



DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

U.S. Customs and Border Protection

19 CFR Part 103

Federal Emergency Management Agency

44 CFR Part 5

[Docket No. DHS-2009-0036]

RIN 1601-AA00

Freedom of Information Act Regulations

**AGENCY:** Office of the Secretary, U.S. Customs and Border Protection, and Federal Emergency Management Agency, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Department's regulations under the Freedom of Information Act (FOIA). The regulations have been revised to update and streamline the language of several procedural provisions, and to incorporate changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007. Additionally, the regulations have been updated to reflect developments in the case law.

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

**FOR FURTHER INFORMATION CONTACT:** James V.M.L. Holzer, Deputy Chief FOIA Officer, DHS Privacy Office, (202) 343-1743.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Secretary of Homeland Security has authority under 5 U.S.C. 301, 552, and 552a, and 6 U.S.C. 112(e), to issue FOIA and Privacy Act regulations. On January 27, 2003, the Department of Homeland Security (Department or DHS) published an interim rule in the Federal Register (68 FR 4056) that established DHS procedures for obtaining agency records under the FOIA, 5 U.S.C. 552, or Privacy Act, 5 U.S.C. 552a. DHS solicited comments on this interim rule, but received none.

In 2005, Executive Order 13392 called for the designation of a Chief FOIA Officer and FOIA Public Liaisons, along with the establishment of FOIA Requester Service Centers as appropriate. Subsequently, the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), Public Law 110–175, required agencies to designate a Chief FOIA Officer who is then to designate one or more FOIA Public Liaisons (5 U.S.C. 552(j) and 552(k)(6)). Sections 6, 7, 9, and 10 of the OPEN Government Act amended provisions of the FOIA by setting time limits for agencies to act on misdirected requests and limiting the tolling of response times (5 U.S.C. 552(a)(6)(A)); requiring tracking numbers for requests that will take more than 10 days to process (5 U.S.C. 552 (a)(7)(A)); providing requesters a telephone line or Internet service to obtain information about the status of their requests, including an estimated date of completion (5 U.S.C. 552(a)(7)(B)); expanding the definition of “record” to include records “maintained for an agency by an entity under Government contract, for the purposes of records management” (5 U.S.C. 552(f)(2)); and introducing alternative dispute

resolution to the FOIA process through FOIA Public Liaisons (5 U.S.C. 552(a)(6)(B)(ii) & (l)) and the Office of Government Information Services (5 U.S.C. 552(h)(3)).

On July 29, 2015, the Department of Homeland Security published a proposed rule to amend existing regulations under the FOIA. See 80 FR 45101.<sup>1</sup> DHS accepted comments on the proposed rule through September 28, 2015. Finally, on June 30, 2016, the President signed into law the FOIA Improvement Act of 2016, Public Law 114-185, into law. DHS is now issuing a final rule that responds to public comments on the proposed rule and incorporates a number of changes required by the FOIA Improvement Act of 2016.

## **II. Discussion of Final Rule**

### **A. Non-Discretionary Changes Required by the FOIA Improvement Act of 2016**

In compliance with the FOIA Improvement Act of 2016, DHS has made the following changes to the proposed rule text<sup>2</sup>:

DHS has revised proposed CFR 5.8(a)(1), “Requirements for filing an appeal,” to change the current appeals period from 60 days to 90 days as required by section 2(1)(C) of the Act. DHS has also provided further clarification regarding the timely receipt of electronic submissions.

DHS has added 6 CFR 5.11(d)(3) to incorporate the portion of the Act that restricts an agency’s ability to charge certain fees. Specifically, section 2(1)(B) of the Act provides that an agency may continue to charge fees as usual for an untimely response only if: A court has

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<sup>1</sup> Except as explicitly stated below, DHS incorporates by reference the section-by-section analysis contained in the preamble to the proposed rule.

<sup>2</sup> Although these changes represent departures from the proposed rule text, DHS for good cause finds that advance notice and an opportunity for public comment are not necessary in connection with these changes. See 5 U.S.C. 553(b)(B). Notice-and-comment is unnecessary because these changes simply reflect the current state of the law, consistent with the 2016 Act, and because these changes constitute a procedural rule exempt from notice-and-comment requirements under 5 U.S.C. 553(b)(A).

determined that exceptional circumstances exist, or (1) the requester has been timely advised of unusual circumstances, (2) more than 5000 pages are necessary to respond to the request, and (3) the component has contacted the requester (or made at least three good-faith attempts) about ways to narrow or revise the scope of the request. DHS has incorporated this requirement into this final rule without change.

DHS has removed a reference in proposed 6 CFR 5.1(a)(2) that referenced the agency's nonbinding policy to disclose exempt information when the agency reasonably foresees that disclosure would not harm an interest protected by an exemption. Because section 2(1)(D) of the Act codifies a substantially similar standard in law, DHS is eliminating the proposed statement of policy to avoid confusion.

DHS has revised proposed 6 CFR 5.2 to conform to section 2(1)(A)(i) of the Act, which strikes a reference to public records that must be made available "for public inspection and copying," and inserts in its place a reference to public records that must be made available "for public inspection in an electronic format" (emphasis added).

Finally, DHS has also revised proposed 6 CFR 5.5(c), 5.6(c), and 5.6(e) to conform to requirements in section 2(1)(C) of the Act, which require the agency to notify requesters of the availability of the Office of Government Information Services (OGIS) and the agency's FOIA Public Liaison to provide dispute resolution services.

## **B. Response to Comments and Other Changes from the Proposed Rule**

In total, DHS received fifteen public submissions to its proposed rule, including one submission from another agency. DHS has given due consideration to each of the comments received and has made several modifications to the rule, as discussed in greater detail below.

Below, DHS summarizes and responds to the significant comments received.<sup>3</sup> DHS has grouped the comments by section.

**1. Comments on Proposed 6 CFR 5.1 (General Provisions) and 5.2 (Proactive Disclosures of DHS Records).**

DHS proposed to revise 6 CFR sections 5.1 and 5.2 to, among other things, eliminate redundant text and incorporate reference to additional DHS policies and procedures relevant to the FOIA process. Two commenters suggested that the Department retain text in original 6 CFR 5.1(a)(1), which provides that information routinely provided to the public as part of a regular Department activity (for example, press releases) may be provided to the public without following the DHS FOIA regulations. The commenters stated that they opposed DHS's proposed removal of that language because not all DHS FOIA officers and FOIA personnel understand that such information is to be provided routinely. The commenters also stated that retaining the language would promote greater consistency in FOIA review. The Department has considered this suggestion and has determined that the revised language at 6 CFR 5.2 on proactive disclosure of department records adequately replaces the language in original 6 CFR 5.1(a)(1). The revised language provides for posting of records required to be made available to the public, as well as additional records of interest to the public that are appropriate for public disclosure (such as press releases). The Department has made considerable efforts across the components to ensure that records appropriate for public disclosure are proactively posted in agency reading rooms.

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<sup>3</sup> DHS also received a broad range of supportive comments with respect to a number of the rule's provisions. In the interest of brevity, DHS has not summarized all of the supportive comments below.

One commenter suggested that proposed 6 CFR 5.1(a)(1) be amended to reflect that the 1987 OMB guidelines referenced in the paragraph would only apply to the extent they are consistent with subsequent statutory changes. As is the case with any statutory change, if the law changes and the regulation or guidance is no longer consistent with the law, then DHS will comply with the law: in this case, changes in the statute would override the OMB guidelines. DHS declines to make this change, because it is self-evident that DHS only complies with OMB guidelines to the extent they are consistent with the governing statute.

Finally, upon further consideration of the proposed rule text, DHS has made a number of clarifying edits to proposed 6 CFR 5.1(a)(1). Because this content is adequately covered in 6 CFR 5.10, DHS has removed much of the discussion of this topic in 6 CFR 5.1(a)(1).

## **2. Comments on proposed 6 CFR 5.3 (Requirements for Making Requests)**

One commenter suggested that DHS retain the current 6 CFR 5.3(a), which requires requests for information about third-party individuals be accompanied by signed authorizations from the subject of the information. The commenter argued that removing the requirement for signed authorizations could harm individual privacy. However, the subject language in proposed 6 CFR 5.3(a)(4) brings the DHS regulation more into line with the language used by many other government agencies, including the Department of Justice, which provides interagency leadership on FOIA matters. See 28 CFR 16.3. In addition, final section 5.3(a)(4) makes plain the importance of third-party authorization. And as a matter of established case law, in conducting the balancing test between privacy interest and the public interest in disclosure of personal information, DHS will weigh the existence or non-existence of a signed authorization on a case-by-case basis; in many, but not all cases, the lack of a signed authorization may prove

to be a barrier to access of third-party records unless a significant public interest is raised. As such, DHS declines to alter the proposed language.

The same commenter suggested that a caveat be included allowing access to the records of public officials without signed authorization because this would facilitate access to information about government officials. As noted above, DHS considers every request seeking access to third party information under a balancing test that evaluates the privacy of the individual subject of the records against the public interest in disclosing such information. Depending on the information sought, some of the records of government officials may be available without the need for a signed authorization. However, all records of all government officials will not meet the requirements of the balancing test. Therefore, DHS declines to create a blanket policy to waive the personal privacy interests of government officials in their records.

As proposed, 6 CFR 5.3(c) would allow DHS to administratively close a request that does not adequately describe the records, if the requester does not respond within 30 days to DHS's request for additional information. One commenter requested that DHS clarify how DHS may make such a request (e.g., by telephone or in writing or both), how a requester may respond, and whether a written response would be considered timely if it were postmarked or transmitted electronically within 30 days. DHS has revised the regulatory text to make clear that each communication must be in writing (physical or electronic) and that a written response would be considered timely if it were postmarked within 30 working days or transmitted electronically and received by 11:59:59pm ET on the 30<sup>th</sup> working day.

Proposed 6 CFR 5.3(c) provided for administrative closure if the requester fails to provide an adequate description of the records sought within 30 days of DHS's request for such a

description. A commenter suggested amending this section to provide that an inadequately described request may lose priority in the processing queue until the requester provides an adequate description, but will not be administratively closed. For purposes of placement in the processing queue, an unperfected request (i.e. a request that requires additional clarification or other information in order for the agency or component to process the request) is not considered to be in the queue. As a result, the unperfected request has no “priority” in the processing queue. Under this rule, DHS will continue to place a request into the queue for processing only after the request is perfected. DHS believes that this outcome is the fairest to all requesters, because unperfected requests place a heavy administrative burden on DHS to track and process. A policy to process all such requests would result in a reduction in service for other requesters.

One commenter suggested amending proposed 6 CFR 5.3 to provide that if a requester fails to respond to a request for clarification within 30 days, the agency or component should make an effort to contact the requester using more than one means of communication, before administratively closing the request. The commenter stated that if the requester ultimately responds after the 30-day deadline, DHS should not place the clarified requested at the end of the processing line, but should reopen the request and place it back in the processing queue as though the request had been perfected on the date when the original request was filed. The commenter stated that this outcome would be consistent with DOJ guidance on “still interested” letters. DHS declines to commit to always seeking further clarification following the 30-day deadline. This would be inconsistent with the purpose of the 30-day deadline. And for the reasons described earlier in this preamble, DHS also declines to deem responses perfected retrospectively. DHS notes that DOJ’s guidance on “still interested” letters is unrelated to

agency requests for clarification.<sup>4</sup> DHS also notes that proposed 6 CFR 5.3 does not contain an exhaustive list of reasons for administratively closing a request; for example, a request may be administratively closed at the request of the entity or individual that made the request. Pending requests may also be closed if DHS learns that a requester is deceased.

A commenter suggested that DHS commit to always seek additional information from a requester before administratively closing the request. The commenter stated that this would ensure that FOIA officials do not simply close a request without explanation. DHS recognizes that requesters may have difficulty formulating proper FOIA requests and as such, has provided information and resources to aid requesters in drafting proper FOIA requests. Resources permitting, DHS will attempt to seek additional clarification rather than administratively close requests, but out of fairness to other requesters, in the interest of efficiency, and consistent with its historical practice and the practice of other agencies, DHS will not impose an affirmative requirement to seek additional information or clarification in every instance. DHS has clarified 6 CFR 5.3(c) to this end. DHS notes that it does not administratively close requests without any explanation.

Another commenter proposed to extend the deadline for clarification to 30 business days rather than 30 calendar days. The commenter stated that a 30-business-day deadline would “conform to the Department of Justice’s recommended deadline with respect to ‘still-interested’ letters.” DHS agrees with the commenter that 30 working days is more appropriate. DHS has

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<sup>4</sup> A “still interested” letter is a letter that the agency sends to a requester if a substantial period of time has elapsed since the time when the request was submitted and is used as a method to make sure that the requester continues to seek the original information. A requester may respond to a “still interested” letter by indicating that she or he continues to be interested in the original information sought, seek to modify his or her request, or indicate that he or she is no longer interested in the request.

therefore extended the clarification period from 30 calendar days to 30 working days. This has the additional benefit of being consistent with the separate 30-working-day deadline in DOJ's recommended guidelines on still-interested letters.

One commenter suggested amending proposed 6 CFR 5.3(c) to allow for 60 days, rather than 30 days, after a request for clarification and before administrative closure. The commenter stated that the change was necessary because of "inevitable delays in processing outgoing communications from federal agencies." The commenter stated that many journalists are often on assignment without access to physical mail or email for days and weeks at a time, and that "a 30-day window could unfairly jeopardize the processing of their FOIA requests in the event that a DHS component requests a clarification, requiring them to unnecessarily re-submit requests, and delaying their access to requested records. Extending the response time to 60 days does not impose any additional burden on DHS components, but would assist requesters." While DHS recognizes that certain requesters may have some difficulty responding to a request for clarification within a specified time period, in the interest of not creating additional administrative burdens, DHS has determined that the 30-working-day time period established by this rule strikes the appropriate balance. DHS notes that an administrative closure of an unperfected request does not prevent the requester from resubmitting the request at a future date, and that since an unperfected request is by definition not placed in the processing queue, there is no negative impact on a requester with respect to losing their place in the queue if a requester needs to submit a revised request.

A commenter suggested that DHS limit the use of administrative closure to those circumstances described in proposed section 5.3(c), and not administratively close requests based

on any other grounds. The commenter specifically stated that DHS sometimes administratively closes cases based on a requester's failure to respond to a "still interested" letter, and that the use of still-interested letters "place[s] a significant an unwarranted burden on FOIA requesters that runs counter to FOIA." The commenter also stated that the proposed rule did not include provision for administratively closing a FOIA request based on the requester's failure to respond to a "still interested" letter, and suggested that DHS should not introduce new regulatory text on "still-interested" letters in the final rule, because the proposal did not afford commenters a sufficient opportunity to comment on this topic. DHS disagrees that it lacks authority to administratively close requests on grounds that are not referenced in its FOIA regulations. For example, although DHS regulations do not provide for the administrative closure of a request at the requester's election, DHS may administratively close such a request. This example is very similar to the use of "still interested" letters, described earlier in this preamble.

One commenter suggested that the text of proposed 6 CFR 5.3 be amended to state that when a request is clear on its face that it is being made by an attorney on behalf of a client, no further proof of the attorney-client relationship would be required. The commenter stated that DHS inconsistently requires attorneys for requesters provide documentation of the attorney-client relationship in the form of (1) a signed DHS Form G-28, (2) a signed statement on the letterhead of the entity for which the FOIA request is being made, or (3) a signed statement from the actual requester. The commenter stated that such documentation should not be required where the FOIA request clearly states that it is being made by an attorney on behalf of a client. DHS is unable to make this modification. DHS analyzes third-party requests for records under both the Privacy Act and the FOIA. As part of this process, DHS determines if the records are

being sought with the consent of the subject of the records. Without proper documentation, DHS is unable to assess whether a third party, be it an attorney or other representative of the subject of the records, is properly authorized to make a Privacy Act request for the records. Without authorization, DHS applies a balancing test to determine whether the personal privacy interests of the individual outweigh the public interest in disclosure of such records, which may result in a denial of access to third party requests that are not accompanied with proper signed authorization.

### **3. Comments on proposed 6 CFR 5.4 (Responsibility for Responding to Requests).**

One commenter suggested amending proposed 6 CFR 5.4(d), which pertains to interagency consultations, to clarify the extent to which consultations may also be required with the White House. The commenter stated that “[t]o promote transparency,” the final rule should “address [DHS’s] FOIA-related consultations with the Office of White House Counsel.” Consultations occur on a case-by-case basis and depend on the specific information that may be revealed in a request. Depending on the specific request at issue, DHS and its components consult with entities throughout state, local, and federal government, including the White House. An attempt to catalogue every possible consultation would be impracticable, and would be inconsistent with the overall goal of streamlining the regulations. DHS therefore declines to make this suggested change.

One commenter stated that DHS should always notify the requester of referrals because DHS had not substantiated its claim that merely naming the agency to which a FOIA request had been referred could “harm an interest protected by an applicable exemption.” The commenter also stated that proposed 6 CFR 5.4(f) mistakenly referenced referral of records, rather than requests.

The commenter stated that “referrals do not entail referrals of records, but instead implicate requests.” DHS and its components make every effort to notify requesters when records are referred to other components. A referral differs from a consultation in several ways, but most significantly to the requester, when records are referred to another agency, the receiving agency is the entity that will ordinarily respond directly to the requester unless such a response might compromise a law enforcement or intelligence interest. DHS and its components have a very broad mission space that includes law enforcement and intelligence functions. As such, there may be times when DHS is unable to disclose the referral of records from one component to another or from a DHS component to another agency due to law enforcement and/or intelligence concerns. As such, DHS declines to make this a mandatory requirement.<sup>5</sup> Finally, the reference to “records” at the end of proposed 6 CFR 5.4(f) was intentional. In general, when DHS makes a referral to another agency, it is referring responsive records to that agency, rather than referring the request itself without records.

#### **4. Comments on proposed 6 CFR 5.5(e)(3) and 5.11(b)(6) (Timing of Responses to Requests and Fees, with respect to news media).**

Five commenters suggested amendments to the proposed language of 6 CFR 5.5(e)(3) and 5.11(b)(6) to make the definition of news media less restrictive. Commenters felt that it would be difficult or cumbersome for certain requesters to establish that news dissemination was their “primary professional activity.” In response, DHS has eliminated the requirement in proposed

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<sup>5</sup> For more information on consultations and referrals, please see the Memorandum from DHS Chief FOIA Office Mary Ellen Callahan to DHS FOIA Officers, DHS Freedom of Information Act Policy Guidance: 1) Processing “Misdirected” FOIA Requests; and 2) Implementation of the Department of Justice Office of Information Policy (OIP) December 2011 OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them (Mar. 9, 2012), available at [https://www.dhs.gov/sites/default/files/publications/dhs-foia-handling-guidance\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/dhs-foia-handling-guidance_1.pdf).

5.5(e)(3) that a requester seeking expedited processing establish that he or she engages in information dissemination as his or her primary professional activity. DHS has also removed the “organized and operated” restriction. These changes are consistent with existing case law.<sup>6</sup>

One commenter also proposed that DHS eliminate the requirement in proposed 6 CFR 5.11(b)(6) that news be broadcast to the “public at large” and that periodicals qualify for news media status only if their products are available to the general public. The commenter suggested that the proposed rule should make clear that no particular audience size was required. The reference to the “public at large” and the “general public” are merely exemplary and do not act as hard-and-fast restrictions. The standard identified in the final rule, as revised in response to public comments, allows DHS to classify a requester as a member of the news media on a case-by-case basis without a rigid requirement of audience size.

One commenter proposed that DHS eliminate the availability of expedited processing for the news media. As the FOIA statute clearly contemplates expedited processing for news media, DHS is unable to eliminate this provision.

#### **5. Comments on proposed 6 CFR 5.6 (Responses to Requests).**

Two commenters requested that the language of proposed 6 CFR 5.6 be amended to include a statement that there is a “presumption in favor of disclosure.” The first commenter sought inclusion of the language based upon memoranda issued by the President Obama and Attorney General, respectively.<sup>7</sup> The second commenter also cited the model civil society FOIA rules as the basis for requesting the additional language. DHS operates in accordance with guidance

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<sup>6</sup> See Cause of Action v. FTC, 799 F.3d 1108 (D.C. Cir. 2015)

<sup>7</sup> See 74 FR 4683 (Jan. 26, 2009); Memorandum from the Attorney General to the Heads of Executive Departments and Agencies, The Freedom of Information Act (FOIA) (Mar. 19, 2009), available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

promulgated by the Department of Justice, including Attorney General Holder's 2009 memorandum which urged agencies to "adopt a presumption in favor of disclosure." DHS FOIA regulations are intended to inform and advise the public about DHS operations and procedures for processing FOIA requests. Because proposed 6 CFR 5.6 deals strictly with the administrative steps of processing a FOIA request, and because the Department already adheres to the direction in the memoranda without relying on additional regulatory text, the Department declines to make this suggested change.

One commenter suggested that the regulations specify greater use of electronic means of communication by DHS components to allow the electronic filing of FOIA requests to avoid the delay and uncertainty occasioned by first-class mail. The Department already encourages the electronic filing of FOIA requests and the service is available for all components through the DHS FOIA portal at [www.dhs.gov/steps-file-foia](http://www.dhs.gov/steps-file-foia) or through the DHS mobile application (available for both iOS and Android platforms). The Department has incorporated language into 6 CFR 5.6(a) which specifies that DHS components should use electronic means of communicating with requesters whenever practicable.

One commenter proposed changing the language of 6 CFR 5.6(b) to state that DHS will assign a request a tracking number if processing the request would take longer than ten calendar days, rather than ten working days as the proposed rule provided. The commenter stated that the FOIA statute specified "calendar" days rather than working days. The FOIA statute provides only that a tracking number be assigned if the request will take longer than "ten days", 5 U.S.C. 552(a)(7)(A), and is silent on the issue of working or calendar days. However, in light of the use of working days to determine the twenty-day time limitations for original responses and

responses to appeals (which specify twenty days “excepting Saturdays, Sundays, and legal public holidays” 5 U.S.C. 552(a)(6)(A)(i) and (ii)), DHS has also implemented 5 U.S.C. 552(a)(7)(A) using a working days standard. For clarification, working days refers to weekdays (Monday through Friday), and not legal holidays and weekends (Saturday and Sunday).

One commenter suggested that the initial acknowledgment letter contain information on how to file an administrative appeal because if DHS fails to provide a timely response to the FOIA request, a requester is entitled to file an administrative appeal or seek judicial review. The commenter stated that in cases of constructive denial, the requester would not be informed how to administratively appeal the constructive denial. DHS declines to add the appeals language to the initial acknowledgment letter. While DHS acknowledges that in situations of constructive denial, a requester may seek to file an administrative appeal, at the time the initial letter is sent, there is no adverse determination from which to appeal, which may serve to confuse members of the public. In addition, DHS provides information on how to file an appeal on its website (<https://www.dhs.gov/foia-appeals-mediation>), and information is always available by contacting the DHS Privacy Office or any of the component FOIA officers via U.S. mail, electronic mail, or by telephone. Contact information for DHS FOIA officers can be found at the following link: <https://www.dhs.gov/foia-contact-information>.

One commenter suggested that proposed 6 CFR 5.6(d) be amended to exclude language that characterizes as an “adverse determination” the agency’s determination that a “request does not reasonably describe the records sought.” The commenter stated that the language would allow DHS components to deny FOIA requests based on inadequate descriptions of records sought, rather than seeking more information from requesters. As provided in proposed 6 CFR 5.3, DHS

components try to obtain clarification from requesters by use of “needs more information” letters and contacting requesters via telephone or electronic mail to seek additional information. In many, but not all, circumstances the additional information is sufficient to allow DHS to process the request. However, if DHS ultimately administratively closes a request, DHS treats such a closure as an adverse determination from which the requester can seek administrative appeal.

One commenter suggested that proposed 6 CFR 5.6(g) be amended to specifically prohibit DHS from making a “false” response to a request when DHS determines that the request falls within 5 U.S.C. 552(c). Section 5.6(g) was intended to provide notice that records determined to be properly subject to an exclusion are not considered to be responsive to the FOIA request because excluded records, by law, “are not subject to the requirements of [the FOIA].” 5 U.S.C. 552(c). By definition, when DHS determines that an exclusion under 552(c) applies, any documents would no longer be subject to FOIA and DHS’s statement to a requester of such fact could not be considered “false”. While the commenter would prefer that the agency make a “Glomar” response, that is, refuse to confirm or deny the existence of responsive records, the FOIA statutory scheme clearly allows agencies to utilize an exclusion when the situation is appropriate. And as proposed 6 CFR 5.6(g) and 5 U.S.C. 552(c) make clear, once an agency lawfully applies an exclusion, the excluded records are not responsive to the request.

Accordingly, DHS is maintaining the language as proposed.

#### **6. Comments on proposed 6 CFR 5.7 (Confidential Commercial Information).**

One commenter suggested that proposed 6 CFR 5.7 be amended to require “a more detailed notification” to the requester when the agency denies a FOIA request on the basis of FOIA exemption 4. FOIA exemption 4 protects trade secrets and commercial or financial information

obtained from a person that is privileged or confidential. The commenter stated that requiring more detail would “ensure that the requester can properly obtain judicial review.” DHS already strives to provide as much information as possible to a requester when a request for information is denied. DHS must weigh the requester’s need for information against the interests of the submitter of the information; particularly where the information is being withheld as confidential commercial information, it may be impossible for DHS to provide additional information without revealing information that DHS would be required to protect under FOIA Exemption 4. As such, DHS declines to make this suggested change.

Another commenter suggested that DHS revise proposed 6 CFR 5.7(e) and (g) to specify the minimum number of days that will be afforded to submitters to provide comments and file reverse-FOIA lawsuits. The commenter stated that establishing such a standard would prevent the agency from inconsistently interpreting the requirement to provide a “reasonable” period of time. DHS agrees that it is appropriate to set a minimum number of days. Accordingly, this final rule specifies that submitters will have a minimum of 10 working days to provide comments. DHS may provide a longer time period, at its discretion. Further, submitters will be given a minimum of 10 working days’ notice if information is to be disclosed over their objection. The same commenter also sought clarification of whether “submitter” as used in proposed 6 CFR 5.7 was the same as “business submitter” as used in proposed 6 CFR 5.12(a). Section 5.12 applies only to CBP operations and should be read independently from 6 CFR 5.7.

#### **7. Comments on proposed 6 CFR 5.8 (Administrative Appeals).**

As noted above, based upon requirements in the FOIA Improvement Act of 2016, DHS has changed the appeals period from 60 working days to 90 working days.

One commenter suggested that proposed 6 CFR 5.8(a)(1) be amended to state that appeals will be considered timely if delivered within 60 working days of an adverse determination. An adverse determination can refer to any outcome which the requester seeks to appeal. The commenter stated that the proposed regulations do not specify with enough certainty when the 60 workdays begin to run for purposes of filing an administrative appeal. The proposed rule already considered appeals to be timely if the appeal is postmarked, or transmitted in the case of electronic submissions, within 90 workdays of the date of the component's response. DHS considers the postmark rule to be clear and more favorable to appealing requesters. DHS therefore will not require delivery within 90 days of the notice of an adverse determination. However, in the interests of clarifying the exact time period, DHS has added language to reflect that an electronically transmitted appeal will be considered timely if transmitted to the appeals officer by 11:59:59 pm ET or EDT of the 90th working day following the date of an adverse determination on a FOIA request.

An agency commenter suggested that proposed 6 CFR 5.8(c) be amended to clarify that DHS and its components will participate in mediation with the Office of Government Information Services, National Archives and Records Administration, should a requester elect to mediate any dispute related to a FOIA request. DHS reaffirms its commitment to actively participate in mediation should any FOIA requester seek to resolve a dispute and has added language to this section to reflect such.

One commenter suggested that proposed 6 CFR 5.8(d) be amended to clarify that the time period for response to an appeal may not be extended for greater than 10 days. DHS

considers this amendment to be unnecessary as the statute clearly does not provide for extensions beyond a single 10-day period.

One commenter suggested amending proposed 6 CFR 5.8(e) to clarify that judicial review is available without pursuing administrative appeal where a request has been constructively denied through agency inaction. DHS has determined that this proposed change is unnecessary as the FOIA statute itself provides judicial review of constructive denial without the necessity of administrative exhaustion.

**8. Comments on proposed 6 CFR 5.9 (Preservation of Records) or 5.10 (FOIA Requests for Information Contained in a Privacy Act System of Records).**

No comments requiring agency response were received regarding proposed 6 CFR 5.9 or 5.10.

**9. Comments on proposed 6 CFR 5.11 (Fees).**

Several public submissions contained comments regarding the Department's assessment of fees. As a general matter, the Department notes that the fee provisions are written to conform to the OMB Guidelines, which establish uniform standards for fee matters. Conformity with the OMB Guidelines is required by the FOIA. See 5 U.S.C. 552(a)(4)(A)(i).

DHS has revised the "Definitions" section of proposed 6 CFR 5.11(b) by inserting the word "primarily" before "commercial interest" to more accurately conform to the statutory language of the FOIA. Consistent with other provisions of the proposed rule, the change clarifies that fee waivers are available to requesters even if they have a commercial interest as long as the requester can show a public interest in the information and that the primary interest in the information is not commercial.

One commenter suggested that DHS retain the definition of “commercial use request” in current 6 CFR 5.11(b)(1) instead of the proposed revisions because the commenter felt that the proposed regulation significantly broadened DHS’s discretion in determining whether a request is commercial in nature. The DHS definition of “commercial use request” conforms to the definition promulgated by DOJ in its FOIA regulations. DHS has not changed the definition of a commercial request and continues to rely on the same definition in the current interim regulations at 6 CFR 5.11 that “a commercial use request is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which include furthering those interests through litigation.”

The same commenter opposed the removal of the requirement that “the component shall provide a reasonable opportunity to submit further clarification.” The proposed changes do not require DHS to seek further clarification from a requester, but rather allow each component to make a case-by-case determination, which may, in the agency’s discretion, include seeking further information from the requester regarding the purpose for the request. This change comports with the DHS proposed regulation at 6 CFR 5.3(c), which gives the agency discretion to determine which requests will be the subject of requests for clarification in the event the request is insufficient. Requiring DHS to seek further information would increase the administrative burden on the agency and prejudice other requesters. The final rule text reflects the need to allow components to assess the intended purpose of each request on a case-by-case basis. As such, DHS declines to make any changes to this language.

One commenter suggested that DHS retain the broader definition of “educational institution” in current 6 CFR 5.11(b)(4) because the proposed definition of educational

institution would exclude students enrolled in educational institutions that make FOIA requests in furtherance of their own research. DHS agrees and has changed the proposed definition of educational institutions to include students seeking FOIA requests to further their own scholarly research by eliminating the example which had excluded such requesters from categorization as educational institutions. The revisions are also consistent with Sack v. Dep't of Defense, 823 F.3d 687 (D.C. Cir. 2016).

Several commenters sought revision of the definition in proposed 6 CFR 5.11(b)(6) of “news media.” This issue is discussed earlier in this preamble, under the section for comments on proposed 6 CFR 5.5.

One commenter suggested amending proposed 6 CFR 5.11(e) to clarify that a non-commercial requester that does not pay fees or declines to pay an estimated fee would still be eligible for two hours of search time without charge. The commenter sought the change because they stated that there was disagreement between agencies about whether or not such requesters would be entitled to the two free hours of search times under such circumstances. DHS has added language to section 5.11(e)(1) to make this more clear; the fee table at proposed 6 CFR 5.11(k)(6) also contains this information.

One commenter suggested that DHS eliminate proposed 6 CFR 5.11(k)(5), concerning the closure of requests where the required advance fee payment has not been received within 30 days. The commenter stated that the requirement of advance payment posed an additional financial barrier to accessing information, particularly in light of DHS’s proposed redefinition of educational institutions to exclude students making FOIA requests in furtherance of their own educational coursework. As noted above, DHS has already addressed the concern about

students being excluded from the definition of educational request. Regarding the remainder of the commenter's suggestion that DHS eliminate the closure of requests for which the required advance fee payment has not been timely received, DHS declines to make this change. While DHS recognizes that this requirement may impose a burden on some requesters, DHS has a strong interest in maintaining the integrity of the administrative process. As numerous court decisions have noted, government agencies are not required to process requests for free for those requesters that do not qualify for a fee waiver regardless of the requester's ability to pay the estimated fee. Further, the FOIA statute itself allows agencies to collect advance payment of fees when the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250. 5 U.S.C. 552(a)(4)(A)(v).

**10. Comments on proposed 6 CFR 5.12 (Confidential Commercial Information; CBP Procedures).**

One commenter stated that the second sentence of proposed 6 CFR 5.12(a) was redundant in that it provided that "commercial information that CBP [U.S. Customs and Border Protection] determines is privileged or confidential...will be treated as privileged or confidential." DHS has determined that this language is not redundant because there may be information that a submitter deems privileged and confidential that does not meet the criteria established by CBP. The text identified by the commenter serves to clarify to submitters that only information that CBP has deemed "privileged or confidential" will be treated as such by the agency. The same commenter also sought clarification of whether the term "business submitter" used in proposed 6 CFR 5.12 was the same as the definition of "submitter" used in proposed 6 CFR 5.7. As DHS noted above

in the section covering comments on proposed 6 CFR 5.7, these sections are to be read independently and definitions may not be interchangeable.

### **11. Other Comments.**

One commenter stated that he had previously submitted FOIA requests to DHS on behalf of his small business, and that DHS had extended the estimated delivery date of its responses without providing notice or a reason, and that his requests had been sent to the wrong offices and subsequently terminated because found to be duplicative. The commenter asserted, without further elaboration, that delays in FOIA processing imposed direct costs on a small business he represented. The commenter also stated that DHS has a large backlog of FOIA requests. The commenter requested that DHS provide additional economic and small entity analysis related to the costs of FOIA processing delays and the proposed rule, and that “once these have been completed . . . DHS reopen the comment period for at least 60 days for public comment.” The commenter stated that “[i]t is inconceivable that the current backlog has not imposed costs on small and large businesses under this proposal.” The commenter requested DHS develop an estimate of the quantifiable costs and benefits of the rule and also complete a Regulatory Flexibility Act analysis of the impacts of the rule on small entities. The commenter also submitted two related comments regarding specific interactions he had in submitting FOIA requests to two DHS components, the Transportation Security Administration (TSA), and CBP. Those two comments included a list of eight questions related to the TSA request and 11 questions related to the CBP request, which the commenter requested be addressed in an economic analysis.

Much of the commenter's submission is well outside the scope of the proposed rule, which was intended primarily to update and streamline regulatory text to reflect intervening statutory and other changes. For example, the commenter raised specific issues with previous FOIA requests to DHS components (whether a specific FOIA request was closed properly and changes in a delivery date with another FOIA request). The delay costs associated with past DHS processing of a past FOIA request or the impacts of the current backlog are by definition not due to any changes made in this rule and therefore are not direct costs of this rule. Issues regarding specific pending or historical FOIA requests are more properly addressed to the component's FOIA office and not as comments to the FOIA proposed rule. Regarding the commenter's request for an assessment of the quantified costs and benefits of the rule and a Regulatory Flexibility Act analysis, DHS did consider the costs, benefits and impacts of the proposed rule on small entities. The proposed rule's Executive Orders 12866 and 13563 analysis and Regulatory Flexibility Act both reflect DHS's consideration of the economic impacts of the proposed rule, as well as DHS's conclusion that the proposed rule would not impose additional costs on the public or the government. DHS affirmatively stated that (1) the proposed rule would not collect additional fees compared to current practice or otherwise introduce new regulatory mandates, (2) the benefits of the rule included additional clarity for the public, and (3) regarding the impacts on small entities, the proposed rule did not impose additional direct costs on small entities. See 80 FR 45104 for this discussion of costs, benefits, and small entity impacts. DHS notes the commenter did not identify any specific provisions of the proposed rule that he believed would lead to delays in FOIA processing or otherwise increase costs as compared to FOIA current procedures, or suggest any alternatives to the proposed rule that would result in increased

efficiencies. The proposed rule did not invite an open-ended search for any and all potential changes to DHS FOIA regulations that might potentially result in processing improvements; the rule's economic analysis reflects full consideration of the limited changes included in the proposed rule.<sup>8</sup>

One commenter suggested that the regulation be amended to allow individuals protected by the confidentiality provisions in the Violence Against Women Act (VAWA) as amended, 42 U.S.C. 13701 and 8 U.S.C. 1367, to submit FOIA requests for their own information without that information subsequently being made public. DHS agrees with the commenter that this sensitive information should not be made public. But DHS believes the commenter's concerns are misplaced, because DHS does not apply the "release to one, release to all" policies of FOIA to first-party requests for personal information. DHS will not release to the public information covered by the aforementioned authorities subsequent to a first-party request for that his or her own information.

One commenter suggested that proactive disclosure include automatic disclosure of alien files to individuals in removal proceedings. The Department has determined that automatic disclosure of alien files to all individuals in removal proceedings falls well outside of the scope of the proposed rule and FOIA generally, and therefore will not be addressed here.

Finally, one commenter sought inclusion of a proposed section 5.14, which would require DHS to review records to determine if the release of information contained in records would be in the public interest "because it is likely to contribute significantly to public understanding of

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<sup>8</sup> Alternatively, to the extent the commenter implies that DHS FOIA regulations are primarily responsible for processing delays, misdirected FOIA requests, or other challenges associated with FOIA processing, DHS finds the commenter's views completely unsupported, and likely incorrect. DHS is unaware of any study of its FOIA processing challenges that cites flaws in existing regulations as a major causal factor. See <http://www.gao.gov/products/GAO-15-82> and <http://www.gao.gov/products/GAO-12-828>.

the operations or activities of the DHS.” As provided in proposed 6 CFR 5.2, DHS already proactively posts certain Department records it determines are of interest to the public. In addition, DHS generally follows the rule that records are publicly posted after the Department has received three requests for such records. DHS also recently participated in a DOJ pilot program which sought to examine the feasibility of posting all requested records as long as no privacy interests were implicated. Proactive review and posting of records, whether they are the subject of FOIA requests or not, is a time and resource intensive undertaking. DHS will continue to examine the feasibility of expanding the public posting of records, but due to practical and operational concerns, cannot divert resources away from the processing of FOIA requests to devote the additional resources that would be required to comply with the scope of proactive posting suggested by this comment. As such, DHS declines to incorporate this proposed new section.

### **III. Regulatory Analyses**

#### **Executive Orders 12866 and 13563 - Regulatory Review**

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

DHS has considered the costs and benefits of this rule. This rule will not introduce new regulatory mandates. In the proposed rule we stated that this rule would not result in additional costs on the public or the government. As explained above, some commenters raised concerns about the potential burden associated with a streamlined process for administratively closing unclear requests, though none offered a quantified estimate of that burden. We continue to believe that DHS's general assessment of the economic impacts of this rule, as stated in the proposed rule, is accurate. DHS does acknowledge that there will be a limited number of cases, however, in which this rule will result in some requesters clarifying and resubmitting a request, rather than simply clarifying a request. DHS believes that the burden associated with resubmitting a request would be minimal, because requesters that are required to resubmit requests that lack sufficient information or detail to allow DHS to respond are required to submit the same information as requesters that are required to provide clarification (i.e., information that will supplement the information provided with the original request such that DHS can reasonably identify the records the requester is seeking and process the request). Since both sets of requesters must provide additional information in writing to allow the agency to process their requests, it is difficult to quantify any additional cost associated with resubmission as compared to clarification. The rule's benefits include additional clarity for the public and DHS personnel with respect to DHS's implementation of the FOIA and subsequent statutory amendments.

### **Regulatory Flexibility Act**

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, and section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 note, agencies

must consider the impact of their rulemakings on “small entities” (small businesses, small organizations and local governments). The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. DHS has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. DHS does not believe this rule imposes any additional direct costs on small entities. However, as explained in the previous Executive Orders 12866 and 13563 section, it is possible that an entity that resubmits a request might incur a slightly different impact than one that clarifies a request. Such a cost difference would be so minimal it would be difficult to quantify. DHS further notes that although one commenter stated that he found the proposed rule’s regulatory flexibility certification “challenging,” no commenter stated the proposed rule would cause a significant economic impact on a substantial number of small entities, or provided any comments suggesting such an impact on a substantial number of small entities. Based on the previous analysis and the comments on the proposed rule, DHS certifies this rule will not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### List of Subjects

##### 6 CFR Part 5

Classified information, Courts, Freedom of information, Government employees,  
Privacy

##### 19 CFR Part 103

Administrative practice and procedure, Confidential business information, Courts, Freedom of information, Law enforcement, Privacy, Reporting and recordkeeping requirements

##### 44 CFR Part 5

Courts, Freedom of information, Government employees

For the reasons stated in the preamble, the Department of Homeland Security amends 6 CFR chapter I, part 5, 19 CFR chapter I, part 103, and 44 CFR chapter I, part 5, as follows:

#### **TITLE 6 – Domestic Security**

#### **PART 5 -- DISCLOSURE OF MATERIAL OR INFORMATION**

1. The authority citation for part 5 is revised to read as follows:

Authority: 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.S.C. 301; 6 U.S.C. 101 et seq.; E.O. 13392.

2. Revise subpart A of part 5 to read as follows:

Subpart A -- Procedures for Disclosure of Records Under the Freedom of Information Act

Sec.

- 5.1 General provisions.
- 5.2 Proactive disclosures of DHS records.
- 5.3 Requirements for making requests.
- 5.4 Responsibility for responding to requests.
- 5.5 Timing of responses to requests.
- 5.6 Responses to requests.
- 5.7 Confidential commercial information.
- 5.8 Administrative appeals.
- 5.9 Preservation of records.
- 5.10 FOIA requests for information contained in a Privacy Act system of records.
- 5.11 Fees.
- 5.12 Confidential commercial information; CBP procedures.
- 5.13 Other rights and services.

Appendix I to Subpart A—FOIA Contact Information

**Subpart A -- Procedures for Disclosure of Records Under the Freedom of Information Act**

**§ 5.1 General provisions.**

(a)(1) This subpart contains the rules that the Department of Homeland Security follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552 as amended.

(2) The rules in this subpart should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget at 52 FR 10012 (March 27, 1987) (hereinafter “OMB Guidelines”). Additionally, DHS has additional policies and procedures relevant to the FOIA process. These resources are available at <http://www.dhs.gov/freedom-information-act-foia>. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under subpart B of part 5 as well as under this subpart.

(b) As referenced in this subpart, component means the FOIA office of each separate organizational entity within DHS that reports directly to the Office of the Secretary.

(c) DHS has a decentralized system for processing requests, with each component handling requests for its records.

(d) Unofficial release of DHS information. The disclosure of exempt records, without authorization by the appropriate DHS official, is not an official release of information; accordingly, it is not a FOIA release. Such a release does not waive the authority of the Department of Homeland Security to assert FOIA exemptions to withhold the same records in response to a FOIA request. In addition, while the authority may exist to disclose records to individuals in their official capacity, the provisions of this part apply if the same individual seeks the records in a private or personal capacity.

#### § 5.2 Proactive disclosure of DHS records.

Records that are required by the FOIA to be made available for public inspection in an electronic format are accessible on DHS’s website, <http://www.dhs.gov/freedom-information-act-foia-and-privacy-act>. Each component is responsible for determining which of its records

are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each component shall ensure that posted records and indices are updated on an ongoing basis. Each component has a FOIA Public Liaison who can assist individuals in locating records particular to a component. A list of DHS's FOIA Public Liaisons is available at <http://www.dhs.gov/foia-contact-information> and in appendix I to this subpart. Requesters who do not have access to the internet may contact the Public Liaison for the component from which they seek records for assistance with publicly available records.

### § 5.3 Requirements for making requests.

(a) General information. (1) DHS has a decentralized system for responding to FOIA requests, with each component designating a FOIA office to process records from that component. All components have the capability to receive requests electronically, either through email or a web portal. To make a request for DHS records, a requester should write directly to the FOIA office of the component that maintains the records being sought. A request will receive the quickest possible response if it is addressed to the FOIA office of the component that maintains the records sought. DHS's FOIA Reference Guide contains or refers the reader to descriptions of the functions of each component and provides other information that is helpful in determining where to make a request. Each component's FOIA office and any additional requirements for submitting a request to a given component are listed in Appendix I of this subpart. These references can all be used by requesters to determine where to send their requests within DHS.

(2) A requester may also send his or her request to the Privacy Office,

U.S. Department of Homeland Security, 245 Murray Lane SW STOP-0655, or via the internet at <http://www.dhs.gov/dhs-foia-request-submission-form>, or via fax to (202) 343-4011. The Privacy Office will forward the request to the component(s) that it determines to be most likely to maintain the records that are sought.

(3) A requester who is making a request for records about him or herself must comply with the verification of identity provision set forth in subpart B of this part.

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

(b) Description of records sought. Requesters must describe the records sought in sufficient detail to enable DHS personnel to locate them with a reasonable amount of effort. A reasonable description contains sufficient information to permit an organized, non-random search for the record based on the component's filing arrangements and existing retrieval systems. To the extent possible, requesters should include specific information that may assist a component in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Requesters

should refer to Appendix I of this subpart for additional component-specific requirements. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the component's FOIA Officer or FOIA public liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request, a component determines that it does not reasonably describe the records sought, the component should inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the component's designated FOIA Officer, its FOIA Public Liaison, or a representative of the DHS Privacy Office, each of whom is available to assist the requester in reasonably describing the records sought.

(c) If a request does not adequately describe the records sought, DHS may at its discretion either administratively close the request or seek additional information from the requester. Requests for clarification or more information will be made in writing (either via U.S. mail or electronic mail whenever possible). Requesters may respond by U.S. Mail or by electronic mail regardless of the method used by DHS to transmit the request for additional information. In order to be considered timely, responses to requests for additional information must be postmarked or received by electronic mail within 30 working days of the postmark date or date of the electronic mail request for additional information or received by electronic mail by 11:59:59pm ET on the 30<sup>th</sup> working day. If the requester does not respond to a request for additional information within thirty (30) working days, the request may be administratively

closed at DHS's discretion. This administrative closure does not prejudice the requester's ability to submit a new request for further consideration with additional information.

§ 5.4 Responsibility for responding to requests.

(a) In general. Except in the instances described in paragraphs (c) and (d) of this section, the component that first receives a request for a record and maintains that record is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the component shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), shall not be considered responsive to a request.

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

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

(d) Consultations, coordination and referrals. When a component determines that it maintains responsive records that either originated with another component or agency, or which contains information provided by, or of substantial interest to, another component or agency, then it shall proceed in accordance with either paragraph (d)(1), (2), or (3) of this section, as appropriate:

(1) The component may respond to the request, after consulting with the component or the agency that originated or has a substantial interest in the records involved.

(2) The component may respond to the request after coordinating with the other components or agencies that originated the record. This may include situations where the standard referral procedure is not appropriate where disclosure of the identity of the component or agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement component responding to a request for records on a living third party locates records within its files originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if a component locates material within its files originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the component that received the request should coordinate with the originating component or agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the component that originally received the request.

(3) The component may refer the responsibility for responding to the request or portion of the request to the component or agency best able to determine whether to disclose the relevant records, or to the agency that created or initially acquired the record as long as that agency is subject to the FOIA. Ordinarily, the component or agency that created or initially

acquired the record will be presumed to be best able to make the disclosure determination. The referring component shall document the referral and maintain a copy of the records that it refers.

(e) Classified information. On receipt of any request involving classified information, the component shall determine whether information is currently and properly classified and take appropriate action to ensure compliance with 6 CFR part 7. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another component or agency under any applicable executive order concerning the classification of records, the receiving component shall refer the responsibility for responding to the request regarding that information to the component or agency that classified the information, or should consider the information for classification. Whenever a component's record contains information classified by another component or agency, the component shall coordinate with or refer the responsibility for responding to that portion of the request to the component or agency that classified the underlying information.

(f) Notice of referral. Whenever a component refers any part of the responsibility for responding to a request to another component or agency, it will notify the requester of the referral and inform the requester of the name of each component or agency to which the records were referred, unless disclosure of the identity of the component or agency would harm an interest protected by an applicable exemption, in which case the component should coordinate with the other component or agency, rather than refer the records.

(g) Timing of responses to consultations and referrals. All consultations and referrals received by DHS will be handled according to the date that the FOIA request initially was received by the first component or agency, not any later date.

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

(i) Electronic records and searches—(1) Significant interference. The FOIA allows components to not conduct a search for responsive documents if the search would cause significant interference with the operation of the component's automated information system.

(2) Business as usual approach. A "business as usual" approach exists when the component has the capability to process a FOIA request for electronic records without a significant expenditure of monetary or personnel resources. Components are not required to conduct a search that does not meet this business as usual criterion.

(i) Creating computer programs or purchasing additional hardware to extract email that has been archived for emergency retrieval usually are not considered business as usual if extensive monetary or personnel resources are needed to complete the project.

(ii) Creating a computer program that produces specific requested fields or records contained within a well-defined database structure usually is considered business as usual. The time to create this program is considered as programmer or operator search time for fee assessment purposes and the FOIA requester may be assessed fees in accordance with § 5.11(c)(1)(iii). However, creating a computer program to merge files with disparate data formats and extract specific elements from the resultant file is not considered business as usual, but a special service, for which additional fees may be imposed as specified in § 5.11.

Components are not required to perform special services and creation of a computer program

for a fee is up to the discretion of the component and is dependent on component resources and expertise.

(3) Data links. Components are not required to expend DHS funds to establish data links that provide real time or near-real-time data to a FOIA requester.

#### § 5.5 Timing of responses to requests.

(a) In general. Components ordinarily will respond to requests according to their order of receipt. Appendix I to this subpart contains the list of components that are designated to accept requests. In instances involving misdirected requests that are re-routed pursuant to § 5.4(c), the response time will commence on the date that the request is received by the proper component, but in any event not later than ten working days after the request is first received by any DHS component designated in appendix I of this subpart.

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

(c) Unusual circumstances. Whenever the statutory time limits for processing a request cannot be met because of “unusual circumstances,” as defined in the FOIA, and the component

extends the time limits on that basis, the component shall, before expiration of the twenty-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds ten working days, the component shall, as described by the FOIA, provide the requester with an opportunity to modify the request or agree to an alternative time period for processing. The component shall make available its designated FOIA Officer and its FOIA Public Liaison for this purpose. The component shall also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(d) Aggregating requests. For the purposes of satisfying unusual circumstances under the FOIA, components may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. Components will not aggregate multiple requests that involve unrelated matters.

(e) Expedited processing. (1) Requests and appeals will be processed on an expedited basis whenever the component determines that they involve:

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

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

(iii) The loss of substantial due process rights; or

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

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i), (ii), and (iii) of this section must be submitted to the component that maintains the records requested. When making a request for expedited processing of an administrative appeal, the request should be submitted to the DHS Office of General Counsel or the component Appeals Officer. Address information is available at the DHS website, <http://www.dhs.gov/freedom-information-act-foia>, or by contacting the component FOIA officers via the information listed in Appendix I. Requests for expedited processing that are based on paragraph (e)(1)(iv) of this section must be submitted to the Senior Director of FOIA Operations, the Privacy Office, U.S. Department of Homeland Security, 245 Murray Lane SW STOP-0655, Washington, DC 20598-0655. A component that receives a misdirected request for expedited processing under the standard set forth in paragraph (e)(1)(iv) of this section shall forward it immediately to the DHS Senior Director of FOIA Operations, the Privacy Office, for determination. The time period for making the determination on the request for expedited processing under paragraph (e)(1)(iv) of this section shall commence on the date that the Privacy Office receives the request, provided that it is routed within ten working days, but in no event shall the time period for making a determination on the request commence any later than the eleventh working day after the request is received by any component designated in appendix I of this subpart.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that he or she is a person who primarily engages in

information dissemination , though it need not be his or her sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public’s right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful to establishing the requirement that there be an “urgency to inform” the public on the topic. As a matter of administrative discretion, a component may waive the formal certification requirement.

(4) A component shall notify the requester within ten calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

#### § 5.6 Responses to requests.

(a) In general. Components should, to the extent practicable, communicate with requesters having access to the internet using electronic means, such as email or web portal.

(b) Acknowledgments of requests. A component shall acknowledge the request and assign it an individualized tracking number if it will take longer than ten working days to process. Components shall include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) Grants of requests. Ordinarily, a component shall have twenty (20) working days from when a request is received to determine whether to grant or deny the request unless there are unusual or exceptional circumstances. Once a component makes a determination to grant a

request in full or in part, it shall notify the requester in writing. The component also shall inform the requester of any fees charged under § 5.11 and shall disclose the requested records to the requester promptly upon payment of any applicable fees. The component shall inform the requester of the availability of its FOIA Public Liaison to offer assistance.

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

(e) Content of denial. The denial shall be signed by the head of the component, or designee, and shall include:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the component in denying the request;
- (3) An estimate of the volume of any records or information withheld, for example, by providing the number of pages or some other reasonable form of estimation. This estimation is not required if the volume is otherwise indicated by deletions marked on records that are

disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under § 5.8(a), and a description of the requirements set forth therein.

(5) A statement notifying the requester of the assistance available from the agency's FOIA Public Liaison and the dispute resolution services offered by OGIS.

(f) Markings on released documents. Markings on released documents must be clearly visible to the requester. Records disclosed in part shall be marked to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also shall be indicated on the record, if technically feasible.

(g) Use of record exclusions. (1) In the event that a component identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the head of the FOIA office of that component must confer with Department of Justice's Office of Information Policy (OIP) to obtain approval to apply the exclusion.

(2) Any component invoking an exclusion shall maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

#### § 5.7 Confidential commercial information.

(a) Definitions—(1) Confidential commercial information means commercial or financial information obtained by DHS from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter means any person or entity from whom DHS obtains confidential commercial information, directly or indirectly.

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

(c) When notice to submitters is required. (1) A component shall promptly provide written notice to a submitter whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, the component determines that it may be required to disclose the records, provided:

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

(ii) The component has a reason to believe that the requested information may be protected from disclosure under Exemption 4.

(2) The notice shall either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish it.

(d) Exceptions to submitter notice requirements. The notice requirements of paragraphs (c) and (g) of this section shall not apply if:

(1) The component determines that the information is exempt under the FOIA;

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

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

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

(e) Opportunity to object to disclosure. (1) A component will specify a reasonable time period, but no fewer than 10 working days, within which the submitter must respond to the notice referenced above. If a submitter has any objections to disclosure, it should provide the component a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret, or commercial or financial information that is privileged or confidential.

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

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

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

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

(2) A description of the information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice, but no fewer than 10 working days.

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

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

(j) Scope. This section shall not apply to any confidential commercial information provided to CBP by a business submitter. Section 5.12 applies to such information. Section 5.12 also defines "confidential commercial information" as used in this paragraph.

#### § 5.8 Administrative appeals.

(a) Requirements for filing an appeal. (1) A requester may appeal adverse determinations denying his or her request or any part of the request to the appropriate Appeals Officer. A requester may also appeal if he or she questions the adequacy of the component's search for responsive records, or believes the component either misinterpreted the request or did not address all aspects of the request (i.e., it issued an incomplete response), or if the requester believes there is a procedural deficiency (e.g., fees were improperly calculated). For the address of the appropriate component Appeals Officer, contact the applicable component FOIA liaison using the information in appendix I to this subpart, visit [www.dhs.gov/foia](http://www.dhs.gov/foia), or call 1-866-431-0486. An appeal must be in writing, and to be considered timely it must be postmarked or, in the case of electronic submissions, transmitted to the Appeals Officer within 90 working days after the date of the component's response. An electronically filed appeal will be considered timely if transmitted to the Appeals Officer by 11:59:59 pm ET or EDT on the 90<sup>th</sup> working day. The appeal should clearly identify the component determination (including the assigned request number if the requester knows it) that is being appealed and should contain the reasons the requester believes the determination was erroneous. To facilitate handling, the requester should mark both the letter and the envelope, or the transmittal line in the case of electronic transmissions "Freedom of Information Act Appeal."

(2) An adverse determination by the component appeals officer will be the final action of DHS.

(b) Adjudication of appeals. (1) The DHS Office of the General Counsel or its designee (e.g., component Appeals Officers) is the authorized appeals authority for DHS;

(2) On receipt of any appeal involving classified information, the Appeals Officer shall consult with the Chief Security Officer, and take appropriate action to ensure compliance with 6 CFR part 7;

(3) If the appeal becomes the subject of a lawsuit, the Appeals Officer is not required to act further on the appeal.

(c) Appeal decisions. The decision on the appeal will be made in writing. A decision that upholds a component's determination will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services, of the National Archives and Records Administration, as a non-exclusive alternative to litigation. Should the requester elect to mediate any dispute related to the FOIA request with the Office of Government Information Services, DHS and its components will participate in the mediation process in good faith. If the adverse decision is reversed or modified on appeal, in whole or in part, the requester will be notified in a written decision and the request will be thereafter be further processed in accordance with that appeal decision.

(d) Time limit for issuing appeal decision. The statutory time limit for responding to appeals is generally 20 working days after receipt. However, the Appeals Officer may extend the time limit for responding to an appeal provided the circumstances set forth in 5 U.S.C. 552(a)(6)(B)(i) are met.

(e) Appeal necessary before seeking court review. If a requester wishes to seek court review of a component's adverse determination on a matter appealable under paragraph (a)(1) of

this section, the requester must generally first appeal it under this subpart. However, a requester is not required to first file an appeal of an adverse determination of a request for expedited processing prior to seeking court review.

§ 5.9 Preservation of records.

Each component shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 and/or 14 of the National Archives and Records Administration. Records will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 5.10 FOIA requests for information contained in a Privacy Act system of records.

(a) Information subject to Privacy Act. (1) If a requester submits a FOIA request for information about him or herself that is contained in a Privacy Act system of records applicable to the requester (i.e., the information contained in the system of records is retrieved by the component using the requester's name or other personal identifier, and the information pertains to an individual covered by the Privacy Act) the request will be processed under both the FOIA and the Privacy Act.

(2) If the information the requester is seeking is not subject to the Privacy Act (e.g., the information is filed under another subject, such as an organization, activity, event, or an investigation not retrievable by the requester's name or personal identifier), the request, if otherwise properly made, will be treated only as a FOIA request. In addition, if the information is covered by the Privacy Act and the requester does not provide proper verification of the

requester's identity, the request, if otherwise properly made, will be processed only under the FOIA.

(b) When both Privacy Act and FOIA exemptions apply. Only if both a Privacy Act exemption and a FOIA exemption apply can DHS withhold information from a requester if the information sought by the requester is about him or herself and is contained in a Privacy Act system of records applicable to the requester.

(c) Conditions for release of Privacy Act information to third parties in response to a FOIA request. If a requester submits a FOIA request for Privacy Act information about another individual, the information will not be disclosed without that person's prior written consent that provides the same verification information that the person would have been required to submit for information about him or herself, unless—

(1) The information is required to be released under the FOIA, as provided by 5 U.S.C. 552a (b)(2); or

(2) In most circumstances, if the individual is deceased.

(d) Privacy Act requirements. See DHS's Privacy Act regulations in 5 CFR part 5, subpart B for additional information regarding the requirements of the Privacy Act.

#### § 5.11 Fees.

(a) In general. Components shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. Components will ordinarily use the most efficient and least expensive method for processing requested records. In order to resolve any fee issues that arise under this section, a component may contact a requester for additional information. A component ordinarily will collect all applicable fees

before sending copies of records to a requester. If you make a FOIA request, it shall be considered a firm commitment to pay all applicable fees charged under § 5.11, up to \$25.00, unless you seek a waiver of fees. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) Definitions. Generally, “requester category” means one of the three categories in which agencies place requesters for the purpose of determining whether a requester will be charged fees for search, review and duplication; categories include commercial requesters, noncommercial scientific or educational institutions or news media requesters, and all other requesters. The term “fee waiver” means that processing fees will be waived, or reduced, if a requester can demonstrate that certain statutory standards are satisfied including that the information is in the public interest and is not requested for a primarily commercial interest.

For purposes of this section:

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

(2) Direct costs are those expenses that an agency expends in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (i.e., the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and

scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

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

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

Example 1. A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution if the request adequately describes how the requested information would further a specific research goal of the educational institution.

Example 2. A request from the same professor of geology seeking immigration information from the U.S. Immigration and Customs Enforcement in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

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

Note: These examples are provided for guidance purposes only. Each individual request will be evaluated under the particular facts, circumstances, and information provided by the requester.

(5) Noncommercial scientific institution is an institution that is not operated on a “commercial” basis, as defined in paragraph (b)(1) of this section, and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and not for a commercial use.

(6) Representative of the news media is any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including but not limited to, news organizations that disseminate solely on the Internet. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use. In contrast, data brokers or others who merely compile and market government information for direct economic return shall not be presumed to be news media entities. “Freelance” journalists must demonstrate a solid basis for expecting publication through a news media entity in order to be considered as working for a news media entity. A publication

contract would provide the clearest evidence that publication is expected; however, components shall also consider a requester's past publication record in making this determination.

(7) Review is the page-by-page, line-by-line examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 5.7 or § 5.12, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

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

(c) Charging fees. In responding to FOIA requests, components shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, unless otherwise stated in § 5.11, components should not add any additional costs to those charges.

(1) Search. (i) Search fees shall be charged for all requests subject to the restrictions of paragraph (d) of this section. Components may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be as follows: managerial -- \$10.25; professional -- \$7.00; and clerical/administrative -- \$4.00.

(iii) Requesters will be charged the direct costs associated with conducting any search that requires the creation of a new computer program, as referenced in section 5.4, to locate the requested records. Requesters shall be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

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

(2) Duplication. Duplication fees will be charged to all requesters, subject to the restrictions of paragraph (d) of this section. A component shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the component in the form or format requested. Where photocopies are supplied, the component will provide one copy per request at a cost of ten cents per page. For copies of records produced on tapes, disks, or other media, components will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply

with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication, components will charge the direct costs.

(3) Review. Review fees will be charged to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, i.e., the review conducted by a component to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, when the appellate authority determines that a particular exemption no longer applies, any costs associated with a component's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) Restrictions on charging fees. (1) No search fees will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media, unless the records are sought for a commercial use.

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

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

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

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

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

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

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

(ii) The first two hours of search.

(5) When, after first deducting the 100 free pages (or its cost equivalent) and the first two hours of search, a total fee calculated under paragraph (c) of this section is \$14.00 or less for any request, no fee will be charged.

(e) Notice of anticipated fees in excess of \$25.00. (1) When a component determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the component shall notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review and/or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the component shall advise the requester accordingly. If the requester is a noncommercial use requester, the notice will specify that the requester is entitled to his or her statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided. Two hours of search time will be provided free of charge to non-commercial requesters regardless of whether they agree to pay estimated fees.

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

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the component estimates that the total fee will exceed that amount, the component will toll

the processing of the request while it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The component shall inquire whether the requester wishes to revise the amount of fees he or she is willing to pay and/or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

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

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

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

(h) Aggregating requests. When a component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the component may aggregate those requests and

charge accordingly. Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, components will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

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

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

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

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

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

(k) Requirements for waiver or reduction of fees. (1) Records responsive to a request shall be furnished without charge or at a reduced rate below that established under paragraph (c) of this section, where a component determines, on a case-by-case basis, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

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

(2) In deciding whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government, components will consider the following factors:

(i) The subject of the request must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

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

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent. However, components shall not make value judgments about whether the information at issue is "important" enough to be made public.

(3) To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, components will consider the following factors:

(i) Components shall identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure. Components ordinarily shall presume that where a

news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

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

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

(6) Summary of fees. The following table summarizes the chargeable fees (excluding direct fees identified in § 5.11) for each requester category.

Category	Search Fees	Review Fees	Duplication Fees
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Commercial-use.....	Yes.....	Yes.....	Yes
Educational or Non- Commercial Scientific Institution.....	No.....	No.....	Yes (100 pages free).
News Media.....	No.....	No.....	Yes (100 pages free)
Other requesters.....	Yes (2 hours free)...	No.....	Yes (100 pages free).

§ 5.12 Confidential commercial information; CBP procedures.

(a) In general. For purposes of this section, “commercial information” is defined as trade secret, commercial, or financial information obtained from a person. Commercial information provided to CBP by a business submitter and that CBP determines is privileged or confidential commercial or financial information will be treated as privileged or confidential and will not be disclosed pursuant to a Freedom of Information Act request or otherwise made known in any manner except as provided in this section.

(b) Notice to business submitters of FOIA requests for disclosure. Except as provided in paragraph (b)(2) of this section, CBP will provide business submitters with prompt written notice of receipt of FOIA requests or appeals that encompass their commercial information. The written notice will describe either the exact nature of the commercial information requested, or enclose copies of the records or those portions of the records that contain the commercial information. The written notice also will advise the business submitter of its right to file a disclosure objection statement as provided under paragraph (c)(1) of this section. CBP will provide notice to business submitters of FOIA requests for the business submitter’s

commercial information for a period of not more than 10 years after the date the business submitter provides CBP with the information, unless the business submitter requests, and provides acceptable justification for, a specific notice period of greater duration.

(1) When notice is required. CBP will provide business submitters with notice of receipt of a FOIA request or appeal whenever:

(i) The business submitter has in good faith designated the information as commercially- or financially-sensitive information. The business submitter's claim of confidentiality should be supported by a statement by an authorized representative of the business entity providing specific justification that the information in question is considered confidential commercial or financial information and that the information has not been disclosed to the public; or

(ii) CBP has reason to believe that disclosure of the commercial information could reasonably be expected to cause substantial competitive harm.

(2) When notice is not required. The notice requirements of this section will not apply if:

(i) CBP determines that the commercial information will not be disclosed;

(ii) The commercial information has been lawfully published or otherwise made available to the public; or

(iii) Disclosure of the information is required by law (other than 5 U.S.C. 552).

(c) Procedure when notice given. (1) Opportunity for business submitter to object to disclosure. A business submitter receiving written notice from CBP of receipt of a FOIA request or appeal encompassing its commercial information may object to any disclosure of the commercial information by providing CBP with a detailed statement of reasons within 10 days

of the date of the notice (exclusive of Saturdays, Sundays, and legal public holidays). The statement should specify all the grounds for withholding any of the commercial information under any exemption of the FOIA and, in the case of Exemption 4, should demonstrate why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. The disclosure objection information provided by a person pursuant to this paragraph may be subject to disclosure under the FOIA.

(2) Notice to FOIA requester. When notice is given to a business submitter under paragraph (b)(1) of this section, notice will also be given to the FOIA requester that the business submitter has been given an opportunity to object to any disclosure of the requested commercial information.

(d) Notice of intent to disclose. CBP will consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose commercial information. Whenever CBP decides to disclose the requested commercial information over the objection of the business submitter, CBP will provide written notice to the business submitter of CBP's intent to disclose, which will include:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

(2) A description of the commercial information to be disclosed; and

(3) A specified disclosure date which will not be less than 10 days (exclusive of Saturdays, Sundays, and legal public holidays) after the notice of intent to disclose the requested information has been issued to the business submitter. Except as otherwise prohibited by law,

CBP will also provide a copy of the notice of intent to disclose to the FOIA requester at the same time.

(e) Notice of FOIA lawsuit. Whenever a FOIA requester brings suit seeking to compel the disclosure of commercial information covered by paragraph (b)(1) of this section, CBP will promptly notify the business submitter in writing.

§ 5.13 Other rights and services.

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

**Appendix I to Subpart A -- FOIA Contact Information**

Department of Homeland Security Chief FOIA Officer

Chief Privacy Officer/Chief FOIA Officer  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 20528-0655

Department of Homeland Security Deputy Chief FOIA Officer

Deputy Chief FOIA Officer  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 20528-0655

Senior Director, FOIA Operations

Sr. Director, FOIA Operations  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 20528-0655  
Phone: 202-343-1743 or 866-431-0486  
Fax: 202-343-4011  
E-mail: foia@hq.dhs.gov

Director, FOIA Production and Quality Assurance

Public Liaison  
FOIA Production and Quality Assurance  
The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 20528-0655  
Phone: 202-343-1743 or 866-431-0486  
Fax: 202-343-4011  
E-mail: foia@hq.dhs.gov

U. S. Customs & Border Protection (CBP)

FOIA Officer/Public Liaison  
90 K Street NE, 9th Floor  
Washington, D.C. 20229-1181  
Phone: 202-325-0150  
Fax: 202-325-0230

Office of Civil Rights and Civil Liberties (CRCL)

FOIA Officer/Public Liaison  
U.S. Department of Homeland Security  
Washington, D.C. 20528  
Phone: 202-357-1218  
E-mail: CRCL@dhs.gov

Federal Emergency Management Agency (FEMA)

FOIA Officer/Public Liaison

500 C Street, S.W., Room 7NE  
Washington, D.C. 20472  
Phone: 202-646-3323  
E-mail: fema-foia@dhs.gov

Federal Law Enforcement Training Center (FLETC)

FOIA Officer/Public Liaison  
Building #681, Suite 187B  
Glynco, GA 31524  
Phone: 912-267-3103  
Fax: 912-267-3113  
E-mail: fletc-foia@dhs.gov

National Protection and Programs Directorate (NPPD)

FOIA Officer/Public Liaison  
U.S. Department of Homeland Security  
Washington, D.C. 20528  
Phone: 703-235-2211  
Fax: 703-235-2052  
E-mail: NPPD.FOIA@dhs.gov

Office of Biometric Identity Management (OBIM) FOIA Officer  
Department of Homeland Security  
Washington, D.C. 20598-0628  
Phone: 202-298-5454  
Fax: 202-298-5445  
E-Mail: OBIM-FOIA@ice.dhs.gov

Office of Intelligence & Analysis (I&A)

FOIA Officer/Public Liaison  
U.S. Department of Homeland Security  
Washington, D.C. 20528  
Phone: 202-447-4883  
Fax: 202-612-1936  
E-mail: I&AFOIA@hq.dhs.gov

Office of Inspector General (OIG)

FOIA Public Liaison  
DHS-OIG Counsel  
STOP 0305  
245 Murray Lane, SW

Washington, D.C. 20528-0305  
Phone: 202-254-4001  
Fax: 202-254-4398  
E-mail: FOIA.OIG@oig.dhs.gov

Office of Operations Coordination and Planning (OPS)  
FOIA Officer/Public Liaison  
U.S. Department of Homeland Security  
Washington, D.C. 20528  
Phone: 202-447-4156  
Fax: 202-282-9811  
E-mail: FOIAOPS@DHS.GOV

Science & Technology Directorate (S&T)  
FOIA Officer/Public Liaison  
U.S. Department of Homeland Security  
Washington, D.C. 20528

Phone: 202-254-6342  
Fax: 202-254-6739  
E-mail: stfoia@hq.dhs.gov

Transportation Security Administration (TSA)  
FOIA Officer/Public Liaison  
Freedom of Information Act Branch  
601 S. 12th Street  
11th Floor, East Tower, TSA-20  
Arlington, VA 20598-6020  
Phone: 1-866-FOIA-TSA or 571-227-2300  
Fax: 571-227-1406  
E-mail: foia.tsa@dhs.gov

U.S. Citizenship & Immigration Services (USCIS)  
FOIA Officer/Public Liaison  
National Records Center, FOIA/PA Office  
P. O. Box 648010  
Lee's Summit, Mo. 64064-8010  
Phone: 1-800-375-5283 (USCIS National Customer Service Unit)  
Fax: 816-350-5785  
E-mail: uscis.foia@uscis.dhs.gov

United States Coast Guard (USCG)

Commandant (CG-611)  
2100 2nd St., S.W.

Attn: FOIA Officer/Public Liaison  
Washington, D.C. 20593-0001  
FOIA Requester Service Center Contact: Amanda Ackerson  
Phone: 202-475-3522  
Fax: 202-475-3927  
E-mail: efoia@uscg.mil

United States Immigration & Customs Enforcement (ICE)

Freedom of Information Act Office  
FOIA Officer/Public Liaison  
500 12th Street, SW, Stop 5009  
Washington, D.C. 20536-5009

FOIA Requester Service Center Contact  
Phone: 866-633-1182  
Fax: 202-732-4265  
E-mail: ice-foia@dhs.gov

United States Secret Service (USSS)

Freedom of Information and Privacy Acts Branch  
FOIA Officer/Public Liaison  
245 Murray Drive, Building 410  
Washington, D.C. 20223  
Phone: 202-406-6370  
Fax: 202-406-5586  
E-mail: FOIA@uss.s.dhs.gov

Please direct all requests for information from the Office of the Secretary, Citizenship and Immigration Services Ombudsman, Domestic Nuclear Detection Office, Office of the Executive Secretary, Office of Intergovernmental Affairs, Management Directorate, Office of Policy, Office of the General Counsel, Office of Health Affairs, Office of Legislative Affairs, Office of Public Affairs and the Privacy Office, to the DHS Privacy Office at:

The Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW  
STOP-0655  
Washington, D.C. 20528-0655  
Phone: 202-343-1743 or 866-431-0486  
Fax: 202-343-4011  
E-mail: foia@hq.dhs.gov

**Appendix B to Part 5 –[Removed and Reserved]**

3. Remove and reserve appendix B to part 5.

**TITLE 19 – Customs Duties**

**PART 103 – AVAILABILITY OF INFORMATION**

4. The authority citation for part 103 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301, 552, 552a; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

Section 103.31 also issued under 19 U.S.C. 1431;

Section 103.31a also issued under 19 U.S.C. 2071 note and 6 U.S.C. 943;

Section 103.33 also issued under 19 U.S.C. 1628;

Section 103.34 also issued under 18 U.S.C. 1905.

**§ 103.35—[Removed]**

5. Remove § 103.35.

**TITLE 44 – Emergency Management and Assistance**

**PART 5 – PRODUCTION OR DISCLOSURE OF INFORMATION**

6. The authority citation for part 5 is revised to read as follows:

Authority: Pub. L. 107-296, 116 Stat. 2135; 5 U.S.C. 301.

**Subparts A through E—[Removed and Reserved]**

7. Remove and reserve subparts A through E of part 5.

8. Revise §5.86 to read as follows:

§ 5.86 Records involved in litigation or other judicial process.

Subpoenas duces tecum issued pursuant to litigation or any other adjudicatory proceeding in which the United States is a party shall be referred to the Chief Counsel.

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Jeh Charles Johnson,  
Secretary

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