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**[6450-01-P]**

**DEPARTMENT OF ENERGY**

**10 CFR Part 1004**

**RIN 1901-AB41**

**Revision of the Department of Energy's Freedom of Information Act (FOIA) Regulations**

**AGENCY:** FOIA Program, Office of Public Information, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Energy (DOE) issues a final rule amending its regulations that prescribe the procedures by which the public may request records pursuant to the Freedom of Information Act (FOIA) from DOE offices, excluding the Federal Energy Regulatory Commission (FERC). This final rule makes changes to DOE's regulations to reflect statutory amendments made to the FOIA by the FOIA Improvement Act of 2016, and to make minor grammatical and other editorial changes throughout the regulations. The editorial changes clarify various defined terms, update the internal procedures for processing records requested under FOIA, and reflect minor changes to DOE's internal organizational structure.

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

**FOR FURTHER INFORMATION CONTACT:**

Mr. Alexander Morris, FOIA Officer, U.S. Department of Energy, Office of Public Information, Mail Stop MA-46, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 586-5955. E-mail: Alexander.Morris@hq.doe.gov.

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC-33, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 586-7796. E-mail: Elizabeth.Kohl@hq.doe.gov.

**SUPPLEMENTARY INFORMATION:** 10 CFR part 1004 contains DOE’s regulations that implement the FOIA, 5 U.S.C. 552. The regulations provide information concerning the procedures by which the public may request records from DOE offices, and the policies and procedures by which DOE provides such records to members of the public. DOE previously amended its regulations in 1988 (53 FR 15660, May 3, 1988) and 2014 (79 FR 22855, Apr. 25, 2014). DOE is now updating its regulations to implement the requirements of the FOIA Improvement Act of 2016, Public Law 114-185 (June 30, 2016) (Act). The Act requires that Federal agencies review and update their FOIA regulations in accordance with its provisions. The Act addresses a range of procedural issues, including a requirement that agencies make available for public inspection in an electronic format records that have become or are likely to become the subject of subsequent requests for substantially the same records, or records that have been requested three or more times. The Act also requires that agencies provide a minimum of 90 days for requesters to file an administrative appeal following an adverse determination, and that they provide dispute resolution services at various times throughout the FOIA process. The Act also codifies the U.S. Department of Justice’s “foreseeable harm” standard, specifying that an agency shall withhold information only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in 5 U.S.C. 552(b) or if disclosure is prohibited by law. This provision also requires that agencies consider whether partial disclosure is possible if full disclosure is not possible, and that agencies take reasonable steps to segregate and release nonexempt information. The Act also amends Exemption 5 to specify that the deliberative process privilege does not apply to records created 25 years or more before the date of the request; creates a new “FOIA Council” charged with, among other things,

developing recommendations for increased agency compliance and efficiency; and adds two new elements to agency Annual FOIA Reports (i.e., the number of times an agency has denied a request for records under 5 U.S.C. 552(c) and the number of records made available for public inspection under 5 U.S.C. 552(a)(2)).

DOE also makes additional revisions to update, clarify, and streamline the language in several procedural provisions, as described in Section I.

#### **I. Section by Section Analysis.**

In the paragraphs that follow, DOE describes the changes to each section of 10 CFR part 1004 that it is promulgating in this final rule.

In §1004.1, DOE adds a citation to the FOIA Improvement Act of 2016, which was enacted on June 30, 2016. The citation is to Public Law 114-185, 130 Stat. 538.

In §1004.2(b), DOE clarifies the definition of “Authorizing or Denying Official”; clarifies that term in reference to DOE’s National Nuclear Security Administration (NNSA); and corrects several typographical errors.

In §1004.2(h)(1), DOE updates the address of the Bonneville Power Administration.

In §1004.2(h)(5), DOE updates the address of the Golden Field Office.

In §1004.2(h)(6), DOE updates its Headquarters address.

In §1004.2(h)(8), DOE updates the address of the National Nuclear Security Administration.

In §1004.2(h)(9), DOE updates the address of the National Energy Technology Laboratory.

In §1004.2(h)(13), DOE updates the address of the Office of Scientific and Technical Information.

In §1004.2(i), DOE revises the reference to the DOE Organization Act, Public Law 95-91, and clarifies the definition of “General Counsel” in reference to the NNSA General Counsel, as defined by the National Nuclear Security Administration Act, Public Law 106-65.

In §1004.2(m), DOE updates the definition of “Representative of the news media” to mirror the term as defined in the FOIA, 5 U.S.C. 552(a)(4)(A)(ii)(III).

In §1004.2(n), DOE corrects a typographical error.

In §1004.2(p), DOE corrects typographical errors.

In §1004.3, DOE revises the language to conform to the requirements of the FOIA Improvement Act of 2016, which amended 5 U.S.C. 552(a)(2) to require that agencies maintain, for public inspection in an electronic format, the materials required by FOIA to be made available for public inspection and copying. The Act also requires that agencies make available for public inspection in an electronic format records that have become or are likely to become the subject of frequent requests for substantially the same records or that have been requested three or more times. DOE will implement this section consistent with FOIA, as amended by the Act.

DOE deletes paragraphs (b) through (d) of §1004.3 and renumbers §1004.3(e) as §1004.3(b). Paragraphs (b) and (c) pertained to reading rooms at DOE field offices, and paragraph (d) was reserved.

In renumbered §1004.3(b), DOE revises the reference to 5 U.S.C. 552(b)(2) by deleting “(2)” to make this section consistent with the Supreme Court decision in *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259 (2011), wherein the Court clarified that FOIA Exemption 2, 5 U.S.C. 552(b)(2), prevents disclosure only of material that relates solely to the internal personnel rules and practices of an agency. DOE’s revision is also

consistent with the intent of FOIA, which promotes a policy of disclosure unless disclosure is prohibited by law or by any of the enumerated exemptions in 5 U.S.C. 552(b), not solely the exemption found at §552(b)(2).

In renumbered §1004.3(b)(2), DOE revises references to paragraphs §1004.3(e)(1) and (e)(4) to refer to renumbered paragraphs §1004.3(b)(1) and (b)(4), respectively.

In renumbered §1004.3(b)(4), DOE revises the reference to paragraph §1004.3(e)(2) to refer to renumbered paragraph §1004.3(b)(2).

In §1004.4(a), DOE revises the language to conform to the requirements of the FOIA Improvement Act of 2016, which requires that agencies maintain, for public inspection in an electronic format, the materials required by FOIA to be made available for public inspection and copying. 5 U.S.C. 552(a)(2). DOE further revises §1004.4(a) by clarifying that requests can be submitted via facsimile or electronically on an appropriate agency website. DOE also corrects a typographical error.

In §1004.4(c)(2), DOE corrects a typographical error.

In §1004.5(b), DOE revises the procedure for processing requests for records to conform to the requirements of the FOIA Improvement Act of 2016, which requires that a written response to the requester shall notify the requester of the right to seek dispute resolution services from the DOE FOIA Public Liaison or the Office of Government Information Services. 5 U.S.C. 552(a)(6)(A)(i).

In §1004.5(c), DOE corrects grammatical errors in the procedure for processing requests for records in the custody of one or more Authorizing Officials. No change to current practice is intended.

In §1004.5(d), DOE clarifies the definition of “days” with respect to the time limit for processing requests, to eliminate any confusion with existing §1004.12 on computation of time. No change in the time limit is intended. DOE also amends the reference to when a request is “received” for purposes of the time limits prescribed in §1004.4(a).

In §1004.5(d)(iii), DOE clarifies the extension of time that can be granted before a decision on a request can be reached, consistent with existing §1004.12. No change in the length of an extension is intended. DOE also revises this section to conform to the requirements of the FOIA Improvement Act of 2016, which provides that in unusual circumstances, the agency shall notify the requester of the right to seek dispute resolution services from the DOE FOIA Public Liaison or the Office of Government Information Services. 5 U.S.C. 552(a)(6)(B)(i).

In §1004.5(d)(4), DOE corrects a typographical error.

In §1004.5(d)(7), DOE extends the time period during which a requester can appeal a denial of expedited processing to 90 days, as required by the FOIA Improvement Act of 2016, which prescribes the time period in which adverse determinations may be appealed. 5 U.S.C. 552(a)(6)(A)(i)(III)(aa). DOE also corrects a typographical error.

In §1004.7(b), DOE corrects a typographical error.

In §1004.7(b)(4), DOE extends the period during which requesters may challenge the adequacy of search to 90 days, as required by the FOIA Improvement Act of 2016. 5 U.S.C. 552(a)(6)(A)(i)(III)(aa).

In §1004.7(b)(5), DOE extends the period during which requesters may appeal a determination to deny records to 90 days, as required by the FOIA Improvement Act of 2016. 5 U.S.C. 552(a)(6)(A)(i)(III)(aa).

In §1004.8(a), DOE revises the time limit for an appeal of an initial denial of a request for records to 90 days, as required by the FOIA Improvement Act of 2016. 5 U.S.C. 552(a)(6)(A)(i)(III)(aa). DOE also corrects typographical errors in this section.

In §1004.8(b), DOE revises the methods by which an appeal may be delivered to the Office of Hearings and Appeals and corrects typographical errors.

In §1004.8(c), DOE corrects typographical errors.

In §1004.8(d), DOE clarifies the definition of “days” with respect to the Appeal Authority’s time limit for acting upon an appeal, consistent with existing §1004.12. No change in the time limit is intended.

In §1004.8(d)(2), DOE clarifies the means by which DOE notifies requesters of an extension of the time to make an appeal decision.

In §1004.9(a), DOE updates the reference to the Government Printing Office to the Government Publishing Office. DOE also corrects a grammatical error.

In §1004.9(a)(2), DOE revises the language regarding computer searches for records and removes the reference to the central processing unit (CPU), consistent with current practice.

In §1004.9(a)(6)(i), DOE clarifies the definition of “search time” and clarifies how fees for search time are calculated, consistent with current practices.

DOE adds paragraphs (a)(6)(iii) through (iv)(cc) in §1004.9 consistent with the FOIA Improvement Act of 2016. 5 U.S.C. 552(a)(4)(A)(vii). The amendments in the Act enumerate exceptions to DOE’s ability to assess search fees for certain categories of requesters when DOE has not complied with the time limits described in §1004.5(d). The Act also specifies that DOE may assess search fees when it has determined that unusual circumstances apply; more than 5,000 pages are necessary to respond to the request; DOE

has provided the requester with a timely written notice; and DOE has made no fewer than three good-faith attempts to contact the requester to discuss how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

In §1004.9(a)(8)(i), DOE corrects typographical errors.

In §1004.9(a)(8)(ii), DOE corrects typographical errors.

In §1004.9(b), DOE corrects a typographical error.

In §1004.9(b)(1), DOE corrects a typographical error.

In §1004.9(b)(5), DOE clarifies when it will begin assessing interest charges on the amount billed to requesters who fail to pay fees. This change is consistent with existing §1004.12, and no change in the administrative time limits is intended.

In §1004.9(b)(6), DOE clarifies that it is not required to assess charges for search time even if the search fails to identify responsive records or if the records located are exempt from disclosure.

In §1004.9(b)(8)(ii), DOE clarifies the definition of “days” for purposes of determining when a requester has failed to pay a fee in a timely fashion for purposes of exemption from making an advance payment, by deleting the word “working” as superfluous. This section also clarifies the definition of “days” for purposes of administrative time limits for certain actions when DOE receives advance fee payments. This change is consistent with existing §1004.12, and no change in the administrative time limits is intended.

In §1004.10(b)(5), DOE revises the definition of exemption (b)(5) to conform to the requirements of the FOIA Improvement Act of 2016, which states that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested. 5 U.S.C. 552(b)(5).

In §1004.10(c), DOE revises its obligations to reasonably segregate nonexempt portions of records as required by the FOIA Improvement Act of 2016, which states that an agency shall withhold information under 5 U.S.C. 552 only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b) of 5 U.S.C. 552, or disclosure is prohibited by law. 5 U.S.C. 552(a)(8)(A)-(B). The section is also revised to reflect the requirement in the Act that agencies consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible and take reasonable steps necessary to segregate and release nonexempt information.

In §1004.11(g), DOE clarifies the definition of “days” for purposes of the time limit for informing submitters of DOE’s intended discretionary release prior to public disclosure of the information to a requester. This change is consistent with the existing §1004.11(c), (d), and (e), and no change in the administrative time limits is intended.

## **II. Procedural Issues and Regulatory Review**

### A. Review under the Administrative Procedure Act

DOE has determined that notice and comment is not required pursuant to 5 U.S.C. 553(b)(B), which requires notice and an opportunity for comment unless an agency finds good cause that notice and public procedures are impracticable, unnecessary or contrary to the public interest. In this rulemaking, DOE is implementing changes required by the FOIA Improvement Act of 2016, Public Law 114-185 (June 30, 2016). DOE is exercising no discretion in implementing these statutory changes. DOE is also correcting minor typographical errors and making other minor changes to, for example, reflect the current DOE organizational structure. As a result, seeking public comment on these changes is unnecessary. For these same reasons DOE finds good cause to waive the 30-day delay in effective date provided for in 5 U.S.C. 553(d).

### B. Review Under Executive Orders 12866 and 13563

This rule has been determined to be not significant for purposes of Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (Oct. 4, 1993). As a result, the Office of Information and Regulatory Affairs within the Office of Management and Budget did not review this rule.

### C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a final regulatory flexibility analysis (FRFA) for any final rule where the agency was first required by law to publish a proposed rule for public comment. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to

ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (<http://energy.gov/gc/office-general-counsel>). Because there was no requirement to first publish this regulation for comment, as discussed in section II.A., no analysis is required for purposes of the Regulatory Flexibility Act.

#### D. Review Under the Paperwork Reduction Act

This rule does not contain a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### E. Review Under the National Environmental Policy Act of 1969

DOE has reviewed this final rule under 10 CFR part 1021, DOE's National Environmental Policy Act Implementing Procedures. DOE has determined that the final rule fits within categorical exclusion A.5 listed in Appendix A to 10 CFR part 1021, Subpart D: Rulemaking that interprets or amends an existing rule or regulation and that

does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required. DOE's CX determination for this rule is available at <http://energy.gov/nepa/categorical-exclusion-cx-determinations-cx>.

#### F. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 10, 1999) imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule, which would update DOE's FOIA regulations for consistency with the FOIA Improvement Act of 2016, and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, no further action is required by Executive Order 13132.

### G. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

### H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104-4, sec. 201 (codified at 2

U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE’s policy statement is also available at [http://energy.gov/sites/prod/files/gcprod/documents/umra\\_97.pdf](http://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf).

DOE has concluded that this final rule will not result in the expenditure by States, tribal, or local governments, in the aggregate, or by the private sector, of \$100 million in any one year. As a result, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

#### I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any

impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### J. Review Under Executive Order 12630

Pursuant to Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” 53 FR 8859 (March 18, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

#### K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

#### L. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and

that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth amended procedures by which the public may request records from DOE offices under the FOIA, and the policies and procedures by which DOE will provide such records to members of the public, is not a significant energy action because the final rule is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this final rule.

#### M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a “major rule” as defined by 5 U.S.C. 804(2).

#### **List of Subjects in 10 CFR Part 1004**

Freedom of Information.

Issued in Washington, DC, on December 21, 2016.

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Ingrid Kolb  
Director, Office of Management.

For the reasons set forth in the preamble, amend part 1004 of Title 10 of the Code of Federal Regulations as set forth below:

**PART 1004 - FREEDOM OF INFORMATION ACT (FOIA)**

1. The authority citation for part 1004 continues to read as follows:

**Authority:** 5 U.S.C. 552.

2. Section 1004.1 is revised to read as follows:

**§1004.1 Purpose and scope.**

This part contains the regulations of the Department of Energy (DOE) that implement Freedom of Information (FOIA) 5 U.S.C. 552, Pub. L. 89-487, as amended by Pub. L. 93-502, 88 Stat. 1561, by Pub. L. 94-409, 90 Stat. 1241, by Pub. L. 99-570, 100 Stat. 3207-49, by Pub. L. 104-231, 110 Stat. 3048, by Pub. L. 110-175, 121 Stat. 2524, Pub. L. 111-83 §564, 123 Stat. 2142, 2184, and by Pub. L. 114-185, 130 Stat. 538. The regulations of this part provide information concerning the procedures by which records may be requested from all DOE offices, excluding the Federal Energy Regulatory Commission (FERC). Records of DOE made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this part. Persons seeking information or records of DOE may find it helpful to consult with a DOE FOIA Officer before invoking the formal procedures set out below. To the extent permitted by other laws, DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

3. Section 1004.2 is amended by revising paragraphs (b), (h)(1), (h)(5), (h)(6), (h)(8), (h)(9), (h)(13), (i), (m) and (n) to read as follows:

**§1004.2 Definitions.**

\* \* \* \* \*

(b) Authorizing or Denying Official means that DOE officer having custody of or responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to The Freedom of Information Act Officer and officials who report directly to either the Office of the Secretary or a Secretarial Officer as defined. In the field offices, the term refers to the head of a field location identified in paragraph (h) of this section and the heads of field offices to which they provide administrative support and have delegated this authority. In the National Nuclear Security Administration (NNSA), the term refers to the official appointed at such location as identified in paragraph (h)(8) of this section.

\* \* \* \* \*

(h) \* \* \*

(1) Bonneville Power Administration, P.O. Box 3621CHI-7, Portland, OR 97208-3621.

\* \* \* \* \*

(5) Golden Field Office, 15013 Denver West Parkway, Mail Stop RSF DOE Golden, CO 80401.

(6) Headquarters, Department of Energy, 1000 Independence Avenue, SW,  
Washington, DC 20585.

\* \* \* \* \*

(8) National Nuclear Security Administration Albuquerque Complex, P.O. Box  
5400, Albuquerque, NM 87185.

(9) National Energy Technology Laboratory, 626 Cochran Mill Road, P.O. Box  
10940, Pittsburgh, PA 15236-0940.

\* \* \* \* \*

(13) Office of Scientific and Technical Information, P.O. Box 62, Oak Ridge, TN  
37830.

\* \* \* \* \*

(i) General Counsel means the General Counsel provided for in section 202(e) of the DOE Organization Act, or any DOE attorney designated by the General Counsel as having responsibility for counseling the Department on Freedom of Information Act matters. In the NNSA, the term refers to the NNSA General Counsel, or any attorney designated by the NNSA General Counsel for counseling the NNSA on Freedom of Information Act matters, as provided for in section 3217 of the National Nuclear Security Administration Act, 50 U.S.C. 2407, Pub. L. 106-65. The NNSA General Counsel is not a Secretarial Officer.

\* \* \* \* \*

(m) Representative of the news media refers to any person or entity that 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 are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; DOE may also consider the past publication record of the requester in making such a determination.

(n) Review refers to the process of examining documents located in response to a commercial use request (see paragraph (c) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

\* \* \* \* \*

4. Section 1004.3 is amended by:

- a. Revising the section heading and paragraph (a);
- b. Removing paragraphs (b) through (d);
- c. Redesignating paragraph (e) as paragraph (b);
- d. Revising newly designated paragraphs (b)(1), (b)(2), and (b)(4).

The revisions read as follows:

**§1004.3        Public inspection in an electronic format and policy on contractor records.**

(a) DOE will maintain, for public inspection in an electronic format, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying. An electronic public reading room can be accessed via *www.energy.gov* and *nnsa.energy.gov*.

(b) *Contractor records.* (1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b).

(2) Notwithstanding paragraph (b)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in paragraph (b)(4) of this section or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).

\* \* \* \* \*

(4) For purposes of paragraph (b)(2) of this section, “technical data and information having commercial value” means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data.

6. Section 1004.4 is amended by revising paragraphs (a) and (c)(2) to read as follows:

**§1004.4 Elements of a request.**

(a) *Addressed to the FOIA Officer.* A request for a record of DOE which is not available for public inspection in an electronic format, as described in §1004.3, shall be: Addressed to the Headquarters or appropriate field FOIA Officer at DOE at a location listed in §1004.2(h), and both the envelope and the letter shall be clearly marked “Freedom of Information Act Request;” or submitted via facsimile or electronically, on an appropriate agency website. Except as provided in paragraph (e) of this section, a request will be considered to be received by DOE for purposes of 5 U.S.C. 552(a)(6) and the 20-day response period will start upon actual receipt by the appropriate FOIA Officer,

or not later than ten days after receipt by a designated FOIA Officer at any location in §1004.2(h). Requests delivered after regular business hours are considered received on the next regular business day.

\* \* \* \* \*

(c) \* \* \*

(2) *Assistance in reformulating a non-conforming request.* If a request does not reasonably describe the records sought, as specified in paragraph (c)(1) of this section, the DOE response will specify the reasons why the request failed to meet the requirements of paragraph (c)(1) of this section and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to manageable proportions by reformulation or by agreeing on an orderly procedure for the production of the records. If DOE responds that additional information is needed from the requester to render records reasonably described, any reformulated request submitted by the requester will be treated as an initial request for purposes of calculating the time for DOE response.

\* \* \* \* \*

7. Section 1004.5 is amended by:

- a. Revising paragraphs (b) and (c);
- b. Revising the introductory text of paragraph (d)(1), and revising paragraphs (d)(1)(iii), (d)(4), and(d)(7).

The revisions read as follows:

**§1004.5 Processing requests for records.**

\* \* \* \* \*

(b) The Authorizing Official will promptly identify and review the records encompassed by the request. The Authorizing Official or FOIA Officer will prepare a written response—

(1) Granting the request;

(2) Denying the request;

(3) Granting/denying it in part;

(4) Replying with a response stating that the request has been referred to another agency under §1004.4(f) or §1004.6(e); or

(5) Informing the requester that responsive records cannot be located or do not exist. The written response shall also notify the requester of the right to seek dispute resolution services from the DOE FOIA Public Liaison(s) or the Office of Government Information Services.

(c) Where a request involves records that are in the custody of or are the concern of more than one Authorizing Official, the FOIA Officer will identify all concerned Authorizing Officials that can reasonably be expected to have custody of the requested records. Upon identification of the appropriate Authorizing Officials, the FOIA Officer will forward them a copy of the request and a request for action. The Authorizing

Officials will prepare a DOE response to the requester consistent with paragraph (b) of this section. The response will identify the Authorizing Official having responsibility for the determination to release or deny records.

(d) *Time for processing requests.* (1) Action pursuant to paragraph (b) of this section will be taken within 20 days of a request for DOE records being received (“received” is defined in §1004.4(a)), except that,

\* \* \* \* \*

(iii) If unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Authorizing Official or FOIA Officer of the reasons for such extension and the date on which a determination is expected to be dispatched, then the Authorizing Official or FOIA Officer may take an extension not to exceed ten days. In cases where the Authorizing Official determines that unusual circumstances exist, the requester shall be notified in writing of the right to seek dispute resolution services from the DOE FOIA Public Liaison(s) or the Office of Government Information Services.

\* \* \* \* \*

(4) If no determination has been made at the end of the 20-day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the responsible Authorizing Official or FOIA Officer will

nevertheless continue to process the request. If DOE is unable to provide a response within the statutory period, the Authorizing Official or FOIA Officer will inform the requester of the reason for the delay; the date on which a determination may be expected to be made; and the requester's right to seek remedy through the courts, but will ask the requester to forego such action until a determination is made.

\* \* \* \* \*

(7) A determination to grant or deny a request for expedited processing will be made by the appropriate FOIA Officer within ten days after receipt of the request. The requester will be notified of the determination and informed that any denial may be appealed within 90 calendar days to the Office of Hearings and Appeals.

8. Section 1004.7 is amended by:

- a. Revising the introductory text of paragraph (b);
- b. Revising paragraphs (b)(4) and (b)(5).

The revisions read as follows:

**§1004.7 Responses by authorizing officials; Form and content.**

\* \* \* \* \*

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

\* \* \* \* \*

(4) *Adequacy of search.* Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 90 calendar days to the Office of Hearings and Appeals.

(5) *Administrative appeal.* A statement that the determination to deny documents made within the statutory time period may be appealed within 90 calendar days to the Office of Hearings and Appeals.

9. Section 1004.8 is amended by revising paragraphs (a), (b), (c), (d)(1), and (d)(2) to read as follows:

**§1004.8      Appeal of initial denial.**

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing or Denying Official or FOIA Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with §1004.4(d), or when the FOIA Officer has denied a request for expedited processing consistent with §1004.5(d) or for waiver of fees consistent with §1004.9, the requester may, within 90 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) *Elements of appeal.* The appeal must be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585-1615 and both the envelope and letter must be clearly marked “Freedom of Information Act Appeal.” The appeal may be delivered by U.S. Mail, commercial delivery service, or by electronic mail to *OHA.Filings@hq.doe.gov*.

The appeal must contain a concise statement of the grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals, and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed must be submitted with the appeal. The appeal should also provide a telephone number, electronic mail address, or other means for communicating with the requester during business hours.

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

(d) *Action within 20 days.* (1) The Appeal Authority will act upon the appeal within 20 days of its receipt, except that if unusual circumstances (as defined in §1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the Appeal Authority may extend the time for final action for an additional ten days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued. Notification will be sent by electronic mail, when possible, or by letter.

\* \* \* \* \*

10. Section 1004.9 is amended by revising paragraphs (a) introductory text, (a)(2), (a)(6), (a)(8) introductory text, (a)(8)(i) introductory text, (a)(8)(ii) introductory text, (b) introductory text, (b)(1), (b)(5), (b)(6) and (b)(8)(ii) to read as follows:

**§1004.9 Fees for providing records.**

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

\* \* \* \* \*

(2) *Computer searches for records.* DOE will charge at the actual direct cost of providing the service.

\* \* \* \* \*

(6) *Restrictions on assessing fees.* (i) With the exception of requesters seeking documents for a commercial use pursuant to 5 U.S.C. 552(a)(4)(A)(iv), DOE will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, DOE will not charge fees to any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, DOE will not begin to assess fees until after the Department has provided the free search and reproduction. For example, if a request involves two hours and ten minutes of search time and results in 105 pages of documents, DOE will charge for only ten minutes of search time and only five pages of reproduction. If this cost is equal to or less than \$15.00, the amount DOE incurs to process a fee collection, no charges would be assessed. For purposes of these restrictions on assessment of fees, the word “pages” refers to paper copies of a standard agency size which will be normally be “8- 1/2 × 11” or “11 × 14.” Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction. Similarly, the term “search time” is based on a *manual or electronic search*. To apply this term, DOE will calculate the hourly rates of the subject matter expert and/or FOIA analysts conducting the search plus 16 percent.

(ii) When unusual or exceptional circumstances do not apply and time limits specified in FOIA are not met, DOE will not charge any search fees, or duplication fees

for educational and non-commercial scientific institution requesters and requesters who are representatives of the news media.

(iii) Except as provided in paragraph (a)(6)(iv) of this section, DOE will not assess any search fees (or in the case of a requester who is an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media, duplication fees) under this paragraph (a)(6)(iii) if DOE has failed to comply with any time limit under §1004.5(d).

(iv)(A) If DOE has determined that unusual circumstances apply (as the term is defined in §1004.5(d)(2)) and DOE provided a timely written notice to the requester in accordance with §1004.5(d)(1)(iii), a failure described in paragraph (a)(6)(iii) of this section is excused for an additional 10 days. If DOE fails to comply with the extended time limit, DOE may not assess any search fees (or in the case of a requester described under paragraph (a)(6)(iii) of this section, duplication fees).

(B) If DOE has determined that unusual circumstances (as that term is defined in §1004.5(d)(2)) apply and more than 5,000 pages are necessary to respond to the request, DOE may charge search fees (or in the case of a requester described under paragraph (a)(6)(iii) of this section, duplication fees) if DOE has provided a timely written notice to the requester in accordance with §1004.5(d)(1)(iii) and DOE has discussed with the requester via written mail, electronic 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).

(C) If a court has determined that unusual circumstances exist (as that term is defined in §1004.5(d)(2)), a failure described in paragraph (a)(6)(iv) of this of this section shall be excused for the length of time provided by the court order.

\* \* \* \* \*

(8) *Waiving or reducing fees.* DOE will furnish documents without charge or at reduced charges if disclosure of the 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 disclosure is not primarily in the commercial interest of the requester. This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First it must be established that 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. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When these requirements are satisfied, based upon information supplied by a requester or otherwise made known to DOE, the waiver or reduction of a FOIA fee will be granted. In determining when fees should be waived or reduced the appropriate FOIA Officer should address the following two criteria:

(i) That disclosure of the information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” Factors to be considered in applying this criteria include but are not limited to:

\* \* \* \* \*

(ii) If disclosure of the information “is not primarily in the commercial interest of the requester.” Factors to be considered in applying this criteria include but are not limited to:

\* \* \* \* \*

(b) *Fees to be charged—categories of requesters.* There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The FOIA Officers will make determinations regarding categories of requesters as defined at §1004.2. The Headquarters FOIA Officers will assist field FOIA Officers in categorizing requesters, and will resolve conflicting categorizations. FOIA prescribes specific levels of fees for each of these categories:

(1) *Commercial use requesters.* When DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. DOE will recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

\* \* \* \* \*

(5) *Charging interest—notice and rate.* Interest will be charged to those requesters who fail to pay fees. DOE will begin to assess interest charges on the amount billed on

the 31st calendar day following the day on which the billing was sent to the requester. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

(6) *Charges for unsuccessful search.* DOE may assess charges for time spent searching even if the search fails to identify responsive records or if records located are determined to be exempt from disclosure. If DOE estimates that search charges are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice will offer the requester the opportunity to confer with agency personnel in order to reformulate the request to reduce the cost of the request.

\* \* \* \* \*

(8) \* \* \*

(ii)(A) A requester has previously failed to pay a fee in a timely fashion (i.e., within 30 calendar days of the date of the billing). DOE will require the requester to pay the full amount delinquent plus any applicable interest as provided in paragraph (b)(5) of this section, or demonstrate that he or she has, in fact, paid the delinquent fee; and to make an advance payment of the full amount of the estimated current fee before we begin to process a new request or a pending request from that requester.

(B) When DOE acts under paragraphs (b)(8) (i) or (ii) of this section, the administrative time limits prescribed in section (a)(6) of FOIA (i.e., 20 days from receipt of initial requests and 20 days from receipt of appeals from initial denials, plus

permissible extensions of these time limits) will begin only after DOE has received fee payments described .

\* \* \* \* \*

11. Section 1004.10 is amended by revising paragraphs (b)(5) and (c) to read as follows:

**§1004.10 Exemptions.**

\* \* \* \* \*

(b) \* \* \*

(5) Inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

\* \* \* \* \*

(c) DOE shall withhold information under this section only if—

(1) The agency reasonably foresees that disclosure would harm an interest protected by an exemption described in paragraph (b) of this section; or

(2) Disclosure is prohibited by law. DOE shall consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible and take reasonable steps necessary to segregate and release nonexempt information. Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure by paragraph (b)(3) of this section.

12. Section 1004.11 is amended by revising paragraphs (a) and (g) to read as follows:

**§1004.11 Handling information of a private business, foreign government, or an international organization.**

(a) Whenever a document submitted to DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, DOE will consider the submitter's views (as that term is defined in this section) in making its determination. Nothing in this section will preclude the submission of a submitter's views at the time of the submission of the document to which the views relate, or at any other time.

\* \* \* \* \*

(g) When DOE, in the course of responding to a Freedom of Information Act request, determines that information exempt from the mandatory public disclosure requirements of the Freedom of Information Act is to be released in accordance with §1004.1, DOE will notify the submitter of the intended discretionary release no less than seven (7) calendar days prior to the intended public disclosure of the information in question.

\* \* \* \* \*

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