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DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 4

[160801675-7593-02]

RIN: 0605-AA45

Public Information, Freedom of Information Act and Privacy Act Regulations

AGENCY: Department of Commerce.

ACTION: Final rule.

SUMMARY: This rule amends the Department of Commerce's (Department) regulations under the Freedom of Information Act (FOIA) and Privacy Act. The FOIA regulations are being revised to clarify, update and streamline the language of several procedural provisions, including methods for submitting FOIA requests and appeals and the time limits for filing an administrative appeal, and to incorporate certain changes brought about by the amendments to the FOIA under the FOIA Improvement Act of 2016. Additionally, the FOIA regulations are being updated to reflect developments in the case law.

DATES: These amendments are effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Dr. Michael J. Toland, Deputy Chief Freedom of Information Act Officer and Department Privacy Act Officer, Office of Privacy and Open Government, 1401 Constitution Ave, NW, Room 61013, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background Information

On February 6, 2018, the Department published a proposed rule revising its existing regulations under the FOIA and Privacy Act. See 83 FR 5215. This rule proposed revisions to the Department's regulations under the Freedom of Information Act to incorporate certain changes made to the FOIA, 5 U.S.C. 552, by the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (June 30, 2016). The FOIA Improvement Act of 2016 provides 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 updated the Department's regulations in 15 CFR part 4, subpart A, to reflect those statutory changes. Additionally, this rule revises the Department's regulations under the FOIA to clarify, update and streamline the language of several procedural provisions, including the methods for submitting FOIA requests and appeals, to reflect developments in the case law and to keep the regulations up to date with small administrative changes.

Public Comments

Interested persons were afforded the opportunity to participate in the rulemaking process through submission of written comments to the proposed rule during the 30-day open comment period. The Department received twenty-four public submissions in response to the proposed rulemaking. Due consideration was given to each comment received and a determination was

made that twenty-three of the comments were not relevant to the proposed rule¹. The Department adopted the twenty-fourth comment to enable a more efficient FOIA process.

Section 4.10 (Appeals From Initial Determinations or Untimely Delays)

One commenter offered that the proposed regulations should comply with guidance from the U.S. Department of Justice’s Office of Information Policy (OIP) directing agencies—as part of the agency’s final appeal determination—to also alert FOIA requesters of OGIS’s mediation services as a nonexclusive alternative to litigation. The Department accepts this suggestion and updates §4.10(f) with language that follows the aforementioned OIP guidance.

The same commenter further recommended that the Department add language to §4.10(f), which clarifies for requesters the difference between formal mediation and the services OGIS provides. The Department also agrees with this suggestion and updates §4.10(f) with appropriate clarifying language.

Classification

Executive Order 12866: It has been determined that this document is not significant for purposes of E.O. 12866.

Regulatory Flexibility Act: In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Chief Counsel for Regulation certified at the Proposed Rule stage that this regulation will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. No comments were received regarding the economic impact of this final rule. As a result, a final regulatory flexibility analysis is not required and one was not prepared.

¹ Comment topics included discussions about infrastructure gas pipelines, clean water issues, air quality, environmental regulations, and mining.

Paperwork Reduction Act: This document does not contain a collection-of-information requirement subject to the Paperwork Reduction Act (PRA). Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information subject to the Paperwork Reduction Act unless that collection displays a currently valid OMB Control Number.

Dated:
August 7, 2018

Michael J. Toland
Department of Commerce
Deputy Chief FOIA Officer
Department Privacy Act Officer

For the reasons stated in the preamble, the Department of Commerce amends 15 CFR part 4 as follows:

PART 4—[AMENDED]

- 1. The authority citation for part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 552; 5 U.S.C. 552a; 5 U.S.C. 553; 31 U.S.C. 3717; 41 U.S.C. 3101; Reorganization Plan No. 5 of 1950.

Subpart A—Freedom of Information Act

- 2. Amend § 4.1 by redesignating paragraph (c) as (d), and by adding a new paragraph (c) to read as follows:

§ 4.1 General provisions.

* * * * *

(c) The Department has a FOIA Requester Service Center with at least one FOIA Public Liaison. Each Department component may have a FOIA Requester Service Center with at least

one FOIA Public Liaison. FOIA Public Liaisons are responsible for: working with requesters that have any concerns about the service received from a FOIA component, reducing delays in the processing of FOIA requests, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. Contact information for the relevant component FOIA Requester Service Centers, FOIA Public Liaisons, and component FOIA offices and contacts is available at <http://www.osec.doc.gov/opog/contacts.html>.

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■ 3. Amend § 4.2 by revising paragraphs (a) and (c) to read as follows:

§ 4.2 Public reading rooms.

(a) Records that the FOIA requires to be made available for public inspection and copying are accessible electronically through the Department's "Electronic FOIA Library" on the Department's Web site, <http://www.doc.gov>, which includes links to Web sites for those components that maintain Electronic FOIA Libraries. Each component of the Department is responsible for determining which of its records are required to be made available, as well as identifying additional records of interest to the public that are appropriate for disclosure, and for making those records available either in its own Electronic Library or in the Department's central Electronic FOIA Library. Components that maintain their own Electronic FOIA Libraries are designated as such in Appendix A to this part. Each component shall also maintain and make available electronically a current subject-matter index of the records made available electronically. Each component shall ensure that posted records and indices are updated regularly, at least quarterly.

* * * * *

(c) The Department and its components shall maintain and make available electronically for public inspection:

(1) Copies of records that have been released and—

(i) That the component that maintains them determines, because of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records by other requesters, or

(ii) That have been requested three or more times by different requesters;

(2) A general index of the records available for public inspection—for purposes of these regulations, a general index includes records available through a search capability on the Department or component’s website, such as a person finder;

(3) Final opinions and orders, including concurring and dissenting opinions made in the adjudication of cases;

(4) Those statements of policy and interpretations that have been adopted by a component and are not published in the Federal Register; and

(5) Administrative staff manuals and instructions to staff that affect a member of the public.

■ 4. Amend § 4.3 by revising paragraph (d) to read as follows:

§ 4.3 Records under the FOIA.

* * * * *

(d) Components shall preserve all correspondence pertaining to the requests they receive under this subpart, as well as copies of all requested records, until disposition or destruction is authorized by Title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 4.2, Information Access and Protection Records.

Components shall not dispose of records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

■ 5. Revise § 4.4 to read as follows:

§ 4.4 Requirements for making requests.

(a) *How made and addressed.* The Department has a decentralized system for responding to FOIA requests, with each component designating a FOIA office to process records from that component. All components have the capability to receive requests electronically either through electronic mail (email) or the FOIAonline Web site, <http://foiaonline.regulations.gov>. A request for Department records that are not customarily made available to the public as part of the Department's regular informational services (or pursuant to a user fee statute), must be in writing and shall be processed under the FOIA, regardless of whether the FOIA is mentioned in the request. Requests must include the requester's full name and a valid return address. Requesters may also include other contact information, such as an email address and a telephone number. For the quickest handling, the request (and envelope, if the request is mailed or hand delivered) should be marked "Freedom of Information Act Request." Requests may be submitted by U.S. mail, delivery service, email, or online at the FOIAonline Web site, <http://foiaonline.regulations.gov>. Requests may also be submitted to some components, identified in Appendix A to this part, by facsimile. Requests should be sent to the Department component identified in Appendix A to this part that maintains those records requested, and should be sent to the addresses, email addresses, or numbers listed in Appendix A to this part or the Department's Web site, <http://www.doc.gov>¹. If the proper component cannot be determined,

¹ The United States Patent and Trademark Office (USPTO), which is established as an agency of the United States within the Department of Commerce, operates under its own FOIA regulations at 37 CFR part 102, subpart A. Accordingly, requests for USPTO records, and any appeals thereof, should be sent directly to the USPTO.

the request should be sent to the central facility identified in Appendix A to this part. The central facility will forward the request to the component(s) it believes most likely to have the requested records. Requests will be considered received for purposes of the 20-day time limit of § 4.6 as of the date it is received by the proper component's FOIA office, but in any event not later than ten working days after the request is first received by any Department component identified in Appendix A to this part.

(b) *Requests for records about an individual or oneself.* For requests for records about oneself, § 4.24 contains additional requirements. For requests for records about another individual, either a notarized authorization signed by that individual or a declaration by that individual made under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization, permitting disclosure of the individual's records to the requester, or proof that the individual is deceased (for example, a copy of a death certificate or an obituary) will facilitate processing the request.

(c) *Description of records sought.* (1) A FOIA request must reasonably describe the agency records sought, to enable Department personnel to locate them with a reasonable amount of effort.

(2) Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number, and the name and location of the office where the record(s) might be found.

(i) In addition, if records about a court case are sought, the title of the case, the court in which the case was filed, and the nature of the case should be included.

(ii) If known, any file designations or descriptions of the requested records should be included.

(iii) As a general rule, the more specifically the request describes the records sought, the greater the likelihood that the Department will be able to locate those records.

(3) Before submitting their requests, requesters may first contact the Department's or the component's FOIA contact to discuss the records they are seeking and to receive assistance in describing the records.

(4) For further assistance, requesters may also contact the relevant FOIA Requester Service Center or FOIA Public Liaison. Contact information for relevant FOIA Requester Service Centers and FOIA Public Liaisons is contained on the Department's Web site, <http://www.osec.doc.gov/opog/contacts.html> and Appendix A to this part.

(5) If a component determines that a request does not reasonably describe the records sought, it shall inform the requester what additional information is needed or how the request is otherwise insufficient, to enable the requester to modify the request to meet the requirements of this section.

(6) Requesters who are attempting to reformulate or modify such a request may discuss their request first with the relevant FOIA Contact, or if unresolved, with the relevant Requester Service Center or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records.

(7) When a requester fails to provide sufficient detail within 30 calendar days after having been asked to reasonably describe the records sought, the component shall notify the requester in writing that the request has not been properly made, that no further action will be taken, and that the FOIA request is closed. Such a notice constitutes an adverse determination

under § 4.7(d) for which components shall follow the procedures for a denial letter under § 4.7(e).

(8) In cases where a requester has modified his or her request, the date of receipt for purposes of the 20-day time limit of § 4.6 shall be the date of receipt of the modified request.

■ 6. Amend § 4.5 by revising paragraphs (a), (b), and (c) to read as follows:

§ 4.5 Responsibility for responding to requests.

(a) *In general.* Except as stated in paragraph (b) of this section, the proper component of the Department to respond to a request for records is the component that first receives the request and has responsive records (or in the instance of where no records exist, the component that first receives the request and is likely to have responsive records), or the component to which the Departmental FOIA Officer or component FOIA Officer assigns lead responsibility for responding to the request. Where a component's FOIA office determines that a request was misdirected within the Department, the receiving component's FOIA office shall route the request to the FOIA office of the proper component(s). Records responsive to a request shall include those records within the Department's possession and control as of the date the Department begins its search for them. 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) *Consultations and referrals.* When the Department or a component receives a request for a record (or a portion thereof) in its possession that originated with another Departmental component or Federal agency subject to the FOIA, the Department or component should typically refer the record to the component or originating agency for direct response to the requester (see § 4.8 for additional information about referrals of classified information). When the Department or a component receives a request for a record (or a portion thereof) in its

possession that originated with another Departmental component, Federal agency, or executive branch office that is not subject to the FOIA, the Department or component shall consult with that component, Federal agency, or executive branch office before responding to the requester. In instances where a record is requested that originated with the Department or component and another component, Federal agency, or executive branch office has substantial interest in the record (or a portion thereof), the Department or component should typically consult with that component, Federal agency, or executive branch office before responding to the requester.

(c) *Notice of referral.* Whenever a component refers a record to another Federal agency or Department component for direct response to the requester, the component's FOIA Officer should typically notify the requester in writing of the referral and inform the requester of the name(s) of the agency or Department component to which the record was referred, including that agency's or component's FOIA contact information. The standard referral procedure is not appropriate where disclosure of the identity of the agency or Department component 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 agency 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 were not publicly known, then to disclose that law enforcement interest by providing notice of a referral could cause an unwarranted invasion of the personal privacy of the third party. In such cases, the agency that received the request should consult with the originating agency to seek its views on the disclosability of the record and the release determination should then be conveyed to the requester by the agency that originally received the request.

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- 7. Amend § 4.6 by revising paragraphs (d)(1), (d)(2), and (e)(1) to read as follows:

§ 4.6 Time limits and expedited processing.

* * * * *

(d) * * *

(1) Components may extend the time period for processing a FOIA request only in “unusual circumstances,” as described in paragraph (d)(2) of this section, in which the component shall, before expiration of the twenty-day period to respond, notify the requester of the extension in writing of the unusual circumstances involved and the date by which processing of the request is expected to be completed. If the extension is for more than ten working days, the component shall provide the requester with an opportunity to modify the request or agree to an alternative time period for processing the original or modified request. Furthermore, the requester will be advised that the relevant FOIA Public Liaison or FOIA contact is available for this purpose and of the requester’s right to seek dispute resolution services from the Office of Government Information Services (OGIS).

(2) For purposes of this section, “unusual circumstances” include:

- (i) The need to search for and collect the requested agency records from field facilities or other establishments that are separate from the office processing the request;
- (ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request; or
- (iii) The need to consult, which shall be conducted with all practicable speed, with another Federal agency having a substantial interest in the determination of the FOIA request or

with another component of the Department which has a substantial interest in the determination of the request.

* * * * *

(e) * * *

(1) A component must use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request, including the amount of pages involved, the need to consult with or refer to other agencies or Department components or for commercial confidential information to a third party, or whether the request qualifies for unusual circumstances as described in paragraph (d)(2) of this section, and whether the request qualifies for expedited processing as described in paragraph (f) of this section.

* * * * *

■ 8. Revise § 4.7 to read as follows:

§ 4.7 Responses to requests.

(a) *Acknowledgment of requests.* Upon receipt of a request, a component ordinarily shall send an acknowledgement to the requester which shall provide an assigned tracking request number for further reference and, if necessary, confirm whether the requester is willing to pay fees. A component must send this acknowledgment if the request will take longer than ten working days to process. In most cases, the acknowledgement email, generated by the FOIAonline system, that is sent to requesters who provide an email address will suffice for this requirement.

(b) *Interim responses.* If a request involves voluminous records or requires searches in multiple locations, to the extent feasible, a component shall provide the requester with interim

responses. Such responses may include records that are fully releasable or records that have been withheld in part under one or more applicable FOIA exemptions set forth at 5 U.S.C. 552(b). Bureaus will make reasonable efforts to provide to requesters an estimated date when a determination will be provided. An interim response is not a determination and appeal rights need not be provided with the interim response.

(c) *Determination*—(1) *Grants of requests*. If a component makes a determination to grant a request in whole or in part, it shall notify the requester in writing of such determination.

(i) A component shall inform the requester:

(A) Of any fees charged under § 4.11; and

(B) That the requester may contact the relevant FOIA Public Liaison or FOIA contact for further assistance.

(ii) The component shall also disclose records to the requester promptly upon payment of any applicable fees.

(iii) Records disclosed in part shall be marked or annotated to show the applicable FOIA exemption(s) and the amount of information deleted, unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted shall also be indicated on the record, if feasible.

(2) *Adverse determinations of requests*. If a component makes an adverse determination regarding a request, it shall notify the requester of that determination in writing.

(i) An adverse determination may be a denial of a request and includes decisions that:

(A) The requested record is exempt, in whole or in part.

(B) The request does not reasonably describe the records sought and the requester is unwilling to further clarify the request.

(C) The information requested is not a record subject to the FOIA.

(D) The requested record does not exist, cannot be located, or has previously been destroyed.

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

(ii) Adverse determinations may also include:

(A) Denials of requested fee category status.

(B) Denials of requests for fee waivers.

(C) Denials of requests for expedited processing.

(D) Denials of requests for reduction of fees.

(3) *Content of denial.* The denial letter shall be signed by an official listed in Appendix B to this part (or a designee), and shall include:

(i) The name and title or position of the person responsible for the denial;

(ii) A brief statement of the reason(s) for the denial, including any FOIA exemption(s) applied by the component in denying the request;

(iii) An estimate of the volume of any records or information withheld, by providing the number of pages or some other reasonable form of estimation. This 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 FOIA exemption;

(iv) A statement advising the requester of the right to seek dispute resolution services from the Department FOIA Public Liaison, the relevant component FOIA Public Liaison or FOIA contact, or OGIS; and

(v) A statement that the denial may be appealed under § 4.10, and a list of the requirements for filing an appeal set forth in § 4.10(b).

■ 9. Revise § 4.9 to read as follows:

§ 4.9 Confidential commercial information.

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

(1) *Confidential commercial information* means commercial or financial information, obtained by the Department from a submitter, which may be protected from disclosure under FOIA exemption (b)(4) (5 U.S.C. 552(b)(4)).

(2) *Submitter* means any person or entity outside the Federal Government from which the Department obtains confidential commercial information, directly or indirectly. The term includes U.S. or foreign persons, U.S. or foreign corporations; state, local and tribal governments; and foreign governments.

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

(c) *Notice to submitters.* (1) A component shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its confidential commercial information whenever required under paragraph (d) of this section, except as provided in paragraph (g) of this section, in order to give the submitter an opportunity under paragraph (e) of this section to object to disclosure of any specified portion of that information.

(2) Such written notice shall be sent via certified mail, return receipt requested, or similar means.

(3) Where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

(4) The notice shall either describe the confidential commercial information requested or include copies of the requested records or portions of the records containing the information. If notification of a large number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification, instead of sending individual notifications.

(d) *When notice is required.* Notice shall be given to the submitter whenever:

(1) The submitter has designated the information in good faith as protected from disclosure under FOIA exemption (b)(4); or

(2) The component has reason to believe that the information may be protected from disclosure under FOIA exemption (b)(4), but has not yet determined whether the information is protected from disclosure.

(e) *Opportunity to object to disclosure.* A component shall allow a submitter seven working days (i.e., excluding Saturdays, Sundays, and legal public holidays) from the date of receipt of the written notice described in paragraph (c) of this section to provide the component with a statement of any objection to disclosure. A FOIA Officer may extend the comment period from seven to ten working days, if a submitter requests an extension. The statement from a submitter must identify any portions of the information the submitter requests to be withheld under FOIA exemption (b)(4), and describe how each qualifies for protection under the

exemption: that is, why the information is a trade secret, or commercial or financial information that is privileged or confidential. If a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information. Information a submitter provides under this paragraph may itself be subject to disclosure under the FOIA.

(f) *Notice of intent to disclose.* A component shall consider a submitter's objections and specific grounds under the FOIA for nondisclosure in deciding whether to disclose confidential commercial information. If a component decides to disclose confidential commercial information over a submitter's objection, the component shall give the submitter written notice via certified mail, return receipt requested, or similar means, which shall include:

- (1) A statement of reason(s) why the submitter's objections to disclosure were not sustained;
- (2) A description of the confidential commercial information to be disclosed; and
- (3) A statement that the component intends to disclose the information seven working days, or ten working days if an extension is granted, from the date the submitter receives the notice.

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

- (1) The component determines that the information is exempt and will be withheld under a FOIA exemption;
- (2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with Executive Order 12600; 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 provide the submitter written notice of any final decision to disclose the information seven working days after the date the submitter receives the notice.

(h) *Notice to submitter of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the component shall promptly notify the submitter. Where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

(i) *Corresponding notice to requester.* Whenever a component provides a submitter with notice and an opportunity to object to disclosure under paragraph (c) of this section, the component shall notify the requester that the request is being processed under the provisions of this regulation and, as a consequence, there may be a delay in receiving a response. The notice to the requester will not include any of the specific information contained in the records being requested. Whenever a submitter files a lawsuit seeking to prevent the disclosure of confidential commercial information, the component shall notify the requester of such action and, as a consequence, there may be further delay in receiving a response.

■ 10. Amend § 4.10 by revising paragraphs (a), (b), (c), (d), and (f)(3) and (4), and adding paragraph (f)(5), to read as follows:

§ 4.10 Appeals from initial determinations or untimely delays.

(a)(1) If a request for records to a component other than the Office of Inspector General is initially denied in whole or in part, or has not been timely determined, or if a requester receives an adverse determination regarding any other matter listed under this subpart (as described in § 4.7(c)), the requester may file an appeal. Appeals can be submitted in writing or electronically, as described in paragraph (b)(1) of this section. For requests filed on or after July 1, 2016, the appeal must be received by the Office of the General Counsel during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday) within 90 calendar days of the date of the written denial of the adverse determination or, if there has been no determination, an appeal may be submitted any time after the due date of the request, including the last extension under § 4.6(d), of a request due date. Written or electronic appeals arriving after normal business hours will be deemed received on the next normal business day. If the 90th calendar day falls on a Saturday, Sunday, or a legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely. Appeals received after the 90-day limit will not be considered.

(2) If a request for records to the Office of Inspector General is initially denied in whole or in part, or has not been timely determined, or if a requester receives an adverse determination regarding any other matter listed under this subpart (as described in § 4.7(c)), the requester may file an appeal. Appeals can be submitted in writing or electronically, as described in paragraph (b)(2) of this section. For requests submitted on or after July 1, 2016, the appeal must be received by the Office of Inspector General, Office of Counsel, during normal business hours (8:30 a.m. to 5:00 p.m., Eastern Time, Monday through Friday) within 90 calendar days of the date of the written denial of the adverse determination or, if there has been no determination, an appeal may be submitted any time after the due date, including the last extension under § 4.6(d), of the

adverse determination. Written or electronic appeals arriving after normal business hours will be deemed received on the next normal business day. If the 90th calendar day falls on a Saturday, Sunday, or a legal public holiday, an appeal received by 5:00 p.m., Eastern Time, the next business day will be deemed timely. Appeals received after the 90-day limit will not be considered.

(b)(1) Appeals, other than appeals from requests made to the Office of Inspector General, shall be decided by the Assistant General Counsel for Employment, Litigation, and Information (AGC-ELI). Written appeals should be addressed to the Assistant General Counsel for Employment, Litigation, and Information, at the U.S. Department of Commerce, Office of the General Counsel, Room 5896, 1401 Constitution Avenue NW., Washington, DC 20230. For a written appeal, both the letter and the appeal envelope should be clearly marked "Freedom of Information Act Appeal." Appeals may also be submitted electronically either by email to FOIAAppeals@doc.gov or online at the FOIAonline Web site, <http://foiaonline.regulations.gov>, if requesters have a FOIAonline account. In all cases, the appeal (written or electronic) should include a copy of the original request and initial denial, if any. All appeals should include a statement of the reasons why the records requested should be made available and why the adverse determination was in error. No opportunity for personal appearance, oral argument or hearing on appeal is provided. Upon receipt of an appeal, AGC-ELI ordinarily shall send an acknowledgement letter to the requester which shall confirm receipt of the requester's appeal.

(2) Appeals of initial and untimely determinations by the Office of Inspector General shall be decided by the Counsel to the Inspector General, except that appeals of records requests that were initially denied by the Counsel to the Inspector General shall be decided by the Deputy Inspector General. Written appeals should be addressed to the Counsel to the Inspector General,

or the Deputy Inspector General if the records were initially denied by the Counsel to the Inspector General. The address of both is: U.S. Department of Commerce, Office of the Inspector General, Office of Counsel, Room 7898C, 1401 Constitution Avenue NW., Washington, DC 20230. For a written appeal, both the letter and the appeal envelope should be clearly marked "Freedom of Information Act Appeal." Appeals may also be submitted electronically either by email to FOIA@oig.doc.gov or online at the FOIAonline Web site, <http://foiaonline.regulations.gov>, if requesters have a FOIAonline account. In all cases, the appeal (written or electronic) should include a copy of the original request and initial denial, if any. All appeals should include a statement of the reasons why the records requested should be made available and why the adverse determination was in error. No opportunity for personal appearance, oral argument or hearing on appeal is provided. Upon receipt of an appeal, the Counsel to the Inspector General, or the Deputy Inspector General if the records were initially denied by the Counsel to the Inspector General, ordinarily shall send an acknowledgement letter to the requester which shall confirm receipt of the requester's appeal.

(c) Upon receipt of an appeal involving records initially denied on the basis of FOIA exemption (b)(1), the records shall be forwarded to the Deputy Assistant Secretary for Security (DAS) for a declassification review. The DAS may overrule previous classification determinations in whole or in part if continued protection in the interest of national security is no longer required, or no longer required at the same level. The DAS shall advise the AGC-ELI, the General Counsel, Counsel to the Inspector General, or Deputy Inspector General, as appropriate, of his or her decision.

(d) If an appeal is granted, the notification letter may include documents to be released or the request may be referred back to the component for further action consistent with the determination on the appeal.

(f) * * *

(3) Notification that dispute resolution services are offered by the Office of Government Information Services (OGIS) of the National Archives and Records Administration as a non-exclusive alternative to litigation, informing the requester that dispute resolution is a voluntary process, and if the Department and requester agree to participate in the dispute resolution services provided by OGIS, the Department will actively engage as a partner to the process in an attempt to resolve the dispute.

(4) Notification that judicial review of the denial is available in the district court of the United States in the district in which the requester resides, or has his or her principal place of business, or in which the agency records are located, or in the District of Columbia; and

(5) The name and title or position of the official responsible for denying the appeal.

■ 11. Amend § 4.11 by:

a. Revising paragraphs (a), (b)(2), (b)(4), (b)(6), (b)(7), (b)(8), (c) introductory text, (c)(2), (c)(3)(ii), (d)(6), and (d)(7).

b. Adding paragraph (d)(8).

c. Revising paragraphs (e), (i)(4), (j), (l)(2)(iii), (l)(3)(ii), and (l)(5).

The revisions and addition read as follows:

§ 4.11 Fees.

(a) *In general.* Components shall charge fees for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d)

of this section or when a waiver or reduction is granted under paragraph (l) of this section. A component shall collect all applicable fees before processing a request if a component determines that advance payment is required in accordance with paragraphs (i)(2) and (i)(3) of this section. If advance payment of fees is not required, a component shall collect all applicable fees before sending copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) * * *

(2) *Direct costs* means those expenses a component incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. The hourly processing fees for calculating direct costs for Department or component personnel searching for, duplication, and reviewing records are reflected in Table 1. Note that the 16% overhead has already been included in the hourly rates identified in Table 1.

Table 1. FOIA Hourly Processing Fees

Type	Grade	Hourly Rate
Administrative	E-9/GS-8 and below	\$28
Professional	Contractor/O-1 to O-6/W-1 to W-5/GS-9 to GS-15	\$56
Executive	O-7 and above and Senior Executive Service	\$128

* * * * *

(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. Educational institutions may include a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an

institution of graduate higher education, an institution of professional education, or an institution of vocational education A Department component may seek verification from the requester that the request is in furtherance of scholarly research and agencies will advise requesters of their placement in this category. Verification may be supported by a letter from a teacher, instructor, or professor written on the institution's letterhead or from an institutional email address and in which the body of the email outlines the research to be conducted. Student requests may be supported by evidence that the records are sought for the student's academic research purposes, for example, through evidence of a class assignment or a letter from a teacher, instructor, or professor. A component's decision to grant a requester educational institution status will be made on a case-by-case basis based upon the requester's intended use of the material.

Example 1. A request from a professor or a student 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. A request from the same professor or student 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 letterhead.

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

* * * * *

(6) *Representative of the news media, or news media requester*, means any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting 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. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would be the clearest proof, but components shall also look to the past publication record of a requester in making this determination. A component's decision to grant a requester media status will be made on a case-by-case basis based upon the requester's intended use of the material. The mere fact that a person or entity has been classified as news media with respect to one request does not mean they will be so considered as news media with respect to any other requests.

(7) *Review* means 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 it and marking any applicable exemptions. Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent

obtaining and considering any formal objection to disclosure made by a submitter under § 4.9, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Components shall ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(c) *Fees*. In responding to FOIA requests, components shall charge the fees summarized in chart form in paragraphs (c)(1) and (c)(2) of this section and explained in paragraphs (c)(3) through (c)(5) of this section, unless a waiver or reduction of fees has been granted under paragraph (l) of this section.

* * * * *

(2) Uniform fee schedule.

Service	Rate
(i) Manual search	Hourly rate from Table 1 of employee involved.
(ii) Computerized search	Actual direct cost, including operator time, using the hourly rate from Table 1, of the employee involved.

Service	Rate
(iii) Review of records	Hourly rate from Table 1 of employee involved.
(iv) Duplication of records:	
(A) Paper copy reproduction	\$.08 per page.
(B) Other reproduction (e.g., converting paper into an electronic format (e.g., scanning), computer disk or printout, or other electronically-formatted reproduction (e.g., uploading records made available to the requester into FOIAonline))	Actual direct cost, including operator time, using the hourly rate from Table 1, of the employee involved.

(3) * * *

(ii) For computer searches of records, requesters will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (d)(1) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (d)(3) of this section) are entitled to the cost equivalent of two hours of manual search time without charge. These direct costs will include the costs of the operator/programmer FOIA hourly processing rate apportionable to the search and any other tangible direct costs associated with a computer search.

* * * * *

(d) ***

(6) No search fees shall be charged to a FOIA requester when a component does not comply with the statutory time limits at 5 U.S.C. 552(a)(6) in which to respond to a request (this section only applies to FOIA requests, not appeals), except as described in paragraph (d)(8) of this section.

(7) No duplication fees shall be charged to requesters in the fee category of a representative of the news media or an educational or noncommercial scientific institution when a component does not comply with the statutory time limits at 5 U.S.C. 552(a)(6) in which to respond to a request, except as described in paragraph (d)(8) of this section.

(8)(i) When a Department component determines that unusual circumstances, as those terms are defined in § 4.6(d)(2), apply to the processing of the request, and provides timely written notice to the requester in accordance with the FOIA, then the Department component is granted an additional ten days until the fee restrictions in paragraphs (d)(6) and (7) of this section apply.

(ii) The fee restrictions in paragraphs (d)(6) and (7) of this section do not apply:

(A) When a Department component determines that unusual circumstances, as those terms are defined in § 4.6(d)(2), apply to the processing of the request;

(B) More than 5,000 pages are necessary to respond to the request;

(C) The Department component provides timely written notice to the requester in accordance with the FOIA; and

(D) The Department component has discussed with the requester (or made three good faith attempts to do so) on how the requester can effectively limit the scope of the request.

(e) *Notice of anticipated fees in excess of \$20.00.* (1) When a component determines or estimates that the fees for processing a FOIA request will total more than \$20.00 or total more

than the amount the requester indicated a willingness to pay, the component shall notify the requester of the actual or estimated amount of the fees, unless the requester has stated in writing 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 that the estimated fee may be only a portion of the total fee. A notice under this paragraph shall offer the requester an opportunity to discuss the matter with Departmental personnel in order to modify the request in an effort to meet the requester's needs at a lower cost. The requester may also contact the Department FOIA Public Liaison, the relevant component's FOIA Public Liaison or FOIA contact, or OGIS for further assistance, or file an administrative appeal of the fee estimate amount in accordance with § 4.10.

(2) When a requester has been notified that the actual or estimated fees will amount to more than \$20.00, or amount to more than the amount the requester indicated a willingness to pay, the component will do no further work on the request until the requester agrees in writing to pay the actual or estimated total fee. The component will toll the processing of the request when it notifies the requester of the actual or estimated amount of fees and this time will be excluded from the twenty (20) working day time limit (as specified in § 4.6(b)). The requester's agreement to pay fees must be made in writing, must designate an exact dollar amount the requester is willing to pay, and must be received within 30 calendar days from the date of the notification of the fee estimate. If the requester fails to submit an agreement to pay the anticipated fees within 30 calendar days from the date of the component's fee notice, the component will presume that the requester is no longer interested and notify the requester that the request will be closed.

* * * * *

(i) ***

(4) When the component requires advance payment or payment due under paragraphs (i)(2) and (i)(3) of this section, the component will not further process the request until the required payment is made. The component will toll the processing of the request when it notifies the requester of the advanced payment due and this time will be excluded from the twenty (20) working day time limit (as specified in § 4.6(b)). If the requester does not pay the advance payment within 30 calendar days from the date of the component's fee notice, the component will presume that the requester is no longer interested and notify the requester that the request will be closed.

(j) *Tolling*. When necessary for the component to clarify issues regarding fee assessment with the FOIA requester, the time limit for responding to the FOIA request is tolled until the component resolves such issues with the requester. The tolling period is from the day a requester was contacted through the working day (i.e., excluding Saturdays, Sundays, and legal public holidays) on which a response was received by the responsible component.

* * * * *

(1) ***

(2) ***

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure*: whether disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media satisfies this consideration.

* * * * *

(3) ***

(ii) *The primary interest in disclosure*: whether any identified commercial interest of the requester is sufficiently great, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.” A fee waiver or reduction is justified if the public interest standard (paragraph (1)(1)(i) of this section) is satisfied and the public interest is greater than any identified commercial interest in disclosure. Components ordinarily shall presume that if a news media requester has satisfied the public interest standard, the public interest is the primary interest served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market Government information for direct economic return shall not be presumed to primarily serve the public interest.

* * * * *

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (1)(2) and (3) of this section, insofar as they apply to each request.

■ 12. Amend Appendix A to Part 4 by revising the introductory text of paragraph (5) and paragraph (5)(v) to read as follows:

Appendix A to Part 4—Freedom of Information Public Inspection Facilities, and Addresses for Requests for Records Under the Freedom of Information Act and Privacy Act, and Requests for Correction of Amendment Under the Privacy Act

* * * * *

(5) Economic Development Administration, Office of the Chief Counsel, U.S. Department of Commerce, 14th and Constitution Avenue NW., Room 72023, Washington, DC 20230; Ph.: (202) 482-3085; Fax: (202) 482-5671;
FOIAonline: <http://foiaonline.regulations.gov>. This component maintains a separate online

Electronic FOIA Library through its Web site, <http://www.eda.gov>. The following Regional EDA offices do not maintain separate online Electronic FOIA Libraries.

* * * * *

(v) Philadelphia Regional Office, EDA, U.S. Department of Commerce, Robert N.C. Nix Federal Building, 900 Market Street, Room 602, Philadelphia, Pennsylvania 19107; Ph.: (215) 597-4603.

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