



NATIONAL CAPITAL PLANNING COMMISSION

1 CFR Part 456 and Chapter VI

Freedom of Information Act Regulations

AGENCY: National Capital Planning Commission.

ACTION: Final Rule.

SUMMARY: The National Capital Planning Commission (NCPC or Commission) hereby adopts new Freedom of Information Act (FOIA) Regulations. NCPC must comply with the requirements of FOIA when it process requests for Information submitted pursuant to FOIA.

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

FOR FURTHER INFORMATION CONTACT: Anne R. Schuyler, General Counsel and Chief FOIA Officer, 202-482-7223, anne.schuyler@ncpc.gov.

SUPPLEMENTARY INFORMATION:

On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016 (Public Law No. 114-185). The FOIA Improvement Act of 2016 addresses a range of procedural issues, including, among others, the requirement that agencies establish a minimum of 90 days for requesters to file an administrative appeal; provide dispute resolution services at various times throughout the FOIA process; refrain from charging fees for failure to comply with mandated time limits; engage in proactive disclosure of records of general interest or use to the public that are appropriate for such disclosure; and apply the Department of Justice's "foreseeable harm" standard as the basis for withholding information pursuant to an exemption contained in FOIA.

NCPC adopted updated FOIA regulations in February 2014. As a result, NCPC included many of the Department of Justice, Office of Information Policy (OIP) policies into its existing regulations some of which are now incorporated as law into the FOIA Improvement Act of 2016. This means the new FOIA Regulations (FOIA Regulations) required only a few changes to comply with the requirements of the FOIA Improvement Act of 2016.

NCPC published its existing FOIA regulations under Title 1, Chapter IV, part 456 of the Code of Federal Regulations (CFR). Historically, Title 1, Chapter IV (Miscellaneous Agencies), Parts 455, 456, and 457 of the CFR contained NCPC regulations (Privacy, FOIA, and Nondiscrimination respectively). However, as there were no additional parts within Chapter IV to accommodate NCPC's recently adopted National Environmental Policy Act (NEPA) Regulations, the Office of the Federal Register assigned NCPC a new Chapter – Chapter VI--within Title 1 for consolidation of all current and future NCPC regulations. As NCPC revises its existing regulations and prepares new ones, each revised and new regulation will be published in the next sequential Part of Chapter VI. The next sequential Part available for NCPC's revised FOIA regulations is Part 602. Thus, the revised FOIA regulations are advertised as Part 602.

I. Key Changes Incorporated into NCPC's Freedom of Information Act Regulations

A. Time Limits

The FOIA Improvement Act of 2016 requires agencies to establish a minimum of 90 days for requesters to file an administrative appeal. NCPC's FOIA regulations

incorporate this requirement in § 602.12(a) (Appeals of Adverse Determinations). Section 602.12(g) enumerates the ability to extend time limits for responding to a FOIA request (20 days) and the process to be followed by NCPC to extend the time limits.

B. Assistance from NCPC's FOIA Public Liaison and the National Archives Record Administration's (NARA), Office of Government Information (OGIS)

The FOIA Improvement Act of 2016 requires agencies to advise Requesters of the availability of dispute resolution services at various times throughout the FOIA process. The Act provides for these services to be offered by an agency's FOIA Public Liaison and OGIS. NCPC's FOIA Regulations reference these services in §§ 602.5 (FOIA Request requirements), 602.6 (FOIA Response requirements), and 602.12 (Appeals of Adverse Determinations).

C. Changes to Fee Structure

The FOIA Improvement Act of 2016 precludes the collection of fees if an agency fails to meet mandated FOIA time limits. NCPC's FOIA regulations contain this limitation in § 602.13(f)(1). Section 602.13(f)(2) introduces a new fee construct contained in the FOIA Improvements Act of 2016 for Requests that generate 5000 pages of responsive records.

As a general matter, the FOIA Regulations contain a reorganized fee section. The current regulations organize the fee section based on types of fees, e.g., Search, Review and Duplication. The new FOIA Regulations organize the fee section based on three categories of Requesters, e.g., Commercial Use Requesters; Noncommercial Scientific Institutions, Educational Institutions, and News Media Requesters; and all other

Requesters. NCPC adopted this new organizational structure to improve the clarity of the fee section. Other than the reorganized structure and the two additions necessitated by the FOIA Improvements Act of 2016, the content of the fee section in the FOIA Regulations remains unchanged from that of the existing regulations.

D. Standard for Release of Records

The FOIA Improvement Act of 2016 requires agencies to proactively disclose in electronic format records that have been requested three or more times. It also requires application of the Department of Justice’s “foreseeable harm” standard as the basis for withholding information pursuant to an exemption contained in FOIA. The concept of proactive disclosure is already contained in NCPC’s current regulations and is carried over in NCPC’s FOIA Regulations at §§ 602.2(b) (Policy) and 602.4(b)(10) (Information Available without a FOIA Request). The foreseeable harm standard is incorporated in § 602.6(c).

E. Elimination of a Description of NCPC’s Organizational Structure

NCPC’s existing regulations contain an entire section devoted to a description of the Agency’s organizational structure and the Commission’s composition (See, 1 CFR 456.2). As this information is now readily available on NCPC’s website, the referenced section has been removed from the FOIA Regulations. As a consequence, the remaining sections of the FOIA Regulations have been renumbered. Moreover, the Policy section has been moved. It now follows the Purpose section (renamed from General Information) and proceeds the Definition section. This appeared to be a move logical organizational structure.

II. Summary of and Response to Comments

NCPC published a proposed rule addressing revisions to its current FOIA Regulations in the Federal Register on August 1, 2017 for a 30-day public comment period. The public comment period closed on August 31, 2017.

NCPC received no comments on its proposed FOIA Regulations. Consequently, the proposed FOIA Regulations are now being advertised as the final FOIA Regulations.

III. Compliance with Laws and Executive Orders

Executive Orders 12866 and 13563

By Memorandum dated October 12, 1993 from Sally Katzen, Administrator, Office of Information and Regulatory Affairs (OIRA) to Heads of Executive Departments and Agencies, and Independent Agencies, OMB rendered the NCPC exempt from the requirements of Executive Order 12866 (See, Appendix A of cited Memorandum). Nonetheless, NCPC endeavors to adhere to the provisions of Executive Orders and developed this rule in a manner consistent with the requirements of Executive Order 13563.

Executive Order 13771

By virtue of its exemption from the requirements of EO 12866, NCPC is exempt from this Executive Order. NCPC confirmed this fact with OIRA.

Regulatory Flexibility Act

As required by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the NCPC certifies that the rule will not have a significant economic effect on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory

Enforcement Fairness Act. It does not have an annual effect on the economy of \$100 million or more; will not cause a major increase in costs for individuals, various levels of governments or various regions; and does not have a significant adverse effect on completion, employment, investment, productivity, innovation or the competitiveness of US enterprises with foreign enterprises.

Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.)

A statement regarding the Unfunded Mandates Reform Act is not required. The rule neither imposes an unfunded mandate of more than \$100 million per year nor imposes a significant or unique effect on State, local or tribal governments or the private sector.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The rule does not substantially and directly affect the relationship between the Federal and state governments.

Civil Justice Reform (Executive Order 12988)

The General Counsel of NCPC has determined that the rule does not unduly burden the judicial system and meets the requirements of Executive Order 12988 3(a) and 3(b)(2).

Paperwork Reduction Act

The rule does not contain information collection requirements, and it does not require a submission to the Office of Management and Budget under the Paperwork Reduction Act.

National Environmental Policy Act

The rule is of an administrative nature, and its adoption does not constitute a major federal action significantly affecting the quality of the human environment. NCPC's adoption of the rule will have minimal or no effect on the environment; impose no significant change to existing environmental conditions; and will have no cumulative environmental impacts.

Clarity of the Regulation

Executive Order 12866, Executive Order 12988, and the Presidential Memorandum of June 1, 1998 requires the NCPC to write all rules in plain language. NCPC maintains the rule meets this requirement. Those individuals reviewing the rule who believe otherwise should submit specific comments to the addresses noted above recommending revised language for those provision or portions thereof where they believe compliance is lacking.

Public Availability of Comments

Be advised that personal information such as name, address, phone number electronic address, or other identifying personal information contained in a comment may be made publically available. Individuals may ask NCPC to withhold the personal information in their comment, but there is no guarantee the agency can do so.

List of Subjects in 1 CFR Parts 456 and 602

Freedom of information.

For the reasons stated in the preamble, the National Capital Planning Commission amends 1 CFR Chapter IV and establishes 1 CFR Chapter VI to read as follows:

CHAPTER IV – MISCELLANEOUS AGENCIES

PART 456 [Removed]

1. Under the authority of 40 U.S.C. 8711(a) remove part 456.
2. Establish Chapter VI, consisting of part 602, to read as follows:

CHAPTER VI – NATIONAL CAPITAL PLANNING COMMISSION

**PART 602--NATIONAL CAPITAL PLANNING COMMISSION FREEDOM OF
INFORMATION ACT REGULATIONS**

Sec.

602.1 Purpose.

602.2 Policy.

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602.9 Consultations and referrals.

602.10 Classified and Controlled Unclassified Information.

602.11 Confidential Commercial Information.

602.12 Appeals of Adverse Determinations.

602.13 Fees.

602.14 Fee waiver requirements.

602.15 Preservation of FOIA records.

Authority: 5 U.S.C. 552, as amended.

§602.1 Purpose.

This part contains the rules the National Capital Planning Commission (NCPC or Commission) shall follow in processing third party Requests for Records concerning the activities of the NCPC under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. Requests made by a U.S. citizen or an individual lawfully admitted for permanent residence to access his or her own records under the Privacy Act, 5 U.S.C. 522a are processed under this part and in accordance with part 603 of Title 1 of the Code of Federal Regulations (CFR) to provide the greatest degree of access while safeguarding an individual's personal privacy. Information routinely provided to the public as part of regular NCPC activity shall be provided to the public without regard to this part.

§ 602.2 Policy.

(a) It is the NCPC's policy to facilitate the broadest possible availability and dissemination of information to the public through use of the NCPC's website, www.ncpc.gov, and physical distribution of materials not available electronically. The NCPC staff shall be available to assist the public in obtaining information formally by using the procedures herein or informally in a manner not inconsistent with the rule set forth in this part.

(b) To the maximum extent possible, the NCPC shall make available agency Records of interest to the public that are appropriate for disclosure.

§ 602.3 Definitions.

For purposes of this part, the following definitions shall apply:

Act and FOIA mean the Freedom of Information Act, 5 U.S.C. 552, as amended.

Adverse Determination or Determination shall include a determination to withhold, in whole or in part, Records requested in a FOIA Request; the failure to respond to all aspects of a Request; the determination to deny a request for a Fee Waiver; or the determination to deny a request for expedited processing. The term shall also encompass a challenge to NCPC's determination that Records have not been described adequately, that there are no responsive Records, or that an adequate Search has been conducted.

Agency Record or Record means any documentary material which is either created or obtained by a federal agency (Agency) in the transaction of Agency business and under Agency control. Agency Records may include without limitation books; papers; maps; charts; plats; plans; architectural drawings; photographs and microfilm; machine readable materials such as magnetic tape, computer disks and electronic data storage devices; electronic records including e-mail messages; and audiovisual material such as still pictures, sound, and video recordings. This definition generally does not cover records of Agency staff that are created and maintained primarily for a staff member's convenience, exempt from Agency creation or retention requirements, and withheld from distribution to other Agency employees for their official use.

Confidential Commercial Information means commercial or financial information obtained by the NCPC from a Submitter that may be protected from disclosure under Exemption 4 of the FOIA. Exemption 4 of the FOIA protects trade secrets and commercial or financial information obtained from a person which information is privileged or confidential.

Controlled Unclassified Information means unclassified information that does not meet the standards for National Security Classification under Executive Order 13536, as

amended, but is pertinent to the national interests of the United States or to the important interests of entities outside the federal government, and under law or policy requires protection from unauthorized disclosure, special handling safeguards, or prescribed limits on exchange or dissemination.

Commercial Use Request means a FOIA Request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the Requester or the person on whose behalf the Request is made.

Direct Costs means those expenditures that the NCPC incurs in searching for, duplicating, and reviewing documents to respond to a FOIA Request. Direct Costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of the rate to cover benefits) and the cost of operating duplicating machinery. Direct Costs do not include overhead expenses such as costs of space, and heating or lighting the facility in which the Records are stored.

Duplication means the process of making a copy of a document necessary to respond to a FOIA Request in a form that is reasonably usable by a Requester. Copies can take the form of, among others, paper copy, audio-visual materials, or machine readable documents (i.e., computer disks or electronic data storage devices).

Educational Institution means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. To be classified in this category, a Requester must show that the Request is authorized by and is made

under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

Expedited Processing means giving a FOIA Request priority because a Requester has shown a compelling need for the Records.

Fee Waiver means a waiver in whole or in part of fees if a Requester can demonstrate that certain statutory requirements are satisfied including that the information is in the public interest and is not requested primarily for commercial purposes.

FOIA Public Liaison means an NCPC official who is responsible for assisting in reducing delays, increasing transparency and understanding the status of Requests, and assisting in the resolution of disputes.

FOIA Request or Request means a written Request made by an entity or member of the public for an Agency Record submitted via the U.S. Postal Service mail or other delivery means to include without limitation electronic-mail (e-mail) or facsimile.

Frequently Requested Documents means documents that have been Requested at least three times under the FOIA. It also includes documents the NCPC anticipates would likely be the subject of multiple Requests.

Multi-track Processing means placing requests in multiple tracks based on the amount of work or time (or both) needed to process the request. Simple Requests requiring relatively minimal work and/or review are placed in one processing track, more complex Requests are placed in one or more other tracks, and expedited Requests are placed in a separate track. Requests in each track are processed on a first-in/first-out basis.

Noncommercial Scientific Institution means an institution that is not operated for commerce, trade or profit, but is operated solely for the purpose of conducting scientific

research the results of which are not intended to promote any particular product or industry. To be in this category, a Requester must show that the Request is authorized by and is made under the auspices of a qualifying institution and that the Records are not sought for commercial use but are sought to further scientific research.

Privacy Act Request means, in accordance with NCPC's Privacy Act Regulations (1 CFR part 603) a written (paper copy with an original signature) request made by an individual for information about himself/herself that is contained in a Privacy Act system of records. The Privacy Act applies only to U.S. citizens and aliens lawfully admitted for permanent residence such that only individuals satisfying these criteria may make Privacy Act Requests.

Reading Room Materials means Records, paper or electronic, that are required to be made available to the public under 5.U.S.C. 552(a)(2) as well as other Records that the NCPC, at its discretion, makes available to the public for inspection and copying without requiring the filing of a FOIA Request.

Representative of the News Media means any person or entity that gathers information of potential interest to a segment of the population, uses his/her/its editorial skills to turn raw material into a distinct work, and distributes that work to an audience. News media entities include television or radio stations broadcasting to the public at large; publishers of periodicals that qualify as disseminators of news and make their products available for purchase or subscription by the general public; and alternative media to include electronic dissemination through telecommunication (internet) services. To be in this category, a Requester must not be seeking the Requested Records for a commercial use. A *Freelance Journalist* is a Representative of the News Media who is able to demonstrate a

solid basis for expecting publication through a news organization, even though not actually employed by that news organization. A publication contract or past evidence of a specific freelance assignment from a news organization may indicate a solid basis for expecting publication.

Requester means an entity or member of the public submitting a FOIA Request.

Requester Category means one of the five categories NCPC places Requesters in for the purpose of determining whether the Requester will be charged for Search, Review and Duplication, and includes Commercial Use Requests, Educational Institutions, Noncommercial Scientific Institutions, Representatives of the News Media, and all other Requesters.

Review means the examination of Records to determine whether any portion of the located Record is eligible to be withheld. It also includes processing any Records for disclosure, i.e., doing all that is necessary to excise the record and otherwise prepare the Record for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search means the process of looking for material, by manual or electronic means that is responsive to a FOIA Request. The term also includes page-by-page or line-by-line identification of material within documents.

Submitter means any person or entity outside the federal government from whom the NCPC directly or indirectly obtains commercial or financial information. The term includes, among others, corporations, banks, state and local governments, and agencies of foreign governments who provide information to the NCPC.

Unusual Circumstances means, for purposes of § 602.7(c), and only to the extent reasonably necessary to the proper processing of a particular Request:

- (1) The need to Search for and collect the Requested Agency Records from establishments that are separate from the Commission's offices;
- (2) The need to Search for, collect and appropriately examine and Review a voluminous amount of separate and distinct Agency Records which are demanded in a single Request; or
- (3) The need for consultation with another Agency having a substantial interest in the determination of the FOIA Request.

Workday means a regular Federal workday. It does not include Saturdays, Sundays, and legal public holidays.

§ 602.4 Information available without a FOIA Request.

(a) The NCPC shall maintain an electronic library at www.ncpc.gov that makes Reading Room Materials capable of production in electronic form available for public inspection and downloading. The NCPC shall also maintain an actual public reading room containing Reading Room Materials incapable of production in electronic form at NCPC's offices. The actual reading room shall be available for use on Workdays during the hours of 9:00 a.m. to 4:00 p.m. Requests for appointments to review Reading Room Materials in the actual public reading room should be directed to the NCPC's Information Resources Specialist identified on the NCPC website (www.ncpc.gov).

(b) The following types of Records shall be available routinely without resort to formal FOIA Request procedures unless such Records fall within one of the exemptions listed at 5 U.S.C. 552(b) of the Act:

- (1) Commission agendas;
- (2) Plans and supporting documentation submitted by applicants to the Commission to include environmental and historic preservation reports prepared for a plan or project;
- (3) Executive Director's Recommendations;
- (4) Commission Memoranda of Action;
- (5) Transcripts of Commission proceedings;
- (6) The Comprehensive Plan for the National Capital: Federal Elements and other plans prepared by the NCPC;
- (7) Federal Capital Improvements Plan for the National Capital Region following release of the President's Budget;
- (8) Policies adopted by the Commission;
- (9) Correspondence between the Commission and the Congress, other federal and local government agencies, and the public; and
- (10) Frequently Requested Documents.

§ 602.5 FOIA Request requirements.

- (a) The NCPC shall designate a Chief Freedom of Information Act Officer who shall be authorized to grant or deny any Request for a Record of the NCPC.
- (b) Requests for a Record or Records that is/are not available in the actual or electronic reading rooms shall be directed to the Chief Freedom of Information Act Officer.
- (c) All FOIA Requests shall be made in writing. If sent by U.S. mail, Requests should be sent to NCPC's official business address contained on the NCPC website. If sent via e-mail, they should be directed to FOIA@ncpc.gov. To expedite internal handling of

FOIA Requests, the words Freedom of Information Act Request shall appear prominently on the transmittal envelope or the subject line of a Request sent via e-mail or facsimile.

(d) The FOIA Request shall:

(1) State that the Request is made pursuant to the FOIA;

(2) Describe the Agency Record(s) Requested in sufficient detail including, without limitation, any specific information known such as date, title or name, author, recipient, or time frame for which you are seeking Records, to enable the NCPC personnel to locate the Requested Agency Records;

(3) State, pursuant to the fee schedule set forth in § 602.14, a willingness to pay all fees associated with the FOIA Request or the maximum fee the Requester is willing to pay to obtain the Requested Records, unless the Requester is seeking a Fee Waiver or placement in a certain Requester Category;

(4) State, if desired, the preferred form or format of disclosure of Agency Records with which the NCPC shall endeavor to comply unless compliance would damage or destroy an original Agency Record or reproduction is costly and/or requires the acquisition of new equipment; and

(5) Provide a phone number, e-mail address or mailing address at which the Requester can be reached to facilitate the handling of the Request.

(e) If a FOIA Request is unclear, overly broad, involves an extremely voluminous amount of Records or a burdensome Search, or fails to state a willingness to pay the requisite fees or the maximum fee which the Requester is willing to pay, the NCPC shall endeavor to contact the Requester to define the subject matter, identify and clarify the Records being sought, narrow the scope of the Request, and obtain assurances regarding

payment of fees. The timeframe for a response set forth in § 602.6(a) shall be tolled (stopped temporarily) and the NCPC will not begin processing a Request until the NCPC obtains the information necessary to clarify the Request and/or clarifies issues pertaining to the fee.

(f) NCPC shall designate a FOIA Public Liaison to assist a Requester in making a Request or to assist a Requester in correcting a Request that does not reasonably describe the Records sought or to correct other deficiencies described in paragraph (e) of this section that necessitate follow-up with the Requester.

§ 602.6 FOIA response requirements.

(a) The Freedom of Information Act Officer, upon receipt of a FOIA Request made in compliance with these rules, shall determine whether to grant or deny the Request. The Freedom of Information Officer shall notify the Requester in writing within 20 Workdays of receipt of a perfected Request of his/her determination and the reasons therefore and of the right to appeal any Adverse Determination to the head of the NCPC.

(b) In cases involving Unusual Circumstances, the agency may extend the 20 Workday time limit by written notice to the Requester. The written notice shall set forth the reasons for the extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension of more than 10 Working Days unless the agency affords the Requester an opportunity to modify his/her Request or arranges an alternative timeframe with the Requester for completion of the NCPC's processing. The agency shall also advise the Requester of his/her right to seek assistance from the FOIA Public Liaison or OGIS to resolve time limit disputes arising under this paragraph.

(c) NCPC shall deny a Request based on an exemption contained in the FOIA and withhold information from disclosure pursuant to an exemption only if NCPC reasonably foresees that disclosure would harm an interest protected by an exemption or if disclosure is prohibited by law. If a Request is denied based on an exemption, NCPC's response shall comply with the requirements of paragraph (d) below.

(d) If a Request is denied in whole or in part, the Chief FOIA Officer's written determination shall include, if technically feasible, the precise amount of information withheld, and the exemption under which it is being withheld unless revealing the exemption would harm an interest protected by the exemption. NCPC shall release any portion of a withheld Record that reasonably can be segregated from the exempt portion of the Record.

§ 602.7 Multi-track processing.

The NCPC may use multiple tracks for processing FOIA Requests based on the complexity of Requests and those for which expedited processing is Requested. Complexity shall be determined based on the amount of work and/or time needed to process a Request and/or the number of pages of responsive Records. If the NCPC utilizes Multi-track Processing, it shall advise a Requester when a Request is placed in a slower track of the limits associated with a faster track and afford the Requester the opportunity to limit the scope of its Request to qualify for faster processing.

§ 602.8 Expedited processing.

(a) The NCPC shall provide Expedited Processing of a FOIA Request if the person making the Request demonstrates that the Request involves:

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

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

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

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

(b) A Request for Expedited Processing may be made at the time of the initial FOIA Request or at a later time.

(c) A Requester seeking Expedited Processing must submit a detailed statement setting forth the basis for the Expedited Processing Request. The Requester must certify in the statement that the need for Expedited Processing is true and correct to the best of his/her knowledge. To qualify for Expedited Processing, a Requester relying upon the category in paragraph (a)(2) of this section must establish:

(1) He /She is a full time Representative of the News Media or primarily engaged in the occupation of information dissemination, though it need not be his/her sole occupation;

(2) A particular urgency to inform the public about the information sought by the FOIA Request beyond the public's right to know about the government activity generally; and

(3) The information is of the type that has value that will be lost if not disseminated quickly such as a breaking news story. Information of historical interest only or

information sought for litigation or commercial activities will not qualify nor would a news media deadline unrelated to breaking news.

(d) Within 10 calendar days of receipt of a Request for expedited processing, the NCPC shall decide whether to grant or deny the Request and notify the Requester of the decision in writing. If a Request for Expedited Processing is granted, the Request shall be given priority and shall be processed in the expedited processing track as fast as practicable. If a Request for Expedited Processing is denied, any appeal of that decision shall be acted on expeditiously.

§ 602.9 Consultations and referrals.

(a) If a Requester seeks a Record in which another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA, NCPC shall either respond to the FOIA Request after consultation with the Agency best able to determine if the Requested Record(s) is/are subject to disclosure or refer the responsibility for responding to the FOIA Request to the Agency responsible for originating the Record(s). Generally, the Agency originating a Record will be presumed by the NCPC to be the Agency best qualified to render a decision regarding disclosure or exemption except for Agency Records submitted to the NCPC pursuant to its authority to review Agency plans and/or projects.

(b) Upon referral of Records to another Agency, the NCPC shall notify the Requester in writing of the referral, inform the Requester of the name of the Agency to which all or part of the responsive records have been referred, provide the Requester a description of the part of the Request referred, and advise the Requester of a point of contact within the receiving Agency.

(c) The timeframe for a response to a FOIA Request requiring consultation or referral shall be based on the date the FOIA Request was initially received by the NCPC and not any later date.

§ 602.10 Classified and Controlled Unclassified Information.

(a) For Requests for an Agency Record that has been classified or may be appropriate for classification by another Agency pursuant to an Executive Order concerning the classification of Records, the NCPC shall refer the responsibility for responding to the FOIA Request to the Agency that either classified the Record, should consider classifying the Record, or has primary interest in the Record, as appropriate.

(b) Whenever a Request is made for a Record that is designated Controlled Unclassified Information by another Agency, the NCPC shall refer the FOIA Request to the Agency that designated the Record as Controlled Unclassified Information. Decisions to disclose or withhold information designated as Controlled Unclassified Information shall be made based on the applicability of the statutory exemptions contained in the FOIA, not on a Controlled Unclassified Information marking or designation.

§ 602.11 Confidential Commercial Information.

(a) Confidential Commercial Information obtained by the NCPC from a Submitter shall be disclosed under the FOIA only in accordance with the requirements of this section.

(b) A Submitter of Confidential Commercial Information shall use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from

disclosure under Exemption 4 of the FOIA. 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) Notice shall be given to a Submitter of a FOIA Request for potential Confidential Commercial Information if:

(1) The requested information has been designated in good faith by the Submitter as Confidential Commercial Information eligible for protection from disclosure under Exemption 4 of the FOIA; or

(2) The NCPC has reason to believe the requested information is Confidential Commercial Information protected from disclosure under Exemption 4 of the FOIA.

(d) Subject to the requirements of paragraphs (c) and (g) of this section, the NCPC shall provide a Submitter with prompt written notice of a FOIA Request or administrative appeal that seeks the Submitter's Confidential Commercial Information. The notice shall give the Submitter an opportunity to object to disclosure of any specified portion of that Confidential Commercial Information pursuant to paragraph (e) of this section. The notice shall either describe the Confidential Commercial Information Requested or include copies of the Requested Records or portions thereof containing the Confidential Commercial Information. When notice to a large number of Submitters is required, NCPC may provide notification by posting or publishing the notice in a place reasonably likely to accomplish the intent of the notice requirement such as a newspaper, newsletter, the NCPC website, or the Federal Register.

(e) The NCPC shall allow a Submitter a reasonable time to respond to the notice described in paragraph (d) of this section and shall specify within the notice the time

period for response. If a Submitter has any objection to disclosure, it shall submit a detailed written statement. The statement must specify all grounds for withholding any portion of the Confidential Commercial Information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the Confidential Commercial Information is a trade secret or commercial or financial information that is privileged or confidential. If the Submitter fails to respond to the notice within the specified time, the NCPC shall consider this failure to respond as no objection to disclosure of the Confidential Commercial Information on the part of the Submitter, and NCPC shall proceed to release the requested information. A statement provided by the Submitter that is not received by NCPC until after the NCPC's disclosure decision has been made shall not be considered by the NCPC. Information provided by a Submitter under this paragraph may itself be subject to disclosure under the FOIA.

(f) The NCPC shall consider a Submitter's objections and specific grounds for nondisclosure in deciding whether to disclose Confidential Commercial Information. Whenever the NCPC decides to disclose Confidential Commercial Information over the objection of a Submitter, the NCPC shall give the Submitter written notice, which shall include:

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

(2) A description of the Confidential Commercial Information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

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

(1) The NCPC determines that the Confidential Commercial Information is exempt under FOIA;

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

(3) The Confidential Commercial Information's disclosure is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (Predisclosure Notification Procedures for Confidential Commercial Information); or

(4) The designation made by the Submitter under paragraph (b) of this section appears obviously frivolous in which case the NCPC shall, within a reasonable time prior to a specified disclosure date, give the Submitter written notice of any final decision to disclose the Confidential Commercial Information.

(h) Whenever a Requester files a lawsuit seeking to compel the disclosure of Confidential Commercial Information, the NCPC shall promptly notify the Submitter.

(i) Whenever the NCPC provides a Submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, the NCPC shall also notify the Requester. Whenever the NCPC notifies a Submitter of its intent to disclose Requested Information under paragraph (f) of this section, the NCPC shall also notify the Requester. Whenever a Submitter files a lawsuit seeking to prevent the disclosure of Confidential Commercial Information, the NCPC shall notify the Requester.

§ 602.12 Appeals of Adverse Determinations.

(a) An appeal of an Adverse Determination shall be made in writing to the Chairman of the Commission (Chairman). An appeal may be submitted via U.S. mail or other type

of manual delivery service or via e-mail or facsimile within 90 Workdays of the date of a notice of an Adverse Determination. To facilitate handling of an appeal, the words Freedom of Information Act Appeal shall appear prominently on the transmittal envelope or the subject line of a Request sent via electronic-mail or facsimile.

(b) An appeal of an Adverse Determination shall include a detailed statement of the legal, factual or other basis for the Requester's objections to an Adverse Determination; a daytime phone number or e-mail address where the Requester can be reached if the NCPC requires additional information or clarification regarding the appeal; copies of the initial Request and the NCPC's written response; and for an Adverse Determination of a Request for Expedited Processing or a Fee Waiver, a demonstration of compliance with the requirements of §§ 602.8(a) and (c) or 602.15(a) through (c) respectively.

(c) The Chairman shall respond to an appeal of an Adverse Determination in writing within 20 Workdays of receipt.

(1) If the Chairman grants the appeal, the Chairman shall notify the Requester, and the NCPC shall make available copies of the Requested Records promptly thereafter upon receipt of the appropriate fee determined in accordance with § 602.13.

(2) If the Chairman denies the appeal in whole or in part, the letter to the Requester shall state

(i) The reason(s) for the denial, including the FOIA exemptions(s) applied;

(ii) A statement that the decision is final;

(iii) A notice of the Requester's right to seek judicial review of the denial in the District Court of the United States in either the locale in which the Requester resides, the

locale in which the Requester has his/her principal place of business, or in the District of Columbia; and

(iv) A notice that the Requester may seek dispute resolution services from either the NCPC FOIA Public Liaison or the Office of Government Information Services (OGIS) to resolve disputes between a Requester and the NCPC as a non-exclusive alternative to litigation. Contact information for OGIS can be obtained from the OGIS website at ogis@nara.gov.

(d) The NCPC shall not act on an appeal of an Adverse Determination if the underlying FOIA Request becomes the subject of FOIA litigation.

(e) A party seeking court review of an Adverse Determination must first appeal the decision under this section to NCPC.

§ 602.13 Fees.

(a) NCPC shall charge fees for processing FOIA requests in accordance with the provisions of this section and OMB Guidelines.

(b) For purposes of assessing fees, NCPC shall categorize Requesters into three categories: Commercial Use Requesters; Noncommercial Scientific Institutions, Educational Institutions, and News Media Requesters; and all other Requesters. Different fees shall be charged depending upon the category into which a Requester falls. If fees apply, a Requesters may seek a fee waiver in accordance with the requirements of § 602.15.

(c) Search Fees shall be charged as follows:

(1) NCPC shall not charge Search fees to Requests made by Educational Institutions, Noncommercial Scientific Institutions, or Representatives of the New Media. NCPC

shall charge Search fees to all other Requesters subject to the restrictions of paragraph (f)(5) of this section even if NCPC fails to locate any responsive Records or if the NCPC withholds Records located based on a FOIA exemption

(2) For each quarter hour spent by personnel searching for Requested Records, including electronic searches that do not require new programming, the Search fees shall be calculated based on the average hourly General Schedule (GS) base salary, plus the District of Columbia locality payment, plus 16 percent for benefits of employees in the following three categories: Staff Assistant (assigned at the GS 9-11 grades); Professional Personnel (assigned at the GS 11-13 grades); and Managerial Staff (assigned at the 14-15 grades). For a Staff Assistant the quarter hour fee to Search for and retrieve a Requested Record shall be \$9.00. If a Search and retrieval cannot be performed entirely by a Staff Assistant, and the identification of Records within the scope of a Request requires the use of Professional Personnel, the fee shall be \$12.00 for each quarter hour of Search time spent by Professional Personnel. If the time of Managerial Personnel is required, the fee shall be \$18.00 for each quarter hour of Search time spent by Managerial Personnel.

(3) For a computer Search of Records, Requesters shall be charged the Direct Costs of creating a computer program, if necessary, and/or conducting the Search. Direct Costs for a computer Search shall include the cost that is directly attributable to the Search for responsive Records and the costs of the operator's salary for the time attributable to the Search.

(d) Duplication fees shall be charged to all Requesters, subject to the limitations of paragraph (f)(5) of this section. For a paper photocopy of a Record (no more than one copy of which shall be supplied), the fee shall be 10 cents per page for single or double

sided copies, 90 cents per page for 8 ½ by 11 inch color copies, and \$1.50 per page for color copies up to 11 x 17 inches per page. For copies produced by computer, and placed on an electronic data saving device or provided as a printout, the NCPC shall charge the Direct Costs, including operator time, of producing the copy. For other forms of Duplication, the NCPC shall charge the Direct Costs of that Duplication.

(e) Review fees shall be charged to only those Requesters who make a Commercial Use Request. Review fees will be charged only for the NCPC initial Review of a Record to determine whether an exemption applies to a particular Record or portion thereof. No charge will be made for Review at the administrative appeal level for an exemption already applied. However, Records or portions thereof withheld under an exemption that is subsequently determined not applicable upon appeal may be reviewed again to determine whether any other exemption not previously considered applies. If the NCPC determines a different exemption applies, the costs of that Review are chargeable. Review fees will be charged at the same rates as those charged for a Search under paragraph (c)(2) of this section.

(f) The following limitations on fees shall apply:

(1) If NCPC fails to comply with the time limits in which to respond to a request, NCPC shall not charge Search fees or, in the case of Educational Institutions, Noncommercial Scientific Institutions, or Representatives of the News Media, duplication fees, except as described in paragraphs (f)(2)-(4) of this section.

(2) If NCPC has determined that unusual circumstances as defined by the FOIA apply, and the agency 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.

(3) If NCPC determines that Unusual Circumstances exist, and more than 5000 pages of responsive records are necessary to respond to the Request, NCPC may charge Search fees. NCPC may also charge duplication fees in the case of Educational Institutions, Noncommercial Scientific Institutions, or Representatives of the News Media. The provisions of this paragraph shall only apply if NCPC provides timely written notice of the Unusual Circumstances to the Requester and discusses with the Requester via mail, e-mail or phone (or made at least three good faith efforts to do so) how to effectively limit the scope of the Request.

(4) 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.

(5) No Search or Review fees shall be charged for a quarter-hour period unless more than half of that period is required for Search or Review.

(6) Except for Requesters of a Commercial Use Request, the NCPC shall provide without charge the first two hours of Search (or the cost equivalent) and the first 100 pages of Duplication (or the cost equivalent);

(7) Except for Requesters of a Commercial Use Request, no fee shall be charged for a Request if the total fee calculated under this section equals \$50.00 or less.

(8) Requesters other than those making a Commercial Use Request shall not be charged a fee unless the total cost of a Search in excess of two hours plus the cost of Duplication in excess of 100 pages totals more than \$50.00.

(g) If the NCPC determines or estimates fees in excess of \$50.00, the NCPC shall notify the Requester of the actual or estimated amount of total fees, unless in its initial

Request the Requester has indicated a willingness to pay fees as high as those determined or estimated. If only a portion of the fee can be estimated, the NCPC shall advise the Requester that the estimated fee constitutes only a portion of the total fee. If the NCPC notifies a Requester that actual or estimated fees amount to more than \$50.00, the Request shall not be considered received for purposes of calculating the timeframe for a Response, and no further work shall be undertaken on the Request until the Requester agrees to pay the anticipated total fee. Any such agreement shall be memorialized in writing. A notice under this paragraph shall offer the Requester an opportunity to work with the NCPC to reformulate the Request to meet the Requester's needs at a lower cost.

(h) Apart from other provisions of this section, if the Requester asks for, or the NCPC chooses as a matter of administrative discretion to provide a special service—such as certifying that Records are true copies or sending them by other than ordinary mail, the actual costs of special service shall be charged.

(i) The NCPC shall charge interest on any unpaid fee 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 (Interest and Penalty on Claims) and will accrue from the date of the billing until payment is received by the NCPC. The NCPC shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. No. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) Where the NCPC reasonably believes that one or more Requesters are acting in concert to subdivide a Request into a series of Requests to avoid fees, the NCPC may aggregate the Requests and charge accordingly. The NCPC shall presume that multiple

Requests of this type made within a 30-day period have been made to avoid fees. Where Requests are separated by a time period in excess of 30 days, the NCPC shall aggregate the multiple Requests if a solid basis exists for determining aggregation is warranted under all circumstances involved.

(k) Advance payments shall be treated as follows:

(1) For Requests other than those described in paragraphs (k)(2) and (3) of this section, the NCPC shall not require an advance payment. An advance payment refers to a payment made before work on a Request is begun or continued after being stopped for any reason but does not extend to payment owed for work already completed but not sent to a Requester.

(2) If the NCPC determines or estimates a total fee under this section of more than \$250.00, it shall require an advance payment of all or part of the anticipated fee before beginning to process a Request, unless the Requester provides satisfactory assurance of full payment or has a history of prompt payment.

(3) If a Requester previously failed to pay a properly charged FOIA fee to the NCPC within 30 days of the date of billing, the NCPC shall require the Requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the NCPC begins to process a new Request or continues processing a pending Request from that Requester.

(4) If the NCPC requires advance payment or payment due under paragraphs (k)(2) or (3) of this section, the Request shall not be considered received and no further work will be undertaken on the Request until the required payment is received.

(l) Where Records responsive to Requests are maintained for distribution by Agencies

operating statutorily based fee schedule programs, the NCPC shall inform Requesters of the steps for obtaining Records from those sources so that they may do so most economically.

(m) All fees shall be paid by personal check, money order or bank draft drawn on a bank of the United States, made payable to the order of the Treasurer of the United States.

§ 602.15 Fee waiver requirements.

(a) Records responsive to a Request shall be furnished without charge or at a charge reduced below that established under § 602.14 if the Requester demonstrates to the NCPC, and the NCPC determines, based on all available information, 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, and disclosure of the information is not primarily in the commercial interest of the Requester.

(b) To determine if 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, the Requester shall demonstrate, and NCPC shall consider, the following factors:

(1) Whether the subject of the Requested Records concerns the operations or activities of the government. The subject of the Requested Records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(2) Whether the disclosure is likely to contribute to an understanding of government operations or activities. The portions of the Requested Records eligible for disclosure must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, is not likely to contribute to an understanding of government operations and activities because this information is already known.

(3) Whether disclosure of the Requested information will contribute to public understanding. 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 and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a Representative of the News Media satisfies this consideration.

(4) Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent, as compared to the level of public understanding existing prior to the disclosure. The NCPC shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is important enough to be made public.

(c) To determine whether disclosure of the information is not primarily in the commercial interest of the Requester, the Requester shall demonstrate, and NCPC shall consider, the following factors:

(1) Whether the Requester has a commercial interest that would be furthered by the Requested disclosure. The NCPC shall consider any commercial interest of the Requester (with reference to the definition of Commercial Use Request in § 602.3(f)), or of any person on whose behalf the Requester may be acting, that would be furthered by the Requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(2) Whether any identified commercial interest of the Requester is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the Requester. A Fee Waiver is justified where the public interest standard of paragraph (b) of this section is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The NCPC ordinarily shall presume that a Representative of the News Media satisfies the public interest standard, and 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.

(d) Where only some of the Records to be released satisfy the requirements for a Fee Waiver, a Fee Waiver shall be granted for those Records.

(e) Requests for a Fee Waiver should address the factors listed in paragraphs (a) through (c) of this section, insofar as they apply to each Request. The NCPC shall exercise its discretion to consider the cost-effectiveness of its investment of administrative resources in this decision-making process in deciding to grant Fee Waivers.

§ 602.15 Preservation of FOIA records.

(a) The NCPC shall preserve all correspondence pertaining to FOIA Requests received and copies or Records provided until disposition or destruction is authorized by the NCPC's General Records schedule established in accordance with the National Archives and Records Administration (NARA) approved schedule.

(b) Materials that are responsive to a FOIA Request shall not be disposed of or destroyed while the Request or a related lawsuit is pending even if the Records would otherwise be authorized for disposition under the NCPC's General Records Schedule or NARA or other NARA-approved records schedule.

Anne R. Schuyler

General Counsel

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