



BILLING CODE 8025-01

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Part 102**

### **RIN 3245-AG52**

### **Record Disclosure and Privacy**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Direct final rule; request for comments.

**SUMMARY:** The U.S. Small Business Administration (SBA) is issuing this direct final rule to amend its regulations for disclosure and production of information under the Freedom of Information Act (FOIA). This rule updates and streamlines the language of several procedural provisions and incorporates changes brought about by amendments to the FOIA under the OPEN Government Act of 2007, the OPEN FOIA Act of 2009, and the FOIA Improvement Act of 2016.

**DATES:** This rule is effective [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] without further action, unless adverse comment is received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. If adverse comment is received, the U.S. Small Business Administration will publish a timely withdrawal of the rule in the *Federal Register*.

**ADDRESSES:** Identify your comments by RIN 3245-AG52 and submit them by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>, follow the website instructions for submitting comments.

- Mail or Hand Deliver/Courier: Oreoluwa Fashola, Freedom of Information/Privacy Acts (FOI/PA) Office, 409 Third Street, SW, Mail Code 2441, Washington, DC 20416.

Please be aware that SBA will only accept comments for this direct final rule on <http://www.regulations.gov>, which will be posted publicly.

If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), you must submit such information to the Chief, Freedom of Information/Privacy Acts (FOI/PA) Office, 409 Third Street SW, Mail Code 2441, Washington, DC 20416, or send an email to [foia@sba.gov](mailto:foia@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should withhold this information as confidential. SBA will review your information and determine whether it will make the information public.

**FOR FURTHER INFORMATION CONTACT:** Oreoluwa Fashola, Freedom of Information/Privacy Acts (FOI/PA) Office, at 202-401-8203 or [foia@sba.gov](mailto:foia@sba.gov).

**SUPPLEMENTARY INFORMATION:**

SBA is issuing this direct final rule to amend its regulations for disclosure and production of information under the Freedom of Information Act, 5 U.S.C. 552 (FOIA). This direct final rule updates and streamlines the language of several procedural provisions and incorporates certain changes brought about by amendments to the FOIA under the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act), Public Law 110-175 (2007), and the OPEN FOIA Act of 2009, Public Law 111-83 (2009), which have been incorporated into agency practice but not reflected in the regulations, and the FOIA Improvement Act of 2016, Public Law 114-

185 (2016). The FOIA Improvement Act of 2016 provides, among other things, that agencies must allow a minimum of 90 days for requesters to file an administrative appeal. The Act also requires that agencies notify requesters of the availability of dispute resolution services at various times throughout the FOIA process. This rule updates the Agency's regulations in 13 CFR Part 102, Subpart A to reflect those statutory changes.

#### Section-by-Section Analysis

Section 102.1 (General provisions) is revised to remove outdated wording and to incorporate additional policies and procedures relevant to the FOIA process. SBA is also amending this section to more clearly define a component. Component is defined in § 102.1(b) as each separate bureau, office, division, district office, regional office, area office service center, loan processing center or central office duty station within the SBA that is responsible for processing FOIA requests. A full list of the types of records maintained by different SBA components is provided in Appendix A of this rule. This section is being revised to include the current definition of a record under the FOIA.

Section 9 of the OPEN Government Act amended the definitions section of the FOIA, 5 U.S.C. 552(f), by including within the definition of "record" any information "maintained for an agency by an entity under Government contract, for the purposes of records management." This amendment makes clear that records, in the possession of Government contractors for purposes of records management, are considered agency records for purposes of the FOIA. Through this change to the regulations, SBA adopts the statutory definition of "record."

Section 102.2 (Proactive disclosure of records) is revised to more clearly reflect the FOIA Improvement Act of 2016's requirement that records the FOIA requires

agencies to make available for public inspection must be in an electronic format, rather than simply made available for public inspection and copying. Such records are available via the internet through the electronic reading rooms of each component. For those individuals with no access to the internet, the SBA FOI/PA Office or the component Public Liaison can provide assistance with access to records available in the electronic reading rooms.

Section 102.3 (Requirements pertaining to the submission of requests) is revised to explain that the requester will receive the quickest response if the request is directed to the component that maintains the records. This section also provides that requesters may discuss their requests with the component's FOIA Contact or the FOIA Public Liaison in advance of making a request, as well as to clarify a request already made. New paragraph (b), which describes the process under which SBA may administratively close a request if a requester fails to comply with a request for additional information.

Section 102.4 (Responsibility for responding to requests) is revised to advise requesters of who may grant or deny requests, re-routing of misdirected requests, and of the need to consult, refer, or coordinate with another component and/or agency.

Section 102.5 (Timing of responses to requests) formerly §102.4 is revised to include a requirement that components notify requesters of the availability of assistance from the Office of Government Information Services (OGIS) at the National Archives and Records Administration when the component gives notice to requesters that the request involves unusual circumstances. This notification is required by the FOIA Improvement Act of 2016.

Section 102.6 (Responses to requests) is revised to include requirements that components notify requesters of the availability of assistance from a FOIA Public Liaison and OGIS when providing requesters with responses to their requests. These notifications are required by the FOIA Improvement Act of 2016.

Section 102.7 (Confidential commercial information) is revised to update the language of the current definitions and provide a more detailed description for SBA processes for notification to a submitter of business information.

Section 102.8 (Fees) is revised to identify the different types of requester fee categories and clarify some of the definitions used by SBA in determining a requester's fee category. For instance, "Commercial use request," would clarify that components will make determinations on commercial use on a case-by-case basis. Also this section is revised to conform to recent decisions of the D.C. Circuit Court of Appeals addressing two FOIA fee categories: "representative of the news media" and "educational institution." See *Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015); *Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2016). The Agency's existing FOIA regulations state that a representative of the news media is any person or entity that is organized and operated to publish or broadcast news to the public that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In *Cause of Action*, 799 F.3d at 1125, the court held that a representative of the news media need not work for an entity that is "organized and operated" to publish or broadcast news. Therefore, the definition of "representative of the news media" is revised to remove the "organized and operated" requirement. The definition of "educational institution" is revised to reflect the holding in

*Sack*, 823 F.3d at 688 that students who make FOIA requests in furtherance of their coursework or other school-sponsored activities may qualify under this requester category. Several examples are being added to help requesters understand the analysis that SBA will apply to determine whether a requester meets the criteria to be considered an educational institution.

Paragraph (d) “Charging fees,” changes the current fee schedule that SBA uses for search and review which is currently at a rate of \$30 per hour, to \$46 per hour for professional staff (GS-9 to GS14) and \$83 per hour for managerial staff (GS-15 and above) to be consistent with other Federal Agency costs. Because these and similar changes are consistent with current regulations and describe current processes, SBA does not expect that they will result in significant additional costs for the government or the public. Paragraph (d)(1)(iii), which discusses direct costs associated with conducting any search that requires the creation of a new computer program. This change is intended to improve comprehension and to more accurately describe the circumstances under which a requester may be charged for a computerized search or a search of electronic records. It does not represent a change in practice, as SBA currently charges direct costs for specialized data searches.

Paragraph (e) addresses restrictions on charging fees when the FOIA’s time limits are not met and is revised to reflect changes made to those restrictions by the FOIA Improvement Act of 2016. Specifically, these changes reflect that agencies may not charge search fees (or duplication fees for representatives of the news media and educational/non-commercial scientific institution requesters) when the agency fails to comply with the FOIA’s time limits. The restriction on charging fees is excused and the

agency may charge fees as usual when it satisfies one of three exceptions detailed at 5 U.S.C. 552(a)(4)(A)(viii)(II).

This rule also revises paragraph (I), which addresses the requirements for a waiver or reduction of fees, to specify that requesters may seek a waiver of fees and to streamline and simplify the description of the factors to be considered by components when making fee waiver determinations. These updates do not substantively change the analysis, but instead present the factors in a way that is clearer to both components and requesters. Rather than six factors, the amended section provides for three overall factors. Specifically, a requester should be granted a fee waiver if the requested information (1) sheds light on the activities and operations of the government; (2) is likely to contribute significantly to public understanding of those operations and activities; and (3) is not primarily in the commercial interest of the requester. This streamlined description facilitates easier understanding and application of the statutory standard.

Again, because these changes are consistent with current regulations and case law which describe current processes, SBA does not expect that they will result in significant additional costs for the government or the public. Finally, this section is amended to include a chart showing fee applicability, for ease of reference.

Section 102.9 (Administrative appeals) is revised to extend the time to file an administrative appeal to 90 days, in conformity with the 90-day minimum time period established by the FOIA Improvement Act of 2016. This section is also revised to include a new paragraph regarding engaging in dispute resolution services provided by OGIS.

Section 102.10 (Preservation of records) outlines SBA responsibilities maintaining records responsive to FOIA requests in accordance with 44 U.S.C. or the General Records Schedule 14 of the National Archives and Records Administration.

102.11 (Subpoenas), formerly at 102.10, the text of this section remains the same as before.

Appendix A is added to list the type of records that SBA typically releases or withholds.

SBA is issuing this direct final rule to amend its procedures for disclosure and production of information under the Freedom of Information Act (5 U.S.C. 552) (FOIA), which are in 13 CFR part 102, Subpart A.

Since these are conforming amendments, with no extraneous interpretation or other expanded materials, SBA expects no significant adverse comments. Based on that fact, SBA has decided to proceed with a direct final rule giving the public 30 days to comment. If SBA receives a significant adverse comment during the comment period, SBA will withdraw the rule, and proceed with a new rule.

*Compliance with Executive Orders 12866, 12988, 13132, 13563, 13771, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35).*

*Executive Order 12866*

The Office of Management and Budget (OMB) has determined that this direct final rule does not constitute a significant regulatory action under Executive Order 12866. This direct final rule is also not a major rule under the Congressional Review Act, 5 U.S.C. 800.

*Executive Order 12988*

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

*Executive Order 13132*

For purposes of Executive Order 13132, SBA has determined that this direct final rule will not have any substantial, direct effects 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, for the purpose of Executive Order 13132, Federalism, SBA has determined that this direct final rule has no federalism implications warranting the preparation of a federalism assessment.

*Executive Order 13563*

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. SBA developed this rule in a manner consistent with these requirements with guidance provided by the Department of Justice, Office of Information Policy.

*Executive Order 13771*

This rule is not an Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, regulatory action because this rule is not significant under Executive Order 12866.

*Regulatory Flexibility Act, 5 U.S.C. 601-612*

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their action on small entities, including small businesses. According to the RFA, when an agency issues a rule, the agency must prepare an analysis to determine whether the impact of the rule will have significant economic impact on a substantial number of small entities. However, section 605 of the RFA allows an agency to certify a rule in lieu of preparing an analysis, if the rulemaking is not expected to have a significant impact on a substantial number of small entities. SBA has determined that this direct final rule will not have a significant economic impact on a substantial number of small entities. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by SBA are nominal. Within the meaning of RFA, SBA certifies that this direct final rule will not have a significant economic impact on a substantial number of small entities.

*Paperwork Reduction Act, 44 U.S.C. Ch. 35*

SBA has determined that this direct final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

*List of Subjects in 13 CFR Part 102*

Freedom of information, Privacy.

Accordingly, for the reasons set forth in the preamble, the U.S. Small Business Administration is amending 13 CFR Part 102 as follows:

**PART 102 – [AMENDED]**

1. The authority citation for part 102 is revised to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 31 U.S.C. 3717, 9701; 44 U.S.C. 3501.

2. Subpart A is revised to read as follows:

**Subpart A – Disclosure of Information**

Sec.

102.1 General provisions.

102.2 Proactive disclosure of records.

102.3 Requirements pertaining to the submission of requests.

102.4 Responsibility for responding to requests.

102.5 Timing of responses to requests.

102.6 Responses to requests.

102.7 Confidential commercial information.

102.8 Fees.

102.9 Administrative appeals.

102.10 Preservation of records.

102.11 Subpoenas.

Appendix A to Subpart A--Records maintained by SBA

**Subpart A – Disclosure of Information**

**§ 102.1 General provisions.**

(a) This subpart contains the rules that SBA follows in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552. The rules in this subpart should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under subpart B of this part as well as under this subpart.

(b) As referenced in this subpart, “component” means each separate bureau, office, division, district office, regional office, area office, service center, loan processing center or central office duty location within the SBA that is responsible for processing FOIA requests. See appendix A to this subpart for a list of information generally exempt from disclosure. For contact information for each office visit <https://www.sba.gov/foia> and for a detailed description of the function of each office to help ascertain the types of records maintained by each component, please visit <https://www.sba.gov/about-sba>. The rules described in this regulation that apply to SBA also apply to its components.

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

(d) The term record means:

(1) Any information that would be an agency record subject to the requirements of this section when maintained by SBA in any format, including written or electronic format; and

(2) Any information described under paragraph (d)(1) of this section that is maintained for SBA by an entity under Government contract, for purposes of records management.

## **§ 102.2 Proactive disclosure of records.**

Records that are required by the FOIA to be made available for public inspection in an electronic format may be accessed through the SBA’s website at <https://www.sba.gov/foia>. Each component of SBA is responsible for determining which of its records are required to be made publicly available, as well as for identifying additional records of interest to the public that are appropriate for public disclosure, and

for posting and indexing such records. Each component shall ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. Each component has a FOIA Public Liaison who can assist individuals in locating records particular to a component. A list of the SBA's FOIA Public Liaisons is available at <https://www.sba.gov/foia>.

**§ 102.3 Requirements pertaining to the submission of requests.**

(a) *General information.* (1) The SBA has a decentralized system for responding to FOIA requests, with each component handling requests for its records. All components have the capability to receive requests electronically either through email or a web portal. To make a request for records, a requester should write directly to the Freedom of Information/Privacy Acts (FOI/PA) Office by mail to 409 3rd St., SW, Washington, DC 20416 or submit a fax to 202-205-7059 or e-mail to [foia@sba.gov](mailto:foia@sba.gov). Requesters may also submit their request through the FOIA online portal at <https://foiaonline.regulations.gov/foia/action/public/home>. Additional information for submitting a request to SBA is listed at <https://www.sba.gov/foia>. However, a request will receive the quickest possible response if it is addressed to the component that maintains the records sought.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity provision set forth in subpart B of this part. The Certification of Identity form, available at [http://www.justice.gov/oip/forms/cert\\_ind.pdf](http://www.justice.gov/oip/forms/cert_ind.pdf), may be used by individuals who are making requests for records pertaining to themselves.

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

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the component in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, reference number, the timeframe for which the records are sought, the office that created the records, or any other information that will assist the component in locating documents responsive to the request. Before submitting their requests, requesters may contact the component's FOIA Contact or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If, after receiving a request, a component determines that the request does not adequately describe the records sought, the component will inform the requester what additional information is needed or why the request is otherwise insufficient. The component will also notify the requester that it will not be able to comply with their request unless the additional information it has requested is received from them in writing within 20 working days after the component

has requested it. If this type of notification is received, a requester may wish to discuss it with the FOIA Public Liaison. If the component does not receive a written response containing the additional information within 20 working days after it has been requested, the SBA will presume that the requester is no longer interested in the records and will close the file on the request. Requesters who are attempting to reformulate or modify such a request may discuss their request with the component's designated FOIA Contact or its FOIA Public Liaison, or a representative of the FOI/PA Office, each of whom is available to assist the requester in reasonably describing the records sought. If a request does not reasonably describe the records sought, the SBA's response to the request may be delayed.

(c) *Form or format.* Requests may specify the preferred form or format (including electronic formats) for the records sought. The SBA will accommodate the request if the record is readily reproducible in that form or format.

(d) *Contact information.* Requesters must provide contact information, such as their phone number, email address, and mailing address, to assist the SBA in communicating with the requester and providing the released records.

#### **§ 102.4 Responsibility for responding to requests.**

(a) *In general.* Except in the instances described in paragraphs (c) and (d) of this section, the component that first receives a request for a record and maintains that record is the component responsible for responding to the request. In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the component

shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c) is not considered responsive to a request.

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

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

(d) *Consultation, referral, and coordination.* When reviewing records located by a component in response to a request, the component shall determine whether another component of SBA or another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the component shall proceed in one of the following ways:

(1) *Consultation.* When records originated with the component processing the request, but contain within them information of interest to another component, agency, or other Federal Government office, the component processing the request should typically consult with that other component or agency prior to making a release determination.

(2) *Referral.* (i) When the component processing the request believes that a different component, agency, or other Federal Government office is best able to determine whether to disclose the record, the component typically should refer the responsibility for responding to the request regarding that record, as long as the referral is to a component or agency that is subject to the FOIA. Ordinarily, the component or agency that originated the record will be presumed to be best able to make the disclosure

determination. However, if the component processing the request and the originating component or agency jointly agrees that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever a component refers any part of the responsibility for responding to a request to another component or agency, it shall document the referral, maintain a copy of the record that it refers, and notify the requester of the referral and inform the requester of the name(s) of the component or agency to which the record was referred, including that component's or agency's FOIA Contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the component or agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement component responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if a component locates within its files material originating with an Intelligence Community agency and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the component that received the request should coordinate with the originating component or agency to seek its views on the disclosure of the

record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the component that originally received the request.

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

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

(g) *Timing of responses to consultations and referrals.* All consultations and referrals received by the SBA will be handled according to the date that the FOIA request initially was received by the first component or agency.

**§ 102.5 Timing of responses to requests.**

(a) *In general.* Components ordinarily will respond to requests according to their order of receipt. In instances involving misdirected requests that are re-routed pursuant to § 102.4(c), the response time will commence on the date that the request is received by the proper component's office that is designated to receive requests, but in any event not later than 10 working days after the request is first received by any component's office that is designated by these regulations to receive requests.

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

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of "unusual circumstances," as defined in the FOIA, and the component extends the time limit on that basis, the component shall, before expiration of the 20-working day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the component estimates processing of the request will be completed. Where the extension exceeds 10 working

days, the component shall, as prescribed by the FOIA, provide the requester with an opportunity to modify the request or to arrange an alternative time period for processing the original or modified request. The component shall make available its designated FOIA Contact or its FOIA Public Liaison for this purpose. The component must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

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

(e) *Expedited processing.* (1) Requests and appeals shall be processed on an expedited basis whenever it is determined that they involve:

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

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

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

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

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) through (iii) of this section must be submitted to the component that maintains the records requested. When making a request for expedited processing of an administrative appeal, the request should be submitted to the FOI/PA Office. Requests for expedited processing that are based on paragraph (e)(1)(iv) of this section must be submitted to the component processing the request. A component that receives a misdirected request for expedited processing under the standard set forth in paragraph (e)(1)(iv) of this section shall forward it immediately to the FOI/PA Office for its determination. The time period for making the determination on the request for expedited processing under paragraph (e)(1)(iv) of this section shall commence on the date that the FOI/PA Office receives the request, provided that it is routed within 10 working days.

(3) A requester who seeks expedited processing must submit a notarized statement, such as an affidavit or declaration, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. As a matter of administrative discretion, the SBA may waive the formal certification requirement.

(4) A component shall notify the requester within 10 working days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

#### **§ 102.6 Responses to requests.**

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

(b) *Acknowledgments of requests.* A component shall acknowledge the request in writing and assign it an individualized tracking number. Components shall include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Estimated dates of completion and interim responses.* Upon request, components shall provide an estimated date by which they expect to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the SBA or component may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once a component determines it will grant a request in full or in part, it will notify the requester in writing. The component shall inform the requester of any fees charged under § 102.8 and shall disclose the requested records to the

requester promptly upon payment of any applicable fees. The component must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include denials involving fees or fee waiver matters, denials of requests for expedited processing, and decisions where:

- (1) The requested record is exempt, in whole or in part;
- (2) The request does not reasonably describe the records sought;
- (3) The information requested is not a record subject to the FOIA;
- (4) The requested record does not exist, cannot be located, or has been destroyed;

or

(5) The requested record is not readily reproducible in the form or format sought by the requester.

(f) *Content of denial.* The denial must be signed by the head of the component or designee and must include:

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

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

(4) A statement that the denial may be appealed under § 102.9, and a description of the appeal requirements; and

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

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption.

#### **§ 102.7 Confidential commercial information.**

(a) *Definitions.* For purposes of this section:

*Confidential commercial information* means commercial or financial information obtained by the SBA from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

*Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure

under Exemption 4. These designations shall expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

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

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

(ii) The component has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure under that exemption or any other applicable exemption.

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

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section shall not apply if:

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

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

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

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

(e) *Opportunity to object to disclosure.* (1) A component shall specify a reasonable time period within which the submitter must respond to the notice referenced above. If the submitter has any objections to disclosure, it should provide the component a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as the basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential.

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

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

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

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

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

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

### **§ 102.8 Fees.**

(a) *In general.* Components shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, a component may contact a requester for additional information. Components shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. A component ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Small Business Administration, addressed to the component assessing the fee.

(b) *Categories of requesters.* Different fees are assessed depending on the requester category. Requesters may seek a fee waiver. Requests for fee waivers will be considered in accordance with the requirements in paragraph (l) of this section. For purposes of assessing fees, the FOIA establishes four categories of requesters:

(1) Commercial use requesters;

(2) Non-commercial scientific/educational institutions requesters;

(3) News media requesters, and;

(4) All other requesters.

(c) *Definitions.* For purposes of this section:

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

(2) *Direct costs* are those expenses that the SBA incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (i.e., the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility. This will be in addition to search, review, and duplication fees, and shall be paid by requesters categorized as commercial and other.

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

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

verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

*Example 1 to paragraph (c)(4).* A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

*Example 2 to paragraph (c)(4).* A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

*Example 3 to paragraph (c)(4).* A student, who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

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

(6) *Representative of the news media* is 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 include television or radio stations that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, a requester’s past publication record will be considered in making a determination.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 102.7, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification

of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(d) *Charging fees.* In responding to FOIA requests, components will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (l) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, components will not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees shall be charged for all other requesters, subject to the restrictions of paragraph (e) of this section. Components may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: professional (GS 9 – 14) – \$46; and managerial (GS 15 and above) – \$83.

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

(iv) For requests that require the retrieval of records stored by SBA at a Federal Records Center operated by the National Archives and Records Administration (NARA),

additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* Duplication fees will be assessed to all requesters, subject to the restrictions of paragraph (e) of this section. A component shall honor a requester's preference for receiving a record in a particular form or format where it can be readily reproduced in the form or format requested. Where photocopies are supplied, SBA will provide one copy per request at the cost of \$.10 per page. For copies of records produced on tapes, disks, or other media, SBA will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, components shall charge the direct costs.

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

(ii) The following table summarizes the fees for each type of requester.

Table 1 to § 102.8– Summary of Fees

Requester Category	Search	Review	Duplication Fees	Direct Costs
Commercial Use	Yes	Yes	Yes	Yes
Educational/Noncommercial Scientific Institutions	No	No	Yes (first 100 pages, or equivalent volume free)	No
News Media	No	No	Yes (first 100 pages, or equivalent volume free)	No
All Others	Yes (first 2 hours free)	No	Yes (first 100 pages, or equivalent volume free)	Yes

(e) *Restrictions on charging fees.* (1) When a component determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

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

(ii) If a component has determined that unusual circumstances as defined by the FOIA apply and SBA 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 working days.

(iii) If a component has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the component may charge search fees, or, in the case of requesters described in paragraph (c)(1) of this section, may charge duplication fees, if the following steps are taken. The component shall provide a timely written notice of unusual circumstances to the requester

in accordance with the FOIA and SBA must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the component may charge all applicable fees incurred in the processing of the request.

(iv) 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.

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

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

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

(ii) The first two hours of search.

(4) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$46.00.

(f) *Notice of anticipated fees in excess of \$46.00.* (1) When a component determines or estimates that the fees to be assessed in accordance with this section will exceed \$46.00, the component shall notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the component shall advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the

requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) In cases in which a requester has been notified that the actual or estimated fees are in excess of \$46.00, the request shall not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. Components are not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the component estimates that the total fee will exceed that amount, the component will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The component shall inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

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

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

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

(i) *Aggregating requests.* When a component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the component may aggregate those requests and charge accordingly. Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, components shall aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(j) *Advance payments.* (1) For requests other than those described in paragraphs (j)(2) or (j)(3) of this section, components cannot require the requester to make an

advance payment before work is commenced or continued on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

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

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

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

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

(l) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting written correspondence demonstrating how 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 is not primarily in the commercial interest of the requester. Records responsive to a request shall be furnished without charge or at a reduced rate below the rate established under paragraph (d) of this section, where a component determines, based on all available information, that the requester has demonstrated that:

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

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

(2) Components shall furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (l)(2)(i) through (iii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable

operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

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

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the following criteria will be considered:

(A) Identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, a determination will be made whether the primary interest is furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (l)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request.

Ordinarily there will be a presumption, that when a news media requester has satisfied factors (l)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

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

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

### **§ 102.9 Administrative appeals.**

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the FOI/PA Office. The contact information is contained in § 102.3(a)(1). Examples of adverse determinations are provided in § 102.6(e). The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 working days

after the date of the response. The appeal should clearly identify the component's determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The Chief, FOI/PA or designee will act on behalf of the SBA on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the FOI/PA Office shall take appropriate action to ensure compliance with Executive Orders 13467 and 13526.

(c) *Decisions on appeals.* A decision on an appeal will be made in writing. A decision that upholds a component's determination will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by OGIS as a non-exclusive alternative to litigation. If a component's decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The component will thereafter, further process the request in accordance with that appeal determination and respond directly to the requester.

(d) Time limit for issuing appeal decision. The statutory time limit for responding to appeals is generally 20 working days after receipt. However, the Appeals Officer may

extend the time limit for responding to an appeal provided the circumstances set forth in 5 U.S.C. 552(a)(6)(B)(i) are met.

(e) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If a component agrees to participate in the mediation services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(f) *When an appeal is required.* Before seeking review by a court of a component's adverse determination, a requester generally must first submit a timely administrative appeal.

#### **§ 102.10 Preservation of records.**

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

#### **§ 102.11 Subpoenas.**

(a) The person to whom the subpoena is directed must consult with SBA counsel in the relevant SBA office, who will seek approval for compliance from the Associate General Counsel for Litigation. Except where the subpoena requires the testimony of an employee of the Inspector General's office, or records within the possession of the Inspector General, the Associate General Counsel may delegate the authorization for appropriate production of documents or testimony to local SBA counsel.

(b) If SBA counsel approves compliance with the subpoena, SBA will comply.

(c) If SBA counsel disapproves compliance with the subpoena, SBA will not comply, and will base such noncompliance on an appropriate legal basis such as privilege or a statute.

(d) SBA counsel must provide a copy of any subpoena relating to a criminal matter to SBA's Inspector General prior to its return date.

**APPENDIX A TO SUBPART A OF PART 102— RECORDS MAINTAINED BY  
SBA**

**I. INFORMATION GENERALLY EXEMPT FROM DISCLOSURE**

- a. Non-statistical information on pending, declined, withdrawn, or canceled applications.
- b. Non-statistical information on defaults, delinquencies, losses etc.
- c. Loan status, other than charged-off or paid-in-full.
- d. Home disaster loan status and interest rate.
- e. Financial statements, credit reports, business plans, plant lay-outs, marketing strategy, advertising plans, fiscal projections, pricing information, payroll information, private sector experience and contracts, IRS forms, purchase information, banking information, corporate structure, research plans and client list of applicant/recipient.
- f. Portions of: Certificate of Competency records, Requests for Size Determinations, 8(a) Business Development Plans, loan applications, SBIC applications, loan officer's reports.
- g. Internal documents not incorporated into final Agency action, pending internal recommendations on applications for assistance, SBA/attorney-client

communications, pending litigation documents and investigatory documents.

Discretionary disclosure policy must be utilized.

- h. Personal history and financial statements, tax forms, resumes, all non-government career experience, communications regarding applicant's character, home addresses and telephone numbers, social security numbers, birth dates and medical records. Portions of Inspector General (IG) reports, audit reports, program investigation records and any other records which, if released, would interfere with the Government's law enforcement proceedings and/or would reveal the identity of a confidential source and documents relating to pending litigation and investigations. Requests for IG documents must be referred to the Office of the Inspector General, Counsel Division.
- i. Financial information on portfolio companies.
- j. Information originating from other agencies should be referred to those agencies for disclosure determinations.

## **II. INFORMATION GENERALLY DISCLOSED**

- a. Names and business addresses of recipients of approved loans, SBIC licenses, Certificates of Competency, lease guarantees, surety bond guarantees and requests for counseling.
- b. Names of officers, directors, stockholders or partners of recipient firms.
- c. Kinds and amounts of loans, loan terms, interest rates (except on home disaster loans), maturity dates, general purpose, etc.
- d. Statistical data on assistance, loans, defaults, contracts, counseling, etc.

- e. Decisions, rulings and records showing final Agency actions in specific factual situations if identifying details exempt from disclosure are first deleted.
- f. Awarded contracts: names, amounts, dates, contracting agencies.
- g. Identity of participating banks.
- h. List of 8(a) participants, date of entry, FPPT dates and NAICS codes.
- i. OHA opinions and decisions.
- j. Names of SBA employees, grades, titles, and duty stations.

Linda E. McMahon,

*Administrator.*

[FR Doc. 2017-21204 Filed: 10/4/2017 8:45 am; Publication Date: 10/5/2017]