not working on the date it arrives, it will still be postmarked, or have an e-mail or fax date recorded, and thus be deemed to have been submitted on time.

Appeal processing (§ 1250.74)

One commenter stated that “appropriate designated appeal official” was not clear enough to determine which official is intended. We have modified the section to state: “We respond to your appeal within 20 working days after the appeal official designated in 36 CFR 1250.72(a)(1)(i) and (ii) receives it.” That section of the regulation includes a list of specific appeal officials.

An additional commenter stated that they do not believe it is legal under 5 CFR § 214.402(c)(1) for NARA’s Deputy Archivist to be delegated the authority to make FOIA appellate adjudications under 36 CFR 1250.72(a)(1)(ii) and 36 CFR 1250.74(a)(1) when

the Deputy Archivist “most certainly has responsibility for or substantial involvement in the determination or public advocacy of major controversial FOIA policies of the NARA.” Based on regulations and the Open Government Act of 2007, NARA’s Chief FOIA Officer is responsible for the FOIA program and policies, not the Deputy Archivist. The Chief FOIA Officer for NARA is the General Counsel. Therefore, it is appropriate for the Deputy Archivist to handle appellate adjudications.

Special situations and confidential commercial information (Subpart E) (§§ 1250.80-1250.82)

Six comments were received regarding Subpart E – Special Situations. One suggested re-titling the subpart “Confidential Commercial Information” because the sections all involve such information. We have changed the title as suggested. One comment suggested revising the proposed language in § 1250.80 to require submitters to proactively designate claimed confidential business information within 30 days, that such designations are not binding on NARA, and that blanket designations by page will not be considered a good faith effort. We have made revisions to the provisions to address these concerns and additional comments about the clarity of the language. It now reads: “At the time of submission, a submitter of business information is expected to designate, by appropriate markings, any portions of its submission that it considers to be protected from disclosure under FOIA Exemption 4. Although these portions may be designated, this does not preclude NARA from conducting a full FOIA review of such documents if we receive a FOIA request for those records. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period, or NARA extends the designation period at its discretion.”

A second comment suggested revising § 1250.82 to require substantiation for claims of confidential business information in the form of a detailed written statement specifying grounds for withholding and showing why that information should not be released. We have added language to require justification but have declined to use the detailed language suggested. We believe the review process described in § 1250.82(a) (now split into subparagraphs (a) and (b) for clarity) addresses these portions of the comment and that § 1250.82(e) already indicates that submitters must justify objections, by stating that they must submit the basis for the objection. However, we have added additional language: “We provide the submitter with 20 working days from the date of NARA’s notice to object to the release and to explain a basis for the objection, including justification and support for the claim.”

Another comment asked if NARA would let requesters know when a longer designation period would expire. NARA will not do this because we do not track these expiration dates. These dates are assessed at the time a request for the records is made, based on the original submission date or extension date. The commenter also stated that the language “a reasonable time thereafter” was too vague. We have removed this language. And this commenter asked if the NARA FOIA Officer is a filled and funded position. Although this question is outside the scope of this regulation, NARA’s FOIA officer is a filled and funded position.

The final comment suggested adding a new section, § 1250.83, to streamline notice of requests to submitters, to read, “NARA will not notify a submitter under § **1250.82** (emphasis in original) if it determines that:

(a) The information must be withheld under FOIA's exemptions;

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

(c) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or

(d) The designation made by the submitter appears obviously frivolous – except that, in such a case, the agency will, no fewer than five working days prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.”

We have revised the regulation essentially as suggested with respect to paragraphs (a), (b), and (c), but placed it under § 1250.82(a) instead. However, we have not accepted the proposed paragraph (d) because it would still require notification to the submitter.

Regulatory review information

This rule is not a significant regulatory action for the purposes of E.O. 12866 and has been reviewed by the Office of Management and Budget (OMB). It is also not a major rule as defined in 5 U.S.C. Chapter 8, Congressional Review of Agency Rulemaking. As required by the Regulatory Flexibility Act, we certify that this rule will not have a significant impact on a substantial number of small entities. It makes only clarifications to the already-existing processes by which individuals or entities request access to NARA records, and updates them to reflect changes in Federal requirements to make access easier.

List of Subjects in 36 CFR Part 1250

Administrative practice and procedure, Archives and records, Confidential business information, Freedom of information, Information, Records, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the National Archives and Records Administration revises part 1250 to read as follows:

PART 1250—NARA RECORDS SUBJECT TO FOIA

Subpart A—General Information About Freedom of Information Act (FOIA) Requests

Sec.

- 1250.1 Scope of this part.
- 1250.2 Presumption of Openness and Proactive Disclosures.
- 1250.3 Definitions.
- 1250.4 Who can file a FOIA request?
- 1250.6 Does FOIA apply to all of the records at NARA?
- 1250.8 Does NARA provide access under FOIA to all the executive branch records housed at NARA facilities?
- 1250.10 Do I need to use FOIA to gain access to records at NARA?
- 1250.12 What types of records are available in NARA's FOIA library?
- 1250.14 Preservation of FOIA-related materials.

Subpart B—How to Request Records Under FOIA

- 1250.20 What do I include in my FOIA request?
- 1250.22 Where do I send my FOIA request?
- 1250.24 Does NARA accept electronic FOIA requests?
- 1250.26 How does NARA process my FOIA request?
- 1250.27 How does NARA determine estimated completion dates for FOIA requests?
- 1250.28 How do I request expedited processing?
- 1250.30 How does NARA respond to my request?
- 1250.32 How may I request assistance with the FOIA process?
- 1250.38 In what format does NARA provide copies?

Subpart C—Fees

- 1250.50 General information on fees for all FOIA requests.
- 1250.51 What fee policies apply to archival records?
- 1250.52 What fee policies apply to operational records?
- 1250.53 What is the FOIA fee schedule for operational records?
- 1250.54 How does NARA calculate FOIA fees for operational records?
- 1250.56 How may I request a fee waiver for operational records?

Subpart D—Appeals

- 1250.70 When may I appeal NARA's FOIA determination?
1250.72 How do I file an appeal?
1250.74 How does NARA process appeals?

Subpart E—Confidential Commercial Information

- 1250.80 How does a submitter identify records containing confidential commercial information?
1250.82 How does NARA process FOIA requests for confidential commercial information?

Authority: 44 U.S.C. 2104(a) and 2204 (3)(c)(1); 5 U.S.C. 552; E.O. 13526; E.O. 12600; 52 FR 23781; 3 CFR, 1987 Comp., p. 235.

Subpart A—General Information About Freedom of Information Act (FOIA)

Requests

§ 1250.1 Scope of this part.

This part implements the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, for NARA operational records and archival records that are subject to FOIA. This part contains the rules that we follow to process FOIA requests, such as the amount of time we have to make a determination regarding the release of records and what fees we may charge. Other NARA regulations in 36 CFR parts 1254 through 1275 provide detailed guidance for conducting research at NARA.

§ 1250.2 Presumption of Openness and Proactive Disclosures.

NARA, consistent with its core mission, has always been committed to providing public access to as many of our records as possible. We therefore continue to affirmatively release and post records, or descriptions of such records, on our web site at www.archives.gov in the absence of any FOIA request. We proactively identify and make discretionary disclosures of additional records of interest to the public whenever possible.

§ 1250.3 Definitions.

The following definitions apply to this part:

(a) *Archival records* means permanently valuable records of the United States Government that have been transferred to the legal custody of the Archivist of the United States. These are historical documents and do not include NARA operational records as defined in paragraph (l) of this section.

(b) *Commercial use request* means a request that asks for information for a use or purpose that furthers a commercial, trade, or profit interest of the requester or the person or entity on whose behalf the request is made.

(c) *Confidential commercial information* means records provided by a submitter that may contain trade secrets or confidential business or financial information that is exempt from release under the FOIA because disclosure could reasonably be expected to cause the submitter substantial competitive harm.

(d) *Educational institution request* means a request made by a school, university, or other educational institution that operates a program of scholarly research. To qualify for 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, not for a commercial use.

(e) *Expedited processing* means the process set forth in the FOIA that allows requesters to ask for faster processing of their FOIA request if they can demonstrate a specific compelling need.

(f) *Fee category* means one of the four categories set forth in the FOIA to determine whether a requester will be charged fees for search, review, and duplication. The

categories are: commercial requesters; non-commercial scientific or educational institutions; news media requesters; and all other requesters.

(g) *Fee waiver* means the waiver or reduction of fees if a requester is able to demonstrate that certain standards set forth in the FOIA are satisfied, including that the information is in the public interest and is not requested for a commercial interest.

(h) *FOIA Public Liaison* means an agency official who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(i) *FOIA request* means a written request, that cites the Freedom of Information Act, for access to NARA operational records, records of the executive branch of the Federal Government held by NARA, or Presidential or Vice Presidential records in NARA's custody that were created after January 19, 1981.

(j) *Freedom of Information Act (FOIA)* means the law codified at 5 U.S.C. 552 that provides the public with the right to request Government records from Federal executive branch agencies.

(k) *Non-commercial scientific institution request* means a request submitted by an institution that is not operated on a basis that furthers the commercial, trade, or profit interests of any person or organization, and which is operated solely for the purpose of conducting scientific research.

(l) *Operational records* means records that NARA creates or receives in carrying out our mission and responsibilities as an executive branch agency. This does not include archival records as defined in paragraph (a) of this section.

(m) *Original Classification Authority* means the authority to classify information as National Security Information at creation, as granted by the President of the United States in Executive Order 13526, section 1.3, and defined in 32 CFR part 2001.

(n) *Other request* means a request submitted by any individual whose request does not qualify as a commercial-use request, representative of the news media request (including a request made by a freelance journalist), or an educational or non-commercial scientific institution request.

(o) *Presidential records* means the official Presidential and Vice Presidential records created or received by the President, the Vice President, or the White House staff since January 20, 1981, and covered under the Presidential Records Act, 44 U.S.C. 2201-2207. Presidential Executive orders also apply to these records.

(p) *Presidential Records Act (PRA)* means the law that, in part, governs access to Presidential and Vice Presidential records and is codified at 44 U.S.C. 2201-2207 and Part 1270 of these regulations. The PRA contains six restrictions that authorize NARA to withhold information, which apply for 12 years after a President leaves office. Four of the PRA restrictions are identical to FOIA Exemptions 1, 3, 4, and 6. Two relate to appointments to Federal office and confidential communications requesting or submitting advice between the President and his advisers, or between and among such advisers. The PRA also excludes application of FOIA Exemption 5.

(q) *Representative of the news media* means a person or entity that is organized and operated to publish or broadcast news to the public, and that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn 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, including print and online publications that disseminate news and make their products available through a variety of means to the general public. We consider requests for records that support the news-dissemination function of the requester to be a non-commercial use. We consider “freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity as working for that entity. A publishing contract provides the clearest evidence that a journalist expects publication; however, we also consider a requester’s past publication record. We decide whether to grant a requester media status on a case-by-case basis, based on the requester’s intended use.

(r) *Review* means examining documents responsive to a request to determine whether any portions of them are exempt from disclosure. Review time includes processing any record for disclosure (i.e., doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions.

(s) *Search* means the process of looking for and retrieving records or information responsive to a request. It also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(t) *Submitter* means any person or entity providing potentially confidential commercial information to an agency, which information may be subject to a FOIA request. The term submitter includes, but is not limited to, individuals, corporations, state governments, and foreign governments.

§ 1250.4 Who can file a FOIA request?

Any individual, partnership, corporation, association, or public or private organization other than a Federal agency, regardless of nationality, may file a FOIA request with NARA. The Administrative Procedure Act, 5 U.S.C. 551(2), excludes Federal agencies from filing FOIA requests. However, state and local governments may file FOIA requests.

§ 1250.6 Does the FOIA apply to all of the records at NARA?

No, the FOIA applies only to the records of the executive branch of the Federal Government and certain Presidential and Vice Presidential records:

If you want access to ...	Then access is governed by . . .
(a) Records of executive branch agencies	This CFR part and parts 1254 through 1260 of this chapter. FOIA applies to these records.
(b) Records of the Federal courts and judicial branch agencies	Parts 1254 through 1260 of this chapter. FOIA does not apply to these records.
(c) Records of Congress and legislative branch agencies	Parts 1254 through 1260 of this chapter. FOIA does not apply to these records.
(d) Presidential records (created by Presidents and Vice Presidents holding office since 1981)	This part and parts 1254 through 1270 of this chapter. FOIA applies to these records five years after the President and Vice President leave office.
(e) Documents created by Presidents holding office before 1981 and housed in a NARA Presidential library	The deed of gift under which they were given to NARA. These documents are not agency records and FOIA does not apply to these materials.

(f) Nixon Presidential materials	Part 1275 of this chapter. FOIA does not apply to these materials.
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§ 1250.8 Does NARA provide access under FOIA to all the executive branch records housed at NARA facilities?

(a) NARA provides access under FOIA to the records NARA creates (*operational* records) and records originating in the executive branch that have been transferred to the legal custody of the Archivist of the United States (*archival* records).

(b) NARA's National Personnel Records Center (NPRC), located in St. Louis, Missouri, is the repository for twentieth-century personnel and medical records of former members of the military and personnel records of former civilian employees of the Federal Government.

(1) Those official personnel and medical files that have been transferred to NARA's legal custody, which occurs 62 years after the date of an employee's or veteran's separation from Federal service, are processed by NARA according to this part, at §§ 1250.20 through 1250.32.

(2) Those personnel and medical records that remain in the legal custody of the agencies that created them are governed by the FOIA and other access regulations of the originating agencies, which the NPRC processes under authority delegated by the originating agencies, not under the provisions of this part. Because of the intricacies of other agencies' FOIA regulations, further explanation here is not feasible. More information about the NPRC processes, including access to NPRC records, is available

on NARA's web site at <http://www.archives.gov/st-louis/military-personnel/> and at <http://www.archives.gov/st-louis/civilian-personnel/>.

(c) NARA's Federal records centers store records that agencies no longer need for day-to-day business. These records remain in the legal custody of the agencies that created them. Requests for access to another agency's records in a NARA Federal records center should be made directly to the originating agency. We do not process FOIA requests for these records.

(d) If your FOIA request includes a record in the legal custody of an originating agency, we forward that request to the originating agency for processing. We also provide you with notification that we have done so and with contact information for the originating agency. (See 36 CFR 1256.2 for more information about how to access records that are stored in Federal records centers.)

§ 1250.10 Do I need to use FOIA to gain access to records at NARA?

(a) Most *archival* records held by NARA have no restrictions to access and are available to the public for research without filing a FOIA request. You may either visit a NARA facility as a researcher to view and copy records or you may write to request copies of specific records. (See subpart B of 36 CFR part 1256 for more information about how to access archival records).

(b) If you are seeking access to *archival* records that are not yet available to the public, you need to file a FOIA request. (See 36 CFR 1256.22 for information on how to request access to restricted archival records. See paragraph (d) of this section, and part 1260, for additional procedures on access to classified records.)

(c) You must also file a FOIA request when you request access to NARA *operational* records (records NARA creates) that are not already available to the public.

(d) If you are requesting records that you know are classified to protect national security interests, you may wish to use the Mandatory Declassification Review process, which is set forth at 36 CFR 1260.70. (Please see NARA's FOIA Guide, available online at <http://www.archives.gov/foia/foia-guide.html>, for the differences between the FOIA and Mandatory Declassification Review access processes.)

§ 1250.12 What types of records are available in NARA's FOIA library?

(a) We make available certain materials (listed in the FOIA) for public inspection and copying in both our physical FOIA Library as well as on NARA's web site, available at <http://www.archives.gov/foia/electronic-reading-room.html>.

(b) The materials provided through NARA's FOIA Library include:

- (1) Final NARA orders;
- (2) Written statements of NARA policy which are not published in the *Federal Register*;
- (3) Operational staff manuals and instructions to staff that affect members of the public;
- (4) At our discretion, copies of operational records requested three or more times under FOIA and other records that have been, or are likely to become, the subject of subsequent FOIA requests for substantially the same records;
- (5) An index, updated quarterly, to these materials; and
- (6) FOIA logs including opening and closing date, requester's and organization's name, description of the records, and final disposition.

(c) You may inspect and copy these materials during normal working hours at the NARA facility where the records are located. See 36 CFR part 1253 and NARA's web site at <http://www.archives.gov/> for locations and research room procedures.

(d) You may also access much of these materials on the NARA web site. Any of these materials created after October 31, 1996, are on NARA's web site at <http://www.archives.gov/foia/electronic-reading-room.html>.

(e) For a paper copy of the index to these online materials, write to: NARA FOIA Officer (NGC); Room 3110; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-6001.

§ 1250.14 Preservation of FOIA-related records

Each NARA component preserves all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until Title 44 of the United States Code or NARA's General Records Schedule 14 authorizes disposition or destruction. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

Subpart B—How To Request Records Under FOIA

§ 1250.20 What do I include in my FOIA request?

In your FOIA request:

(a) Describe the records you seek in sufficient detail to enable NARA staff to locate them with a reasonable amount of effort. The more information you provide, the better possibility NARA has of finding the records you are seeking. Information that will help NARA find the records includes:

(1) The agencies, offices, or individuals involved;

- (2) The approximate date(s) when the records were created;
 - (3) The subject, title, or description of the records sought; and
 - (4) Author, recipient, case number, file designation, or reference number.
- (b) Include your name and full mailing address as well as phone number and e-mail address. This information allows us to reach you faster if we have any questions about your request. It is your responsibility to keep your current mailing address up to date with the office where you have filed the FOIA request.
- (c) If you request records about yourself, you must do so in accordance with the Privacy Act and our implementing regulations at 36 CFR part 1202. This includes requirements to verify your identity (see 36 CFR 1202.40). If you request records about someone other than yourself, you may receive greater access if you submit either a notarized document signed by the other person that certifies their identity and gives their permission for you to have access, or proof that the other person is deceased (e.g., a copy of a death certificate or an obituary). NARA may, at its discretion, require you to supply additional information if necessary to verify that a particular individual has consented to disclosure of records about them.
- (d) Mark both your letter and envelope, or the subject line of your e-mail, with the words “FOIA Request.”
- (e) Before filing your request, you may find it helpful to consult NARA’s “Freedom of Information Act Reference Guide” – which is available electronically at <http://www.archives.gov/foia/foia-guide.html>, and in paper form. For a paper copy of NARA’s FOIA Guide, write to: NARA FOIA Officer (NGC); Room 3110; National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740-

6001. For additional information about the FOIA, you may refer directly to the statute at 5 U.S.C. 552 or visit <http://www.foia.gov>.

§ 1250.22 Where do I send my FOIA request?

(a) NARA has several FOIA Customer Service Centers that process FOIA requests. You should send your FOIA request to the appropriate FOIA Customer Service Center that you believe would have the records you seek:

For:	Mail/submit request to or call:
(1) Archival records located in the Washington, DC, area ...	Chief, Special Access and FOIA Staff (RD-F) Room 5500 National Archives and Records Administration 8601 Adelphi Road College Park, MD 20740-6001 OR by e-mail to Specialaccess_foia@nara.gov
(2) Archival records maintained in other parts of the country the director of the facility in which the records are located. You can find locations and contact information for NARA facilities at http://www.archives.gov/locations/ or 36 CFR 1253.5.
(3) Presidential records subject to FOIA the director of the Presidential library in which the records are located. You can find locations and contact information for NARA's Presidential libraries at http://www.archives.gov/locations/ or

	36 CFR 1253.3.
(4) Operational records of any NARA unit except the Office of the Inspector General ...	<p>NARA FOIA Officer (NGC)</p> <p>Room 3110</p> <p>National Archives and Records Administration</p> <p>8601 Adelphi Road</p> <p>College Park, MD 20740-6001</p> <p>OR</p> <p>by e-mail to FOIA@nara.gov</p> <p>OR</p> <p>online at https://foiaonline.regulations.gov</p>
(5) Operational records of the Office of the Inspector General ...	<p>Office of the Inspector General (OIG), FOIA Request</p> <p>Room 1300</p> <p>National Archives and Records Administration</p> <p>8601 Adelphi Road</p> <p>College Park, MD 20740-6001</p>
(6) Any other records, or if you are unable to determine where to send your request or if you do not have access to the internet for a list of NARA's FOIA	<p>NARA FOIA Officer (NGC)</p> <p>Room 3110</p> <p>National Archives and Records Administration</p> <p>8601 Adelphi Road</p> <p>College Park, MD 20740-6001</p> <p>OR</p> <p>call (301) 837-FOIA (3642)</p>

(7) Public Liaisons and Customer Service Centers ...	** Within 10 working days of receiving a request, this office will forward your request to the office(s) that is likely to have the records you are seeking.
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(b) NARA officially receives your request when it reaches the proper office's FOIA staff, but no later than 10 working days after the request first arrives at one of the offices in the table above. Receipt by the appropriate office initiates the time period for responding to your request (see 36 CFR 1250.26).

(c) If you have questions concerning the processing of your FOIA request, you may contact the designated FOIA Customer Service Center for the facility processing your request. If that initial contact does not resolve your concerns, you may wish to contact the designated FOIA Public Liaison for the facility processing your request. You can find a list of NARA's FOIA Customer Service Centers and Public Liaisons at <http://www.archives.gov/foia/contacts.html>.

§ 1250.24 Does NARA accept electronic FOIA requests?

Yes. You may submit and track requests for NARA *operational* records through the *FOIAonline* program, accessible at <https://foiaonline.regulations.gov>, or by sending an e-mail to FOIA@nara.gov. The body of the message must contain all of the information listed in 36 CFR 1250.20. You may also file a FOIA request by e-mailing your request to the offices listed in the table at 36 CFR 1250.22.

§ 1250.26 How does NARA process my FOIA request?

(a) *Acknowledgement.* NARA acknowledges all FOIA requests in writing within 20 working days after receipt by the appropriate office (see 36 CFR 1250.22). The acknowledgement letter or e-mail informs you of your request tracking number, and any complexity in processing that may lengthen the time NARA requires to reach a final decision on the release of the records. The acknowledgement letter or e-mail may also seek additional information to clarify your request or to ask you to narrow the scope of a very large or broad request.

(b) *Clarification of requests.* Requests must reasonably describe the records sought. If we determine that a request does not reasonably describe the records sought, or if we are uncertain about another aspect of the request, we contact you to ask for clarification.

(c) *Search cut-off date.* As the end or cut-off date for a records search, NARA uses the date on which we first begin our search for documents responsive to your request, unless you specify an earlier cut-off date. This includes those cases when you request records “through the present,” “through today,” or similar language. If NARA uses any other search end date, we inform you of that date.

(d) *Stops in processing time, clarification requests, and administrative closure.* NARA may stop the clock for processing a request one time in order to seek your clarification. In such a case, the processing time resumes upon our receipt of your response. We provide at least 60 calendar days for you to respond to a request for clarification. If you do not clarify the request within 60 calendar days, we deny the request for not reasonably describing the records sought and provide you with the opportunity to appeal under the procedures in Subpart D. Should you not answer any correspondence, or should the correspondence be returned as undeliverable, NARA reserves the right to

administratively close the FOIA request 60 calendar days after the date of the last correspondence we send.

(e) *Confidential commercial information.* If you have requested records containing confidential commercial information, refer to 36 CFR 1250.82 for information on how we process that request.

(f) *Processing queues.* NARA places FOIA requests in simple or complex processing queues to be processed in the order received, on a first-in, first-out basis. In most cases, we make a determination about release of the records you requested within 20 working days from when the appropriate office receives your request (simple queue processing). However, if complexity or unusual circumstances prevent NARA from making a decision within 20 working days, we place your request into a complex processing queue. This way, such cases do not hold up the processing of other requests that do not include such time-consuming factors. We notify you of complicating factors in our acknowledgement letter or e-mail, and you may choose to limit the scope of your request to convert the complex processing queue request to a simple processing queue request. For more detailed information on NARA's multi-track processing queues, see our FOIA Guide at <http://www.archives.gov/foia-guide.html> (for a paper copy, see 36 CFR 1250.20(d)).

(g) *Complex processing queue factors.* We place into a complex processing queue any request that cannot be completed within 20 working days due to complexity, volume, because it contains national security information, because it involves Presidential or Vice Presidential records, or involves unusual circumstances. Unusual circumstances include the need to:

(1) Search for and collect the records from one or more field facilities;

- (2) Search for, collect, and review a voluminous amount of records that are part of a single request;
- (3) Consult with another Federal agency before releasing records; or
- (4) Refer records to another Federal agency for declassification.
- (h) *Complex processing schedule.* If NARA needs to extend the deadline for more than an additional 10 working days due to the complexity of a request or as a result of unusual circumstances, we ask if you wish to modify your request so that we can answer the request sooner. If you do not wish to modify your request, we work with you to arrange an alternative schedule for review and release.
- (i) *Complex processing: national security declassification and release.* NARA does not have the authority to declassify and release records containing national security information without the approval of the agencies that have Original Classification Authority for the information contained in the records. We send copies of the documents to the appropriate originating Federal agencies for declassification review. We also send you an initial response to your FOIA request within 20 working days, informing you of this consultation with, or referral to, another Federal agency, except to the extent that the association with the other agency may itself be classified. Upon your request, we provide you an estimated date of completion.
- (j) *Complex processing: Presidential or Vice Presidential records.* If you request Presidential or Vice Presidential records and we determine that the records are not subject to any applicable FOIA or Presidential Records Act (PRA) exemption (and can therefore be released), we must notify the current and former President(s) or Vice President(s) of our intention to disclose information from those records. After receiving the notice, the

current and former President(s) and Vice President(s) have a period of time (as set out in the applicable Executive order on implementation of the PRA) in which to choose whether to invoke Executive Privilege to deny access to the requested information. Although we send you an initial status response to your FOIA request within 20 working days in these cases, the final response to your FOIA request will take longer. We can provide the final response only at the end of the Presidential notification period set forth in the Executive order.

§ 1250.27 How does NARA determine estimated completion dates for FOIA requests?

(a) When you ask for an estimated completion date for records that do not require consultation with another agency, we estimate the completion date on the basis of our reasonable judgment at that point as to how long it will take to complete the request.

Given the uncertainty inherent in establishing any estimate, the estimated completion date may be subject to change at any time.

(b) When you ask for an estimated completion date for records that must be reviewed by another agency, our estimate is also based on information from the other agency:

(1) When we send documents for consultation to another agency, we ask the agency to provide an estimated completion date for its portion of the processing.

(2) We keep the consulting agency's estimated completion date for its portion of the processing in the request file and use it in addition to our own processing time estimate to provide you with an overall estimated completion date.

(3) If the consulted agency or agencies do not provide us with an estimated completion date, we provide you with an estimate based on our general experience working with the agency or agencies and the types and volumes of records at issue.

§ 1250.28 How do I request expedited processing?

(a) NARA processes requests and appeals on an expedited basis whenever we determine that one or more of the following criteria exist:

(1) A reasonable expectation of an imminent threat to an individual's life or physical safety;

(2) A reasonable expectation of an imminent loss of a substantial due process right;

(3) An urgent need to inform the public about an actual or alleged Federal Government activity (this criterion applies only to those requests made by a person primarily engaged in disseminating information to the public); or

(4) A matter of widespread and exceptional media interest in which there exist possible questions that affect public confidence in the Government's integrity.

(b) NARA can expedite requests, or segments of requests, only for records over which we have control. If NARA must refer a request to another agency, we will inform you and suggest that you seek expedited review from that agency. NARA cannot expedite the review of classified records nor can we shorten the Presidential notification period described in 36 CFR 1250.26(j).

(c) To request expedited processing, you must submit a statement, certified to be true and correct, explaining the basis for your need for expedited processing. You must send the request to the appropriate official at the address listed in § 1250.22 of this subpart.

You may request expedited processing when you first request records or at any time during NARA's processing of your request or appeal.

(d) We will respond to your request for expedited processing within 10 calendar days of our receipt of your request to expedite. If we grant your request, the NARA office responsible for the review of the requested records will process your request as a priority, and it will be processed as soon as practicable. We will inform you if we deny your request for expedited processing. If you decide to appeal that denial, we will expedite our review of your appeal.

§ 1250.30 How does NARA respond to my request?

(a) NARA sends you a response informing you of our release determination, including whether any responsive records were located, how much responsive material was located, whether the records have been released in full or withheld in full or in part, where you may review the records, and any fees you must pay for the request. We will use plain language in all written communications with requesters.

(b) If we deny any part of your request, our response will explain the reasons for the denial, which FOIA exemptions apply to withhold records, and your right to appeal that determination.

(c) NARA may withhold records in full or in part if any of the nine FOIA exemptions apply. NARA withholds information only where disclosure is prohibited by law (such as information that remains classified, or information that is specifically exempt by statute) or where we reasonably foresee that disclosure would cause harm to an interest protected by one of the FOIA exemptions. If we must withhold part of a record, we provide access to the rest of the information in the record. On the released portion of the record, we

indicate the amount of information we redacted and the exemption(s) we applied, unless including that indication would harm an interest the exemption protects. NARA may also determine that a request does not reasonably describe the records sought; the information requested is not a record subject to 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 you sought. Information that may be exempt from disclosure under the FOIA is:

Section of the FOIA:	Reason for exemption:
5 U.S.C. 552(b)(1)	“(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.”
5 U.S.C. 552(b)(2)	“related solely to the internal personnel rules and practices of an agency.”
5 U.S.C. 552(b)(3)	“specifically exempted from disclosure by statute (other than § 552(b) of this title), provided that the statute: (A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;”
5 U.S.C. 552(b)(4)	“trade secrets and commercial or financial information obtained from a person that are privileged or confidential;”

<p>5 U.S.C. 552(b)(5)</p>	<p>“inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;”</p>
<p>5 U.S.C. 552(b)(6)</p>	<p>“personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;”</p>
<p>5 U.S.C. 552(b)(7)</p>	<p>“records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information</p> <p>(A) could reasonably be expected to interfere with enforcement proceedings;</p> <p>(B) would deprive a person of a right to a fair trial or an impartial adjudication;</p> <p>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;</p> <p>(D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting lawful national security intelligence investigation, information furnished by a confidential source;</p> <p>(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could</p>

	reasonably be expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual;”
5 U.S.C. 552(b)(8)	“contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;” or
5 U.S.C. 552(b)(9)	“geological and geophysical information and data, including maps, concerning wells.”

(d) If a request involves a voluminous amount of material or searches in multiple locations, we provide you with interim responses, releasing the records on a rolling basis.

(e) NARA may not withhold Presidential records subject to FOIA under 5 U.S.C. 552(b)(5) as defined in the table in paragraph (c) of this section. However, NARA may withhold Presidential records under the remaining FOIA exemptions. In addition, Presidential records may be withheld under the six PRA restrictions for a period of 12 years from when a President leaves office, in accordance with 44 U.S.C. 2204 and 36 CFR part 1270. Representatives of the current and former Presidents may also review Presidential records, and may assert constitutionally-based privileges that would prevent NARA from releasing some or all of the information requested.

§ 1250.32 How may I request assistance with the FOIA process?

(a) For assistance at any point in the FOIA process, you may contact the NARA FOIA Public Liaison. That individual is responsible for assisting you to reduce delays, increase transparency and understanding of the status of requests, and resolve any FOIA disputes.

You can find a list of our FOIA Customer Service Centers and Public Liaisons at <http://www.archives.gov/foia/contacts.html>.

(b) The Office of Government Information Services (OGIS), part of NARA, serves as the Federal FOIA Ombudsman and assists requesters and agencies to prevent and resolve FOIA disputes. OGIS also reviews agencies' FOIA policies, procedures, and compliance. You may contact OGIS using the information provided below in 36 CFR 1250.74(c).

§ 1250.38 In what format does NARA provide copies?

After all applicable fees are paid, we provide you copies of records in the format you request if the records already exist in that format, or if they are readily reproducible in the format you request.

Subpart C—Fees

§ 1250.50 General information on fees for all FOIA requests

(a) If you have failed to pay FOIA fees in the past, we will require you to pay your past-due bill and we may also require that you pay the anticipated fee before we begin processing your current request. If we estimate that your fees may be greater than \$250, we may also require advance payment or a deposit before we begin processing your request. If you fail to make an advance payment within 60 calendar days after the date of NARA's fee letter, we will close the request.

(b) If we determine that you (acting either alone or with other requesters) are breaking down a single request into a series of requests in order to avoid or reduce fees, we may aggregate all of these requests when calculating the fees. In aggregating requests, we may consider the subject matter of the requests and whether the requests were filed close in time to one another.

(c) If, in the course of negotiating fees, you do not respond to a NARA component within 60 calendar days, we reserve the right to administratively close the FOIA request after 60 calendar days have passed from the date of our last correspondence to you.

§ 1250.51 What fee policies apply to archival records?

(a) NARA is specifically authorized to charge fees for copying archival records under a separate fee statute, 44 U.S.C. 2116(c). As a result, archival records are exempt from the FOIA fee waiver provisions, per 5 U.S.C. 552(a)(4)(A)(vi), and we do not grant fee waivers for archival records requested under the FOIA. However, we make most of our archival records available for examination at the NARA facility where the records are located. Whenever this is possible, you may review the records in a NARA research room at that facility free of charge and may also use your own equipment to make copies.

(b) We do not charge search fees for FOIA requests for archival records, but we do limit the search to two hours.

(c) If you would like us to make copies of archival records, we typically require you to pay all applicable fees (in accordance with the fee schedule) before we provide the copies.

(d) You can find our Fee Schedule for archival records at:

www.archives.gov/research/order/fees.html.

§ 1250.52 What fee policies apply to operational records?

(a) For operational records, we may charge search fees even if the records are not releasable or we do not find any responsive records during our search.

(b) If you are a noncommercial FOIA requester entitled to receive 100 free pages, but the records cannot be copied onto standard-sized (8.5" by 11") photocopy paper, we copy them on larger paper and reduce the copy fee by the normal charge for 100 standard-sized photocopies. If the records are not on textual media (e.g., they are photographs or electronic files), we provide the equivalent of 100 pages of standard-sized paper copies for free.

(c) We do not charge you any fee if the total cost for processing your request is \$25 or less.

(d) If estimated search or review fees exceed \$50, we will contact you. If you have specified a different limit that you are willing to spend, we will contact you only if we estimate the fees will exceed that specified amount.

§ 1250.53 What is the FOIA fee schedule for operational records?

In responding to FOIA requests for operational records, NARA charges the following fees, where applicable, unless we have given you a reduction or waiver of fees under §1250.56.

(a) *Search fees* – (1) *Manual searching*. When the search is relatively straightforward and can be performed by a clerical or administrative employee, the search rate is \$16 per hour (or fraction thereof). When the request is more complicated and must be done by a NARA professional employee, the rate is \$33 per hour (or fraction thereof).

(2) *Computer searching*. NARA bases the fees for computer searches on the actual cost to NARA of operating the computer and the salary of the operator. When the search is relatively straightforward and a clerical or administrative employee can conduct it, the search rate is \$16 per hour (or fraction thereof). When the request is more complicated

and a NARA professional employee must perform it, the rate is \$33 per hour (or fraction thereof).

(b) *Review fees.* (1) NARA charges review fees for time we spend examining documents that are responsive to a request to determine whether we must apply any FOIA exemptions to withhold information. NARA charges review fees even if we ultimately are unable to disclose a record.

(2) The review fee is \$33 per hour (or fraction thereof).

(3) NARA does not charge review fees for time we spend resolving general legal or policy issues regarding the application of exemptions. However, NARA does charge review fees for time we spend obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter.

(c) *Reproduction fees* — (1) *Self-service photocopying.* At NARA facilities with self-service photocopiers, you may make reproductions of released paper records for \$0.25 per page.

(2) *Photocopying standard-sized pages.* When we make the photocopies for operational records, the charge is \$0.30 per page.

(3) *Reproductions of electronic records.* NARA charges you for our direct costs for staff time for programming, computer operations, and printouts or electromagnetic media to reproduce the requested electronic information. When the work is relatively straightforward and a clerical or administrative employee can perform it, the rate is \$16 per hour (or fraction thereof). When the request is more complicated and a NARA professional employee must do it, the rate is \$33 per hour (or fraction thereof).

(4) *Copying other media.* This is the direct cost to NARA of the reproduction. We provide specific rates on a case-by-case basis.

§ 1250.54 How does NARA calculate FOIA fees for operational records?

(a) If you are a commercial use requester, NARA charges you fees for searching, reviewing, and copying responsive records.

(b) If you are an educational or scientific institution requester, or a member of the news media, you are entitled to search time, review time, and up to 100 pages of copying without charge. NARA charges copying fees only beyond the first 100 pages.

(c) If you do not fall into either of the categories in paragraphs (a) and (b) of this section, and are an “other requester,” you are entitled to two hours of search and review time, and up to 100 pages of copying without charge. NARA may charge for search time beyond the first two hours and for copying beyond the first 100 pages.

(d) NARA does not charge a fee for processing a FOIA request if it exceeds any time limit under 5 U.S.C. 552(a)(6) in processing that request, unless unusual or exceptional circumstances (defined under the FOIA statute) are relevant.

§ 1250.56 How may I request a fee waiver for operational records?

(a) We waive or reduce your fees for NARA operational records only if your request meets *both* of the following criteria:

(1) The request is in the public interest (*i.e.*, the information is likely to contribute significantly to public understanding of the operations or activities of the Government);
and

(2) The request is not primarily in your commercial interest.

(b) To be eligible for a fee waiver or reduction you must explain:

- (1) How the records you are requesting pertain to the operations and activities of the Federal Government. There must be a clear connection between the identifiable operations or activities of the Federal Government and the subject of your request;
 - (2) How the release will reveal meaningful information that the public does not already know about Federal Government activities. Disclosing information that is already in the public domain, in either the same or a substantially-identical form, does not add anything new to the public's understanding of Government activities;
 - (3) How disclosure to you will advance public understanding of the issue;
 - (4) Your expertise or understanding of the requested records as well as your ability and intention to effectively convey information to the public. NARA ordinarily presumes that a representative of the news media satisfies this consideration;
 - (5) How you intend to disseminate the requested information to a broad spectrum of the public; and
 - (6) How disclosure will lead to a significantly greater understanding of the Government by the public.
- (c) After reviewing your request and determining that there is a substantial public interest in release, we also determine if the request primarily furthers your commercial interests. If it does, you are not eligible for a fee waiver.
- (d) You should ask for waiver or reduction of fees when you first submit your request to NARA, and should address the criteria referenced above. You may also ask for a fee waiver at a later time while the underlying record request is still pending or during an administrative appeal.

(e) We may also waive (either partially or in full) or reduce fees for operational records in additional circumstances as a matter of administrative discretion.

Subpart D—Appeals

§ 1250.70 When may I appeal NARA’s FOIA determination?

You may appeal when there is any adverse determination, including:

- (a) Refusal to release a record, either in whole or in part;
- (b) Determination that a record does not exist or cannot be found;
- (c) Determination that the record you sought was not subject to the FOIA;
- (d) Denial of a request for expedited processing;
- (e) Denial of a fee waiver request; or
- (f) Fee category determination.

§ 1250.72 How do I file an appeal?

(a) You may submit your appeal via mail or electronically. All appeals must be in writing and received by NARA within 60 calendar days from the date of our determination letter.

(1) For appeals submitted via mail, you should mark both your letter and envelope with the words “FOIA Appeal,” and include either your tracking number or a copy of your initial request and our determination letter.

(i) If NARA's Inspector General denied your request, send your appeal to the Archivist of the United States; (ATTN: FOIA Appeal Staff); Room 4200, National Archives and Records Administration; 8601 Adelphi Road; College Park, Maryland 20740-6001.

(ii) Send all other appeals for denial of access to Federal records to the Deputy Archivist of the United States; (ATTN: FOIA Appeal Staff); Room 4200; National Archives and Records Administration; 8601 Adelphi Road; College Park, Maryland 20740-6001.

(iii) For Presidential records, send appeals to the appropriate Presidential library director at the address listed in 36 CFR 1253.3.

(2) For all appeals submitted electronically, except those regarding Presidential records, send an e-mail to FOIA@nara.gov. For Presidential records, electronic appeals must contain all the information listed in § 1250.72 and be sent to the e-mail address of the appropriate Presidential library. These e-mail addresses are listed in 36 CFR 1253.3. The subject line of the e-mail should read “PRA/FOIA appeal.”

(b) In your appeal letter, you may include as much or as little related information as you wish, as long as it clearly identifies NARA’s initial determination letter (including the assigned request number, if known) from which you are appealing, and why we should release the records, grant your fee waiver request, or expedite the processing of your request. If we were not able to find the records you wanted, explain why you believe NARA’s search was inadequate. If we denied you access to records and told you that those records were not subject to FOIA, please explain why you believe the records are subject to FOIA.

§ 1250.74 How does NARA process appeals?

(a) We respond to your appeal within 20 working days after the appeal official designated in 36 CFR 1250.72(a)(1)(i) and (ii) receives it. If we reverse or modify the initial decision, we inform you in writing and, if applicable, reprocess your request. For Presidential records, if we release any additional information, we must follow the

notification procedures outlined in 36 CFR 1250.26(j). If we do not change our initial decision, we respond in writing to you, explain the reasons for the decision, and set out any FOIA exemptions that apply.

(1) An adverse determination by the Archivist or Deputy Archivist will be the final action by NARA; and

(2) NARA will cease processing an appeal if a requester files a FOIA lawsuit.

(b) We notify you of your right to seek judicial review of an adverse determination as set forth in the FOIA at 5 U.S.C. 552(a)(4)(B). If you wish to seek judicial review of any adverse determination, you must first appeal it administratively under this section.

(c) We also inform you that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740
ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

Subpart E—Confidential Commercial Information

§ 1250.80 How does a submitter identify records containing confidential commercial information?

At the time of submission, a submitter of business information is expected to designate, by appropriate markings, any portions of its submission that it considers to be protected from disclosure under FOIA Exemption 4. Although these portions may be designated, this does not preclude NARA from conducting a full FOIA review of all such documents if a FOIA request for those records has been received. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period, or NARA extends the designation period at its discretion.

§ 1250.82 How does NARA process FOIA requests for confidential commercial information?

If NARA receives a FOIA request for records containing confidential commercial information or for records that we believe may contain confidential commercial information, we follow these procedures:

(a) If the records are less than 10 years old or are still covered under an extended FOIA Exemption 4 designation period, we review the records in response to a FOIA request. If we then believe that we should release the records under FOIA, we make reasonable efforts to inform the submitter. The notice to the submitter describes the business information requested or includes copies of the requested records. NARA does not notify the submitter when we determine that:

- (1) We must withhold the information under FOIA's exemptions;
- (2) The information has been lawfully published or made available to the public; or
- (3) We are required by a statute (other than the FOIA), or by a regulation issued in accordance with the requirements of Executive Order 12600, to disclose the information.

(b) If the records are 10 or more years old, we review the records in response to a FOIA request as we would any other records, and at our discretion, inform the submitter.

NARA releases the records if we determine that neither Exemption 4 nor any other exemption applies.

(c) When the request is for information from a single or small number of submitters, we send a notice via registered mail to the submitter's last known address. NARA's notice to the submitter includes a copy of the FOIA request and tells the submitter the time limits and procedures for objecting to the release of the requested material.

(d) When the request involves information from a voluminous number of submitters, we may post or publish the notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending letters.

(e) We provide the submitter with 20 working days from the date of NARA's notice to object to the release and to explain a basis for the objection, including justification and support for the claim. The NARA FOIA Officer may extend this period as appropriate.

(f) We review and consider all objections to release that we receive within the time limit. Any information provided by a submitter under this provision may itself be subject to disclosure under FOIA. NARA considers a submitter who fails to respond within the time period specified in the notice to have no objection to disclosure of the information. If we decide to release the records, we inform the submitter in writing, along with NARA's reasons for the decision to release. We include with the notice copies of the records as we intend to release them. We also inform the submitter that we intend to release the records within a reasonable time after the date of the notice unless a U.S.

District Court forbids disclosure. NARA will not consider any information we receive after the date of a disclosure decision.

(g) If the requester files a lawsuit under the FOIA for access to any withheld records, we promptly notify the submitter.

(h) NARA notifies the requester in three circumstances:

(1) When we notify the submitter of the opportunity to object to disclosure, or to extend the time for objecting;

(2) When we notify the submitter of our intent to disclose the requested information; and

(3) When a submitter files a lawsuit to prevent the disclosure of the information.

Dated: September 10, 2014

DAVID S. FERRIERO

Archivist of the United States.

[FR Doc. 2014-22186 Filed 09/19/2014 at 8:45 am; Publication Date: 09/22/2014]