



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 1

RIN 2900-AQ27

Release of Information from Department of Veterans Affairs' Records

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This document amends the Department of Veterans Affairs' (VA) regulations governing the submission and processing of requests for information under the Freedom of Information Act (FOIA) and the Privacy Act in order to reorganize, streamline, and clarify existing regulations.

DATES: Comments must be received on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov/>; by mail or hand-delivery to the Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AQ27, Release of Information from Department of Veterans Affairs Records." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday

through Friday (except holidays). Please call (202) 461-4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at <http://www.Regulations.gov/>.

FOR FURTHER INFORMATION CONTACT: Catherine Nachmann, Attorney, Office of General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-7742 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: VA's authority for publishing this proposed rule reads as follows: 5 U.S.C. 552, 552a, 38 U.S.C. 501(a), unless otherwise noted. The FOIA, codified at 5 U.S.C. 552, requires an agency to publish public guidance regarding its implementation of the statute, such as rules of procedure and substantive rules of general applicability. The Privacy Act of 1974, as amended, codified at 5 U.S.C. 552a, requires an agency to publish its rules and procedures implementing that statute. Section 501(a) of title 38, U.S.C., authorizes the Secretary of Veterans Affairs to prescribe rules and regulations to carry out the laws administered by VA.

We propose to update VA's regulations pertaining to the release of information from VA claimant records; the regulations are codified at 38 CFR 1.500 through 1.527. Specifically, VA proposes to amend 38 CFR 1.519 regarding the release of lists of names and addresses.

In addition, we propose to amend VA's regulations pertaining to release of information under the FOIA. VA's current FOIA regulations are codified at 38 CFR 1.550 through 1.562. We propose to update these regulations to ensure compliance with the FOIA Improvement Act of 2016, Public Law 114-185, streamline existing procedures based on our experience administering the FOIA, clarify portions of the regulations to make the regulations and VA's implementing procedures consistent with applicable law and easier for the public to understand, eliminate inherent conflict, ensure that the Department's intent is clear with regard to the agency's processing of requests for records and information under these statutes, and generally reorganize provisions as necessary.

We have also made minor, non-substantive changes to the regulations to correct typographical or grammatical errors and make the language of the text generally more consistent.

Finally, we propose to amend VA's regulations pertaining to the release of information from claimant records protected under the Privacy Act of 1974; the regulations are codified at 38 CFR 1.575 through 1.584. Specifically, we propose to amend 38 CFR 1.577(c) and 1.577(e) pertaining to VA's procedures regarding requests for access to records and fees, respectively, and 38 CFR 1.580 pertaining to administrative review of denials of requests for amendment of records.

Changes to 38 CFR Part 1

Release of Information from Department of Veterans Affairs Claimant Records, 1.500-1.527

1.519 Lists of names and addresses.

Current § 1.519(c) provides, in part, that the Associate Deputy Assistant Secretary for Information Resources Management, with the concurrence of the General Counsel (emphasis added), is authorized to release names and addresses of present or former personnel of the armed services and their dependents from VA records to organizations under specific circumstances outlined in that section.

Current §1.519(e) provides that a denial of a request for the release of names and addresses of present or former personnel of the armed services and their dependents from VA records may be appealed to the General Counsel.

We propose to amend § 1.519(c) to delete the requirement that the General Counsel concur in a release of names and addresses; this requirement inherently conflicts with the General Counsel's authority to address appeals in these cases. As it stands, the regulation requires the General Counsel to be involved in the initial determination and address the appeal regarding the release of information. In order to preserve the integrity of the appeals process, however, the General Counsel should review the request for the first time on appeal. Removing the requirement that the General Counsel concur in the determination of Information Resources Management in these cases would resolve this conflict.

Procedures for Disclosure of Records Under the Freedom of Information Act, 1.550-1.562

We propose to make minor stylistic changes throughout the regulations as necessary that have no substantive effect. We also propose more specific and substantive revisions as outlined below.

1.552 General provisions.

Current § 1.552(a) contains the Internet address established by VA to obtain information regarding VA's FOIA processing and information that VA makes electronically available under the FOIA. The Internet address has changed since the last publication of VA's FOIA regulations. Proposed § 1.552(a), therefore, would replace the existing Internet address with the new, current Internet address.

1.554 Requirements for making requests.

Current § 1.554(a) covers FOIA requests submitted by letter or fax and contains general information regarding the submission of requests; the provision advises, e.g., that the requester send the request to the FOIA Officer for the component that he or she believes maintains the records requested. The section also contains signature requirements when requesting records about which the requester believes he or she has a privacy interest or to which a confidentiality statute applies. Current § 1.554(a) also contains two references to the availability of a list of FOIA contacts available on the Internet.

Current § 1.554(b) covers FOIA requests submitted by e-mail, including circumstances under which signature requirements are triggered. Current § 1.554(c) addresses requirements when requesting records pertaining to another individual.

Proposed §1.554(a) would address requests by letter and fax and would delete the redundant reference to Internet information regarding the availability of VA FOIA contacts. Proposed § 1.554(b) would address requests by e-mail. Proposed § 1.554(a) and § 1.554(b) would contain administrative details such as where to send FOIA requests and would remove signature requirements. Proposed § 1.554(c) would address the content of requests by letter, fax and e-mail and would address the circumstances under which a signature requirement is triggered and options for providing a signature; specifically, proposed § 1.554(c) would require the requester to comply with the verification of identity requirements set forth in § 1.577 of 38 CFR Part 1 when seeking records about himself or herself. Proposed § 1.554(c) also would provide that if the requester is seeking records not covered by the Privacy Act, but which the requester believes may pertain to him or her, the requester may provide proof of identity, such as by a notarized, signed statement affirming his or her identity or a declaration made in compliance with 28 U.S.C. 1746. Further, proposed § 1.554(c) would require that if the requester is seeking records pertaining to another individual who is the record subject, whether by letter, fax, or e-mail, the requester may obtain greater access to the records, if he or she provides satisfactory authorization to act on behalf of the record subject. Proposed §§ 1.554(a) through (c), would be synthesized and reorganized to make it easier for the public to understand and to clarify this portion of the regulations.

In proposed §§ 1.554(d)(2) and (d)(4), we would make a minor stylistic revision to use numerals only rather than both numerals and words.

Current § 1.554(e) addresses circumstances in which a FOIA fee issue is unresolved. Proposed § 1.554(e) streamlines and organizes the language to make it easier for the public to understand.

1.556 Timing of responses to requests.

Current § 1.556(c)(1) contains VA procedures with regard to FOIA requests that involve “unusual circumstances,” including notification when the agency is extending the 20-day response time limit by 10 or more days. Proposed § 1.556(c)(1) would provide that in cases where an extension of more than 10 days is needed, the FOIA Officer also must advise the requester that the VA FOIA Liaison is available to assist in any disputes between the requester and VA (as required by the FOIA) and that the requester has the right to seek dispute resolution from the Office of Government Information Services (as required by the FOIA Improvement Act of 2016). In proposed § 1.556(c)(1) and § 1.556(d)(3), we would also make a minor stylistic revision to eliminate use of numerals and written words in favor of using only numerals.

1.557 Responses to requests.

Current § 1.557 addresses the agency’s procedures regarding responses to requests, including the agency’s acknowledgment and timing of responses and adverse determinations. Current § 1.557(a) addresses the FOIA Officer’s responsibility to assign a number to the request and acknowledge the FOIA request. Proposed § 1.557(a) adds specific provisions that the FOIA Officer will advise the

requester of the assigned FOIA request number and how the requester may obtain the status of his or her request.

Current § 1.557(c) addresses time limits for processing requests. Proposed § 1.557(c) would streamline and clarify this provision. Current § 1.557(d) addresses adverse determinations of requests. We propose to add a new provision at § 1.557(d) to address grants of requests in full and to redesignate current § 1.557(d) as § 1.557(e) and revise § 1.557(e). In addition to complying with the FOIA Improvement Act of 2016, these amendments would provide clarification and make the section easier to understand.

1.558 Business information.

Current § 1.558(c)(3) provides for notification to both the submitter of information and the requester when a final decision is made regarding release of business information. We propose to clarify § 1.558(c)(3) to ensure that the requirements of the submitter notification process are met and to make it easier for the public to understand. We also propose to delete the last sentence of current § 1.558(c)(3), which would become unnecessary based on the clarifications made in the proposed revision.

We propose to make a minor stylistic revision to § 1.558(e)(3) to use only the numeral 10 rather than using the written form of the numeral and the numeral as in current § 1.558(e)(3).

1.559 Appeals.

Current § 1.559 addresses the agency's procedures for filing administrative appeals of adverse determinations under the FOIA. Current § 1.559(b) through § 1.559(d) include the requirements for an appeal by letter and e-mail and the time limit and content of the appeal, including the requirement for identity verification when the appeal involves records protected by a confidentiality statute; the latter requirement is contained in both paragraphs (b) and (c). We propose to streamline § 1.559(b) through § 1.559(d) by deleting redundancy in paragraphs (b) and (c) and by including requirements applicable to all appeals in paragraph (d); the proposed revisions would make the section more organized and easier for the public to understand. The proposed revision would also provide other means by which an individual could provide verification of his or her identity; the proposed revision in this regard would make it more efficient and easier for requesters to provide identity verification.

Current § 1.559(d) establishes a 60-day period within which to file an appeal and describes the information that should be included in an appeal. Proposed § 1.559(d) would extend the appeal period to 90 days in accordance with the FOIA Improvement Act. In addition, current § 1.559(d) describes the titles of individuals within the VA Office of General Counsel responsible for addressing FOIA appeals. We propose to revise § 1.559(d) to instead provide a more general description of the responsible office in order to account for past and future changes in nomenclature within the Office of General Counsel. Lastly, the language of § 1.559(d) is disorganized with regard to the information that must be included with an appeal and

that which may be included. Proposed §1.559(d) would reorganize the language to clarify the provision and make it easier for the public to understand.

1.561 Fees.

Current § 1.561(a) provides the general requirements for charging fees under the FOIA. We propose to amend § 1.561(a) to eliminate unnecessary references to other paragraphs of the section and streamline the regulation.

Current § 1.561(b)(3) uses the term “salary” when referring to the employee performing the work. We propose to revise § 1.561(b)(3) to replace the term “salary” with “hourly wage” to clarify the meaning and to provide consistency in the regulations. In addition, we propose to revise the description of direct costs so as to eliminate redundancy in the paragraph.

Current § 1.561(d)(2) provides information on the cost of duplication by paper copy and provides that for other types of duplication, VA will charge for the direct costs of the duplication. Proposed § 1.561(d)(2) would delete the references to the specific cost of duplication or other services in § 1.561(d)(2) and instead, would include those costs in the schedule of fees set forth in proposed § 1.561(g)(1); the proposed revision would eliminate redundancy and confusion. Proposed § 1.561(d)(2) would include language advising requesters that only one copy of duplicated records will be provided.

Current § 1.561(e) provides for limitations on charging fees; parts of the section contain information that is redundant of other sections. Proposed § 1.561(e) would streamline the regulation in order to eliminate repetitive portions (e.g.,

paragraphs (e)(4) and (e)(5)) and make the section easier to understand. Proposed § 1.561(e) also would add language to address requirements imposed by the FOIA Improvement Act of 2016.

Current § 1.561(f) contains a table describing fees that each category of requester may be charged. The table does not include duplication fee information as it pertains to electronic media; we propose to add this information to § 1.561(f).

Current § 1.561(g) contains information regarding fee assessments that is redundant of other sections of the FOIA regulations. In addition, current §1.561(g)(1) provides a fee schedule that includes reference to “DC locality payment” and specific grades of Federal employees. In proposed § 1.561(g), we would eliminate references to specific forms of potential costs and would instead refer to direct costs and the requester’s fee category; the revision would eliminate redundancy and add consistency to the provision. In proposed § 1.561(g)(1), we would add specific-cost information in order to synthesize fee elements as much as possible into one provision. We would also eliminate the reference to DC locality pay in §1.561(g)(1); locality pay is based on where the employee performing the work is located and would not be tied to one particular locality. In addition, the proposed change would clarify the section generally and make it consistent with other parts of the regulation by providing that the assessment of a fee is based on the hourly salary of the employee performing the work, which would include the particular locality pay of that employee. The references to the specific job type of the employee involved would be eliminated as unnecessary and confusing. Overall,

the proposed revisions would make the section easier to understand and more consistent with the remainder of this section.

Current § 561(g)(1) includes a provision that fees are charged in quarter hour increments. The proposed revision would eliminate the text of current § 561(g)(1). Current § 561(g)(2) contains the schedule of fees. In view of the elimination of the text of current § 561(g)(1), current § 561(g)(2) would become § 561(g)(1). Section 561(g)(2) would be reserved.

Current § 1.561(h) addresses notification to the requester of a fee estimate. We propose to streamline and clarify this section.

Current §§ 1.561(i) and (l)(3),(5) address charges for other services and advance payments, respectively. We propose to make minor stylistic revisions to §§ 1.561(i) and (l)(3),(5) in order to clarify the meaning of the sections and make the sections consistent with the other sections.

Current § 1.561(n) sets forth the requirements for a fee waiver or reduction; proposed § 1.561(n) would clarify that if a FOIA Officer communicates with a requester to seek necessary additional information, the fee-waiver request will be closed if the information is not received within 10 days of the request for additional information. Proposed § 1.561(n) also would provide that if the fee waiver is denied or closed, the underlying FOIA request will be processed in accordance with applicable provisions.

Safeguarding Personal Information in Department of Veterans Affairs Records.

1.575-1.584

1.577 Access to records.

Current § 1.577(c) provides that the VA staff office having jurisdiction over the records involved in a request will establish appropriate disclosure procedures. Proposed § 1.577(c) would specify that access requests for Privacy Act records or information must be sent to the staff office that maintains the records and refer the individual to the system of record notice in order to identify the office to which the request should be sent.

Current § 1.577(e) describes the fees to be charged for providing an individual a copy of his or her records and contains a fee table that includes an outdated reference to “direct cost.” Proposed § 1.577(e) would provide the correct reference to direct cost. Current § 1.577(e) includes no provision for the waiver of fees totaling less than \$25.00. Currently, § 1.561(g) provides for the waiver of fees totaling under \$25.00 under the Privacy Act; § 1.561(g), however, is in the FOIA section of VA regulations. Proposed § 1.577(e) would include the waiver language of fees of \$25.00 or less in the Privacy Act regulations. The revision would make it easier for record subjects to find relevant information when making a Privacy Act request. Finally, proposed § 1.577(e) would include a clarification that the first 100 pages are provided free of charge whether provided in paper or an electronic medium.

1.580 Administrative review.

Current §1.580 provides that upon denial of a request for access or amendment to VA records, the requester will be advised of the decision in

writing and will be provided appeal rights to OGC; the regulation does not distinguish between a written response and the lack of a response. As a result, OGC receives appeals from individuals who have received no response from the component or staff office; OGC directs these communications back to the originating office to respond. The proposed amendment clarifies that §1.580 applies to a written denial of the request and not to the absence of a response to the request. The proposed revision represents an effort to effectuate an expeditious review of the record request, i.e., eliminate OGC involvement in order to streamline review procedures when circumstances involve the absence of a response, ensure that access requests are done by the correct component or staff office at the outset, and provide a quicker response to the requester. The proposed revisions result in the addition of section 38 CFR 1.580(c).

We also propose to correct a typographical error in the first sentence of §1.580, i.e., “denial or” to “denial of” a request.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as

they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This proposed rule concerns the procedures for requesting information from VA and the payment of certain fees for processing such requests. The fees prescribed by this proposed rule will generally comprise only an insignificant portion of a small entity's expenditures. Therefore, this proposed rule is exempt, pursuant to 5 U.S.C. 605(b), from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866, 13563 and 13771

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review, defines "significant regulatory action" to mean any regulatory action that is likely to result in a rule that may: "(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal

mandates, the President's priorities, or the principles set forth in this Executive order.”

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined not to be a significant regulatory action under E.O. 12866. This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This proposed rule would have no such effect on state, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There is no Catalog of Federal Domestic Assistance number for the program affected by this proposed rule.

List of Subjects

38 CFR Part 1

Administrative Practice and Procedure, Archives and Records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government Contracts, Government Employees, Government Property, Infants and Children, Inventions and Patents, Parking, Penalties, Privacy, Reporting and Recordkeeping Requirements, Seals and Insignia, Security Measures, and Wages.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jacquelyn Hayes-Byrd, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on March 19, 2018, for publication.

Dated: March 20, 2018

Consuela Benjamin,
Regulation Development Coordinator,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble, VA proposes to amend 38 CFR part 1 as follows:

PART 1—GENERAL PROVISIONS

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

Authority: 38 U.S.C. 501(a), and as noted in specific sections.

2. Revise § 1.519 paragraph (c) to read as follows.

§ 1.519 Lists of names and addresses.

* * * * *

(c) The Associate Deputy Assistant Secretary for Information Resources Management is authorized to release lists of names and addresses to organizations which have applied for such lists in accordance with paragraph (a) of this section, if he or she finds that the purpose for which the organization desires the names and addresses is directly connected with conduct of programs and the utilization of benefits under title 38 U.S.C. Lists of names and addresses authorized to be released pursuant to this paragraph shall not duplicate lists released to other elements, segments, or chapters of the same organization.

* * * * *

3. Revise § 1.552 paragraph (a) to read as follows:

§ 1.552 General provisions.

(a) Additional information. Information regarding VA's FOIA and Privacy Act process generally, including how to file FOIA requests, and information made available by VA under the FOIA, is available at the following Internet address: <http://www.oprm.va.gov/foia/>.

* * * * *

4. Revise § 1.554 paragraphs (a) through (c), (d)(2),(d)(4), and (e) to read as follows:

§ 1.554 Requirements for making requests.

(a) Requests by letter and facsimile (fax). The FOIA request must be in writing and may be by letter or fax. To assist in processing, the request letter, envelope, or fax cover sheet of any FOIA request should be marked "Freedom of Information Act Request." Information helpful for filing a request, such as a list of VA FOIA contacts, VA's FOIA Reference Guide, and the text of the FOIA, are available on VA's FOIA homepage on the Internet. See § 1.552(a) for the pertinent Internet address. VA has a decentralized FOIA system, meaning that each VA component, i.e., administrations and staff offices, the Veterans Health Administration (VHA) medical centers, Veterans Benefits Administration (VBA) regional offices, or offices located within the VA Central Office in Washington, DC (e.g., the Office of the Secretary), maintain their own FOIA processes and respond to FOIA requests directly. Accordingly, requesters must write directly to the FOIA Officer for the VA component that maintains the records. If requesting records from a particular medical facility, regional office, or Central Office component, the request should be

sent to the FOIA Office at the address listed for that component. A legible return address must be included with the FOIA request; the requester may wish to include other contact information as well, such as a telephone number and e-mail address. If the requester is not sure where to send the request, he or she should seek assistance from the FOIA Contact for the office believed to manage the programs whose records are being requested or, if these efforts fail, he or she should send the request to the Director, FOIA Service (005R1C), 810 Vermont Avenue, NW, Washington, DC 20420, who will refer it for action to the FOIA contact at the appropriate component.

(b) Requests by e-mail. VA accepts e-mail FOIA requests. To assure prompt processing, e-mail FOIA requests must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA requests. An e-mail FOIA request that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA request. Mailbox addresses designated to receive e-mail FOIA requests are available on VA's FOIA homepage. See § 1.552(a) for the pertinent Internet address.

(c) The content of a request. Whether submitting the request by letter, fax, or e-mail, the following applies: if the requester is seeking records about himself or herself or to which a confidentiality statute applies (38 U.S.C. 5701, e.g.), the requester must comply with the verification of identity requirements set forth in 1.577 of this Part, which applies to requests for records maintained under the Privacy Act. If the requester is seeking records not covered by the Privacy Act, but which the requester believes may pertain to him or her, the requester may obtain

greater access to the records by complying with the verification of identity requirements set forth in 1.577 of this Part, by providing the image of the requester's signature (such as an attachment that shows the requester's handwritten signature), or by submitting a notarized, signed statement affirming his or her identity or a declaration made in compliance with 28 U.S.C. 1746. The suggested language for a statement under 28 U.S.C. 1746 is included on VA's FOIA homepage; see § 1.552(a) for the pertinent Internet address. If the requester is seeking records pertaining to another individual under the FOIA, whether by letter, fax, or e-mail, the requester may obtain greater access to the records if he or she provides satisfactory authorization to act on behalf of the record subject to receive the records or by submitting proof that the record subject is deceased (e.g., a copy of a death certificate or an obituary). Each component has discretion to require that a requester supply additional information to verify that a record subject has consented to disclosure.

(d) ***

(2) Requests for voluminous amounts of records may be placed in a complex track of a multitrack processing system pursuant to § 1.556(b); such requests also may meet the criteria for "unusual circumstances," which are processed in accordance with § 1.556(c) and may require more than 20 business days to process despite the agency's exercise of due diligence.

* * *

(4) The time limit for VA to process the FOIA request will not start until the FOIA Officer determines that the requester has reasonably described the records

sought in the FOIA request. If the FOIA Officer seeks additional clarification regarding the request and does not receive the requester's written response within 30 calendar days of the date of its communication with the requester, he or she will conclude that the requester is no longer interested in pursuing the request and will close VA's files on the request.

(e) Agreement to pay fees. The time limit for processing a FOIA request will be tolled while any fee issue is unresolved. Depending on the circumstances, the FOIA Officer will notify the requester: that the FOIA Officer anticipates that the fees for processing the request will exceed the amount that the requester has stated a willingness to pay or will amount to more than \$25.00 or the amount set by Office of Management and Budget fee guidelines, whichever is higher; whether the FOIA Officer is requiring the requester to agree in writing to pay the estimated fee; or whether advance payment of the fee is required prior to processing the request (i.e., if the estimated fee amount exceeds \$250 or the requester previously has failed to pay a FOIA fee in a timely manner). If the FOIA Officer does not receive the requester's written response to the notice regarding any of these items within 10 business days of the date of the FOIA Officer's written communication with the requester, the FOIA Officer will close the request. If requesting a fee waiver under § 1.561, the requester nonetheless may state his or her willingness to pay a fee up to an identified amount in the event that the fee waiver is denied; this will allow the component to process the FOIA request while considering the fee waiver request. If the requester pays a fee in advance, and VA later determines that the requester

overpaid or is entitled to a full or partial fee waiver, a refund will be made. (For more information on the collection of fees under the FOIA, see § 1.561.)

* * * * *

5. Revise § 1.556 paragraphs (c)(1) and (d)(3) to read as follows:

§ 1.556 Timing of responses to requests.

* * * * *

(c) ***

(1) FOIA Officers may encounter “unusual circumstances,” where it is not possible to meet the statutory time limits for processing the request. In such cases, the FOIA Officer will extend the 20-business day time limit for 10 more business days and notify the requester in writing of the unusual circumstances and the date by which it expects to complete processing of the request. Where an extension of more than 10 business days is needed, the FOIA Officer will notify the requester in writing and will include in the notice the following: an opportunity to modify the request so that it may be processed within the identified time limit; an opportunity to arrange an alternative time period with the FOIA Officer for processing the request or a modified request; notice of the availability of the agency FOIA Liaison, and the right to seek dispute resolution services from the Office of Government Information Services. Unusual circumstances consist of the following:

(i) The need to search for and collect the requested records from field facilities or components other than the office processing the request;

(ii) The need to search for, collect and examine a voluminous amount of separate and distinct records that are the subject of a single request; or

(iii) The need for consultation with another agency or among two or more components or another agency having a substantial interest in the subject matter of a request.

* * * * *

(d) ***

(3) Within 10 calendar days of its receipt of a request for expedited processing, the FOIA Officer shall determine whether to grant the request and will provide the requester written notice of the decision. If the FOIA Officer grants a request for expedited processing, the FOIA Officer shall give the request priority and process it as soon as practicable. If the FOIA Officer denies the request for expedited processing, the requester may appeal the denial, which appeal shall be addressed expeditiously.

6. Revise § 1.557 paragraphs (a), (c), and (d) and revise and redesignate current paragraph (d) as paragraph (e) to read as follows:

§ 1.557 Responses to requests.

(a) Acknowledgement of requests. When a request for records is received by a component designated to receive requests, the component's FOIA Officer will assign a FOIA request number; the FOIA Officer will send the requester written acknowledgement of receipt of the request and will advise the requester of the assigned FOIA request number and how the requester may obtain the status of his or her request.

* * * * *

(c) Time limits for processing requests. A component must advise the requester within 20 business days from the date of VA's receipt of the request whether the request is granted in its entirety, granted in part, or denied in its entirety and provide the reasons therefor. If the request must be referred to another component, the response time will begin on the date that the request was received by the appropriate component, but in any event not later than 10 business days after the referring office receives the FOIA request; the referring component has an affirmative duty to refer the FOIA request within 10 business days.

(d) Grants of requests in full. When a component makes a determination to grant a request in full, it shall notify the requester in writing. The component also shall inform the requester of any fees charged under §1.561. The component also must inform the requester of his or her right to seek the assistance of the appropriate VA FOIA Public Liaison and provide the contact information for the Liaison.

(e) Adverse determinations of requests. When a component makes an adverse determination denying the request in any respect, the component FOIA Officer shall promptly notify the requester of the adverse determination in writing. Adverse determinations include decisions that a requested record is exempt from release in whole or in part, does not exist or cannot be located, is not readily reproducible in the form or format sought by the requester, or is not a record subject to the FOIA; adverse determinations also include denials regarding requests for expedited processing and requests involving fees, such as requests for fee waivers. The adverse determination notice must be signed by the component head or the component's FOIA Officer, and shall include the following:

(1) The name and title or position of the person responsible for the adverse determination;

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied by the FOIA Officer in denying the request;

(3) The amount of information withheld in number of pages or other reasonable form of estimation; an estimate is not necessary if the volume is indicated on redacted pages disclosed in part or if providing an estimate would harm an interest provided by an applicable exemption;

(4) Notice that the requester may appeal the adverse determination and a description of the requirements for an appeal under § 1.559 of this part; and

(5) Notice that the requester may seek assistance or dispute resolution services from the appropriate VA FOIA Liaison or dispute resolution services from the Office of Government Information Services.

7. Revise § 1.558 paragraphs (c)(3) and (e) to read as follows:

§ 1.558 Business information.

* * * * *

(c) * * *

(3) Whenever the FOIA Officer notifies the submitter of VA's intent to disclose over the submitter's objections, the FOIA Officer will also notify the requester by separate correspondence.

* * * * *

(e) Consideration of objection(s) and notice of intent to disclose. The FOIA Officer will consider all pertinent factors, including but not limited to, the submitter's timely objection(s) to disclosure and the specific grounds provided by the submitter for non-disclosure in deciding whether to disclose business information. Information provided by the submitter after the specified time limit and after the component has made its disclosure decision generally will not be considered. In addition to meeting the requirements of § 1.557, when a FOIA Officer decides to disclose business information over the objection of a submitter, the FOIA Officer will provide the submitter with written notice, which includes:

- (1) A statement of the reason(s) why each of the submitter's disclosure objections were not sustained;
- (2) A description of the business information to be disclosed; and
- (3) A specified disclosure date of not less than 10 days from the date of the notice (to allow the submitter time to take necessary legal action).

* * * * *

8. Revise § 1.559 paragraphs (b) through (d) to read as follows:

§ 1.559 Appeals

* * * * *

(b) How to file and address a written appeal. The requester may appeal an adverse determination denying the request, in any respect, except for those concerning Office of Inspector General records, to the VA Office of the General Counsel (024), 810 Vermont Avenue, NW, Washington, DC, 20420. Any appeals concerning Office of Inspector General records must be sent to the VA Office of

Inspector General, Office of Counselor (50), 810 Vermont Avenue, NW, Washington, DC 20420. The FOIA appeal must be in writing and may be by letter or facsimile (fax); whichever method is used, the appeal must comply with all requirements of this paragraph and paragraph (d). Information regarding where to fax the FOIA appeal is available on VA's FOIA homepage on the Internet. See § 1.552(a) for the pertinent Internet address.

(c) How to file an e-mail appeal. VA accepts e-mail appeals; the appeal must comply with all requirements of this paragraph and paragraph (d). In order to assure initial processing of an appeal filed by e-mail, the e-mail must be sent to one of the official VA FOIA mailboxes established for the purpose of receiving FOIA appeals; an e-mail FOIA appeal that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA appeal. Mailbox addresses designated to receive e-mail FOIA appeals are available on VA's FOIA homepage. See § 1.552(a) for the pertinent Internet address.

(d) Time limits and content of appeal. The appeal to the VA OGC (024) or VA Office of Inspector General (50) must be received or postmarked no later than 90 calendar days after the date of the adverse determination and must contain the following: a legible return address; clear identification of the determination being appealed, including any assigned request number (if no request number was assigned, other information must be provided such as the name of the FOIA officer, the address of the component, the date of the component's determination, if any, and the precise subject matter of the appeal); and identification of the part of the determination that is being appealed (if appealing only a portion of the

determination). If the appeal involves records about the requester himself or herself or records to which a confidentiality statute applies, the requester must comply with the verification of identity requirements set forth in 1.577 of this Part, which applies to requests for records maintained under the Privacy Act. If the appeal involves records not covered by the Privacy Act, but which the requester believes may pertain to him or her, the requester may obtain greater access to the records by complying with the verification of identity requirements set forth in 1.577 of this Part, providing the image of the requester's signature (such as an attachment that shows the requester's handwritten signature), or submitting a notarized, signed statement affirming his or her identity or a declaration made in compliance with 28 U.S.C. 1746. The suggested language for a statement under 28 U.S.C. 1746 is included on VA's FOIA homepage. See § 1.552(a) for the pertinent Internet address. If the appeal involves records pertaining to another individual (i.e., record subject), the requester may obtain greater access to the records if he or she provides satisfactory authorization to act on behalf of the record subject to receive the records or by submitting proof that the record subject is deceased (e.g., a copy of a death certificate or an obituary). Each component has discretion to require that a requester supply additional information to verify that a record subject has consented to disclosure. Appeals should be marked "Freedom of Information Act Appeal." The requester may include other information as well, such as a telephone number and e-mail address and a copy of the initial agency determination. An appeal is not perfected until VA either receives the required information identified above or the appeal is otherwise easily and sufficiently defined. The designated

official within the Office of the General Counsel (024) will act on behalf of the Secretary on all appeals under this section, except those pertaining to the Office of Inspector General. The designated official in the Office of Inspector General will act on all appeals pertaining to Office of Inspector General records. A determination by the Office of General Counsel, or designated official within the Office of Inspector General, will be the final VA action.

* * * * *

§ 1.561 [Amended]

9. Amend § 1.561 by:
- a. Revising paragraphs (a), (b)(3), (d)(2), (e);
 - b. Adding paragraphs (e)(4)(iii) and (4)(iv);
 - c. Removing paragraphs (e)(5) and (e)(6);
 - d. Revising paragraph (f) and (g)(1);
 - e. Removing and reserving paragraph (g)(2), and
 - f. Revising paragraphs (h), (i), (l)(3),(l)(5), and (n)(1).

The revisions and additions read as follows:

§ 1.561 Fees.

(a) General. VA will charge for processing requests under the FOIA, as amended, and in accordance with this section. Requesters must pay fees by check or money order made payable to the Treasury of the United States. Payment by credit card also may be acceptable; the requester should contact the FOIA Officer for instructions on credit card payments. Note that fees associated with requests from VA beneficiaries, applicants for VA benefits, or other individuals, for records

retrievable by their names or individual identifiers processed under 38 U.S.C. 5701 (records associated with claims for benefits) and 5 U.S.C. 552a (the Privacy Act), will be assessed fees in accordance with the applicable regulatory fee provisions relating to VA benefits and VA Privacy Act records.

(b) * * *

(3) Direct costs mean expenses that VA incurs in responding to a FOIA request; direct costs include searching for and duplication of (and in the case of commercial use requesters, reviewing) records to respond to a FOIA request, the hourly wage of the employee performing the work plus 16 percent of the hourly wage, and the cost of operating duplication machinery. Direct costs do not include overhead expenses, such as the costs of space or heating and lighting of the facility where the records are kept.

* * * * *

(d) * * *

(2) Duplication. When the agency provides duplicated records in response to a request, no more than one copy will be provided.

(3) * * *

(e) Limitations on charging fees. (1) When VA determines that a requester is an educational institution, a non-commercial scientific institution, or a representative of the news media, VA will not charge search fees.

(2) VA charges fees in quarter hour increments; no search or review fee will be charged for a quarter hour period unless more than half of that period is required for search or review.

(3) VA may provide free copies of records or free services in response to an official request from another government agency or a congressional office and when a component head or designee determines that doing so will assist in providing medical care to a VA patient or will otherwise assist in the performance of VA's mission.

(4) (i) If VA fails to comply with the time limit to respond to a request, it may not charge search fees, or, in cases of requests from requesters described in paragraph (e)(1) of this section, may not charge duplication fees, except as described in paragraph (e)(4)(ii)-(iv).

(ii) If VA has determined that unusual circumstances as defined by the FOIA apply and has 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.

(iii) If VA has determined that unusual circumstances as defined by the FOIA apply and more than 5,000 pages are necessary to respond to the request, VA may charge search fees, or in the case of requesters described in paragraph (e)(1) of this section, may charge duplication fees, if the following steps are taken: VA must provide timely written notice of unusual circumstances to the requester in accordance with the FOIA and must discuss with the requester via written mail,

e-mail or telephone (and later confirmed in writing) (or have 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.

(e)(5) [Removed]

(e)(6) [Removed]

(f) The following table summarizes the chargeable fees for each category of requester.

Category	Search fees	Review fees	Duplication fees
(1) Commercial Use	Yes	Yes	Yes
(2) Educational Institution	No	No	Yes (100 pages or 1 disc free)
(3) Non-Commercial Scientific Institution	No	No	Yes (100 pages or 1 disc free)
(4) News Media	No	No	Yes (100 pages or 1 disc free)
(5) All other	Yes (2 hours free)	No	Yes (100 pages or 1 disc free)

(g) Fee schedule. If it is determined that a fee will be charged for processing the FOIA request, VA will charge the direct cost to the agency and in accordance with the requester's fee category (see § 1.561(c)); to the extent possible, direct costs are itemized in paragraph 1 of this section. Duplication fees also are applicable to records provided in response to requests made under the Privacy Act (see § 1.577(e),(f)).

(1) Schedule of fees:

Activity	Fees
(i) Duplication of standard size (8½" x 11"; 8½" x 14") paper records or records on electronic media.	Paper records: \$0.15 per page Electronic media: \$3.00 per each compact disc (CD) or digital versatile disc (DVD).
(ii) Duplication of non-paper items (e.g., x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings).	Direct cost to VA.
(iii) Record search by manual (non-automated) methods.	Hourly wage of the employee(s), plus 16 percent.
(iv) Record search using automated methods, such as by computer.	Direct cost to VA.
(v) Record review (for Commercial Use Requesters only).	Hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
(vi) Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the Federal Government is not a party to, and does not have an interest in, the litigation.	Direct cost to VA.

Note to paragraph (g)(1): VA will charge fees consistent with the salary scale published by the Office of Personnel Management (OPM).

(2) Reserved.

(h) Notification of fee estimate or other fee issues. (1) VA will not charge the requester if the fee is \$25.00 or less.

(2) When a FOIA Officer determines or estimates that the fees to be charged under this section will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify the requester in writing of the actual or estimated amount of fees and ask the requester to provide written assurance of the payment of all fees or fees up to a designated amount, unless he or she has indicated a willingness to pay fees as high as those anticipated. Any such agreement to pay the fees shall be memorialized in writing. When the requester does not provide sufficient information upon which VA can identify a fee category (see paragraphs (c)(1) through (c)(4) of this section), or a clarification is otherwise required regarding a fee, the FOIA Officer may notify the requester and seek clarification; the notification to the requester will state that if a written response is not received within 10 days, the request will be closed. The timeline for responding to the request will be tolled and no further work will be done on the request until the fee issue has been resolved.

(i) Charges for other services. Apart from the other provisions of this section, VA will charge the requester the direct costs of providing any special handling or services requested, such as certifying that records are true copies or sending them

by other than ordinary mail. The FOIA Officer may choose to provide such a service as a matter of administrative discretion.

* * * * *

(l) ***

(3) Where the requester previously has failed to pay a properly charged FOIA fee to VA within 30 days of the date of billing, a FOIA Officer may require the requester to pay the full amount due, plus any applicable interest as specified in this section, and to make an advance payment of the full amount of any anticipated fee, before the FOIA Officer begins to process a new request or continues to process a pending request from that requester.

* * * * *

(5) In cases in which a FOIA Officer requires advance payment or payment is due under this section, the time for responding to the request will be tolled and further work will not be done on the request until the required payment is received.

* * * * *

(n) Requirements for waiver or reduction of fees. (1) Waiving or reducing fees. Fees for processing the request may be waived if the requester meets the criteria listed in this section. The requester must submit adequate justification for a fee waiver; without adequate justification, the request will be denied. The FOIA Officer may, at his or her discretion, communicate with the requester to seek additional information, if necessary, regarding the fee waiver request. If the additional information is not received from the requester within 10 days of the FOIA Officer's communication with the requester, VA will assume that the requester does

not wish to pursue the fee waiver request and the fee waiver request will be closed. If the request for waiver or reduction is denied or closed, the underlying FOIA request will continue to be processed in accordance with the applicable provisions of this Part. Requests for fee waivers are decided on a case-by-case basis; receipt of a fee waiver in the past does not establish entitlement to a fee waiver each time a request is submitted.

* * * * *

10. Revise § 1.577 paragraph (c) and (e) to read as follows:

§ 1.577 Access to Records.

* * * * *

(c) The VA component or staff office having jurisdiction over the records subject to the Privacy Act request will establish appropriate disclosure procedures, including notifying the individual who filed the Privacy Act request of the time, place, and conditions under which the VA will comply with the request, in accordance with applicable laws and regulations. Access requests for Privacy Act records or information must be sent to the staff office that maintains the records; the individual seeking access may consult the system of record notice (https://www.oprm.va.gov/privacy/systems_of_records.aspx) in order to identify the office to which the request should be sent. Each component has discretion to require that a requester supply additional information to verify his or her identity.

(e) Fees to be charged, if any, to any individual for making copies of his or her record shall not include the cost of and search for and review of the record. Fees under \$25.00 shall be waived. Fees to be charged are as follows:

Activity	Fees
(1) Duplication of documents by any type of reproduction process to produce plain one-sided paper copies of a standard size (8 1/2" x 11"; 8 1/2" x 14"; 11" x 14")	\$0.15 per page after first 100 one-sided pages or electronic equivalent.
(2) Duplication of non-paper records, such as microforms, audiovisual materials (motion pictures, slides, laser optical disks, video tapes, audio tapes, etc.), computer tapes and disks, diskettes for personal computers, and any other automated media output	Direct cost to the Agency as defined in § 1.561(b)(3) of this part to the extent that it pertains to the cost of duplication.
(3) Duplication of document by any type of reproduction process not covered by paragraphs (e)(1) or (2) of this section to produce a copy in a form reasonably usable by the requester	Direct cost to the Agency as defined in § 1.561(b)(3) of this part to the extent that it pertains to the cost of duplication.

* * * * *

11. Revise § 1.580 to read as follows:

§ 1.580 Administrative review.

(a) Upon consideration and denial of a request under §1.577 or §1.579 of this section, the responsible VA official or designated employee will inform the requester *in writing* of the denial. The adverse determination notice must be signed by the component head or the component's Privacy Officer, and shall include the following:

(1) The name and title or position of the person responsible for the adverse determination;

(2) A brief statement of the reason(s) for the denial and the policy upon which the denial is based; and

(3) Notice that the requester may appeal the adverse determination under § 1.580(b) of this part to the Office of General Counsel (providing the address as follows: Office of General Counsel (024), 810 Vermont Avenue, N.W., Washington, DC 20420), and instructions on what information is required for an appeal, which includes why the individual disagrees with the initial denial with specific attention to one or more of the four standards (e.g., accuracy, relevance, timeliness, and completeness), and a copy of the denial letter and any supporting documentation that demonstrates why the individual believes the information does not meet these requirements.

(b) The final agency decision in appeals of adverse determinations described in paragraph (a) will be made by the designated official within the Office of General Counsel (024).

(c) A written denial must have occurred in order to appeal to OGC. An absence of a response to an access *or* amendment request filed with a VA component is *not* a denial. If an individual has not received a response to a request for access to or amendment of records, the individual must pursue the request with the Privacy Officer of the administration office (e.g., the VHA, VBA, or National Cemetery Administration Privacy Officer) or staff office (e.g.,

the Office of Information Technology or Office of Inspector General Privacy Staff Officer) that has custody over the records.

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