



NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

45 CFR Part 1148

RIN 3135-AA27

Implementing the Freedom of Information Act

AGENCY: National Endowment for the Arts, National Foundation on the Arts and the Humanities.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On June 9, 2017, the NEA proposed a rule titled Implementing the Freedom of Information Act. This rule proposes amending the National Endowment for the Arts' (NEA) regulations implementing the Freedom of Information Act (FOIA). The new proposed rule reflects statutory changes to FOIA, current NEA organizational structure, and current NEA policies and practices with respect to FOIA. Finally, the proposed rule uses current cost figures in calculating and charging fees. Due to delays in publishing the final rule, the agency is re-opening the comment period on these rules for an additional 30 days.

DATES: Written comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3135-AA27, by any of the following methods:

- (a) Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

(b) E-mail: generalcounsel@arts.gov. Include RIN 3135-AA27 in the subject line of the message.

(c) Mail: National Endowment for the Arts, Office of the General Counsel, 400 7th Street SW, Second Floor, Washington, DC 20506.

(d) Hand Delivery / Courier: National Endowment for the Arts, Office of the General Counsel, 400 7th Street SW, Second Floor, Washington, DC 20506.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (3135-AA27) for this rulemaking.

Docket: For access to the docket to read background documents or comments received, go to 400 7th Street, SW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Sarah Weingast, Assistant General Counsel, National Endowment for the Arts, 400 7th St., SW, Washington, DC 20506, Telephone: 202-682-5418.

SUPPLEMENTARY INFORMATION:

1. Background

On June 9, 2017 the NEA published a notice of proposed rulemaking (NPRM) for certain amendments to its FOIA Regulations (82 FR 26763). In the preamble of the NPRM, the NEA discussed on pages 26763 and 26764 the major changes proposed in that document to the FOIA regulations. These included the following:

- The addition of NEA-specific FOIA regulations at 45 CFR part 1148.
- The requirements of the FOIA Improvement Act of 2016 (Pub. L. No. 114-185)

The NEA has not yet issued its final FOIA regulation. Due to the delay in issuing the final regulation, the NEA has decided to reopen comments on its draft for an additional 30 days to

ensure public input on the proposed rule. The regulations proposed herein contain changes from the initial NPRM, some responsive to the single commenter that initially commented on our regulations and some other minor technical clarifications and corrections.

Public Comment: In response to our invitation in the NPRM, one (1) party submitted comments on the proposed regulations. We discuss the issues raised under the section item to which they pertain. Generally, we do not address technical and other minor changes. In addition, we do not address comments that raise concerns not directly related to the proposed regulations.

General Comments

§ 1148.5 (e)(3) Expedited processing and professional status.

Comment: One commenter addressed a potential discrepancy between §1148.5 (e)(3) and the FOIA statute, suggesting that we clarify the language in that section by removing the word “professional” because the FOIA statute does not specifically include this requirement. The commenter asserts that this adds a requirement not otherwise contemplated in the FOIA statute.

Discussion: The NEA declines to revise this section. The sentence referenced in this subsection reads as follows: “For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester’s sole occupation.” This language is exemplary, and included for purposes of guidance and clarity. It does not, in and of itself, create any new requirement for an entity to qualify for expedited processing beyond that which is already imposed by the FOIA statute or these regulations. Rather, this section reflects that the NEA has made the determination that to prove a “compelling need” per 5 U.S.C. § 552(a)(6)(E), an individual who is not a full time member of the news media must provide certain kinds of information in order to meet the

requirements of § 552(a)(6)(E)(vi). Accordingly, the NEA declines to change the proposed regulation.

Changes: None.

§1148.6 (f) Denial Letter Requirements

Comment: One commenter identified two elements of the denial letter that were required by regulation: the FOIA Case Number and 90 day appeal deadline.

Discussion: Because the NEA already regularly informs FOIA requesters of the 90 day appeal deadline in its denial letters, we can accept this suggested change.

Changes: §1148.6(f)(4), which spells out the requirements of the denial letter, has been changed to include mention of the 90 day deadline.

§ 1148.10(h) Aggregation Clarification

Comment: The commenter notes that the proposed regulation permits the NEA to presume that multiple requests of a certain type made in a 30 day period are being made to avoid fees. The commenter asserts that other unspecified agencies aggregate requests in a short timespan, even if they are otherwise not permitted to do so because the matters are unrelated.

Discussion: The NEA declines to revise this section. This section permits the agency to aggregate requests when it reasonably believes that “a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees.” As the commenter brings to our attention, other provisions of the FOIA and these regulations exist which proscribe aggregating unrelated matters. Accordingly, there is no concern which would be addressed by a change responsive to this comment.

Changes: None

§ 1148.8 Appeal Deadline Clarification

Comment: The commenter notes that subsections (a) and (f) of this section contain discrepancies in language surrounding appeals deadlines which may conflict with the FOIA statute. Namely, subsection (a) makes reference to a timely appeal occurring “within 90 calendar days *after the date of response,*” subsection (f) makes reference to a deadline that is 90 days “*after receiving the NEA’s adverse determination.*” (emphasis added throughout)

Discussion: The discrepancy noted by the commenter is well taken, and the NEA will adjust § 1148.8(a) and (f) to clarify that the requester has 90 calendar days from the date of the NEA’s adverse determination.

Changes: § 1148.8(a) is amended to make reference to an adverse determination rather than receiving a response. § 1148.8(f) is amended to remove reference to “receipt” as a factor in assessing the duration of the 90 calendar day period during which a requester can appeal an adverse determination, respectively.

Technical Corrections and Other Updates

Upon review, the agency has undertaken to provide a number of minor clarifications and corrections which appear throughout this document. For example, the agency has clarified which deadlines are based on calendar days and which deadlines are based on working days. In addition, the examples to § 1148.10(b)(4) are modified slightly to apply to factual situations applicable to the NEA, rather than being applicable to other agencies.

2. Compliance

Regulatory Planning and Review (Executive Order 12866)

Executive Order 12866 (E.O. 12866) established a process for review of rules by the Office of Information and Regulatory Affairs, which is within the Office of Management and Budget (OMB). Only “significant” proposed and final rules are subject to review under this

Executive Order. “Significant,” as used in E.O. 12866, means “economically significant.” It refers to rules with (1) an impact on the economy of \$100 million; or that (2) were inconsistent or interfered with an action taken or planned by another agency; (3) materially altered the budgetary impact of entitlements, grants, user fees, or loan programs; or (4) raised novel legal or policy issues.

This proposed rule would not be a significant policy change and OMB has not reviewed this proposed rule under E.O. 12866. We have made the assessments required by E.O. 12866 and determined that this proposed rulemaking: (1) will not have an effect of \$100 million or more on the economy; (2) will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (3) will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (4) does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; and (5) does not raise novel legal or policy issues.

Federalism (Executive Order 13132)

This proposed rulemaking does not have Federalism implications, as set forth in E.O. 13132. As used in this order, Federalism implications mean “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” The NEA has determined that this proposed rulemaking will not have Federalism implications within the meaning of E.O. 13132.

Civil Justice Reform (Executive Order 12988)

This Directive meets the applicable standards set forth in section 3(a) and 3(b)(2) of E.O. 12988. Specifically, this proposed rule is written in clear language designed to help reduce litigation.

Indian Tribal Governments (Executive Order 13175)

Under the criteria in E.O. 13175, we have evaluated this proposed rule and determined that it would have no potential effects on Federally recognized Indian Tribes.

Takings (Executive Order 12630)

Under the criteria in E.O. 12630, this proposed rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This proposed rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Unfunded Mandates Act of 1995 (Section 202, Pub. L. 104-4)

This proposed rule does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year.

Small Business Regulatory Enforcement Fairness Act of 1996 (Sec. 804, Pub. L. 104-121)

This proposed rule would not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This proposed rule will not result in an annual effect on the economy of \$100,000,000 or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or

on the ability of United States-based companies to compete with foreign based companies in domestic and export markets.

Executive Order 13771

Executive Order 13771 § 5 requires that agencies, in most circumstances, remove or rescind two regulations for every regulation promulgated unless they request and are specifically exempted from that order's requirements by the Director of the Office of Management and Budget.

This proposed rule is not subject to the requirements of Executive Order 13771 because this proposed rule is not significant under Executive Order 12866. Furthermore, the NEA has requested and has received an exemption from the requirement that the agency rescind two regulations for every regulation it promulgate from the Director of the Office of Management and Budget.

List of Subjects in 45 CFR Part 1148

Administrative practice and procedure, Archives and records, Freedom of information.

For the reasons stated in the preamble, the NEA proposes to amend 45 CFR chapter XI, subchapter B, by adding part 1148 to read as follows:

PART 1148 - PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT (FOIA)

Sec.

- 1148.1 What is the purpose and scope of these regulations?
- 1148.2 How will the NEA make proactive disclosures?
- 1148.3 How can I make a FOIA request?
- 1148.4 How will the NEA respond to my request?
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1148.7 How does the NEA handle confidential commercial information?

1148.8 How can I appeal a denial of my request?

1148.9 What are the NEA's policies regarding preservation of records?

1148.10 How will fees be charged?

1148.11 What other rules apply to NEA FOIA requests?

Authority: 5 U.S.C. 552; 28 U.S.C. 1746; 31 U.S.C. 3717; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp.

§ 1148.1 What is the purpose and scope of these regulations?

This part contains the rules that the NEA follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines).

Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the NEA's Privacy Act regulations as well as under this part.

§ 1148.2 How will the NEA make proactive disclosures?

Records that the NEA makes available for public inspection in an electronic format may be accessed through the NEA's open government page, available at <https://www.arts.gov/open>. The NEA will determine which of its records should be made publicly available, identify additional records of interest to the public that are appropriate for public disclosure, and post and index such records. The NEA will ensure that its website of posted records and indices is reviewed and updated on an ongoing basis.

§ 1148.3 How can I make a FOIA request?

(a) *General information.* To make a request for records, a requester should write directly to the NEA at National Endowment for the Arts, Office of General Counsel, 400 7th St. SW,

Second Floor, Washington, DC 20506. Requests may also be sent by facsimile to the General Counsel's office at (202) 682-5572, or by email to foia@arts.gov.

(b) *Identity requirements.* Depending on the type of document you ask for, the NEA may require verification of your identity or the identity of a third party.

(1) A requester who is making a request for records about himself or herself must comply with the NEA's verification requirements as set forth in §1159.9 of this chapter.

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

(c) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable NEA personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the NEA identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the NEA's designated FOIA contact or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. Contact information for the NEA's designated FOIA contact and FOIA Public Liaison is available on the NEA's FOIA website (<https://www.arts.gov/freedom-information-act-guide>), or can be obtained by calling (202) 682-5514. If after receiving a request, the NEA determines that it does not reasonably

describe the records sought, the NEA will inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the NEA's designated FOIA contact or FOIA Public Liaison. If a request does not reasonably describe the records sought, the NEA's response to the request may be delayed.

(d) *Format Specifications.* Requests may specify the preferred form or format (including electronic formats) for the records you seek. The NEA will accommodate your request if the record is readily reproducible in that form or format.

(e) *Contact Information Requirements.* Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist the NEA in communicating with them and providing released records.

§ 1148.4 How will the NEA respond to my request?

(a) *In general.* In determining which records are responsive to a request, the NEA ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the NEA will inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The NEA Chairperson or his/her designee is authorized to grant or to deny any requests for records that are maintained by the NEA.

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

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

(2) *Referral.* (i) When the NEA believes that a different agency is best able to determine whether to disclose the record, the NEA typically should refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the NEA and the originating agency jointly agree that the NEA is in the best position to respond regarding the record, then the record may be handled as a consultation.

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

(d) *Timing of responses to consultations and referrals.* The NEA will consider a FOIA request to be a perfected FOIA request if it complies with this section. All consultations and referrals received by the NEA will be handled in the order of the date that the first agency received the perfected FOIA request.

(e) *Agreements regarding consultations and referrals.* The NEA may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 1148.5 When will the NEA respond to my request?

(a) *In general.* The NEA ordinarily will respond to requests according to their order of receipt.

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

(c) *Unusual circumstances.* Whenever the NEA cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the NEA extends the time limit on that basis, the NEA will, before expiration of the 20 business day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the NEA estimates processing of the request will be completed. Where the extension exceeds 10 working days, the NEA will, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The NEA will make available its designated FOIA contact or FOIA Public Liaison for this purpose. The NEA will also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(d) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, the NEA may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that

would otherwise involve unusual circumstances. The NEA will not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* Consistent with 5 U.S.C. 552 (a)(6)(E)(i), the NEA may grant expedited processing under certain circumstances:

(1) The NEA will process requests and appeals on an expedited basis whenever it is determined that they involve:

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

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

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) and (ii) of this section must be submitted to the NEA Office of General Counsel. When making a request for expedited processing of an administrative appeal, the request should be submitted to the NEA's FOIA Appeals Office per §1148.8(a).

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

the public on the topic. As a matter of administrative discretion, the NEA may waive the formal certification requirement.

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

§ 1148.6 How will I receive responses to my requests?

(a) *In general.* The NEA, to the extent practicable, will communicate with requesters having access to the Internet electronically, such as email or web portal.

(b) *Acknowledgments of requests.* The NEA will acknowledge the request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process. The NEA will include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

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

(d) *Grants of requests.* Once the NEA determines it will grant a request in full or in part, it will notify the requester in writing. The NEA will also inform the requester of any fees charged under §1148.10 and will disclose the requested records to the requester promptly upon payment of any applicable fees. The NEA will inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* If the NEA makes an adverse determination denying a request in any respect, it will notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial will be signed by the NEA's General Counsel or designee and will include:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the NEA in denying the request;
- (3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;
- (4) A statement that:
 - (i) The denial may be appealed under §1148.8(a),
 - (ii) That the requester has 90 days to file an appeal in order for it to be considered timely, and that the NEA will not process or consider appeals that were not filed within 90 days of the receipt of an adverse determination;
 - (iii) A description of the appeal requirements; and

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

(g) *Use of record exclusions.* In the event that the NEA identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the NEA will confer with Department of Justice, Office of Information Policy, to obtain approval to apply the exclusion. The NEA, when invoking an exclusion will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§ 1148.7 How does the NEA handle confidential commercial information?

The following definitions apply to this section.

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

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

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* The following rules and procedures determine when the NEA will provide written notice to submitters of confidential commercial information that their information may be disclosed under FOIA.

(1) The NEA will promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the NEA determines that it may be required to disclose the records, provided:

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

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

(2) The notice will either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the NEA may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

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

(1) The NEA determines that the information is exempt under the FOIA, and therefore will not be disclosed;

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

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12,600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, the NEA will give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* A submitter will have the opportunity to object to disclosure of information under FOIA.

(1) The NEA will specify a reasonable time period within which the submitter must respond to the notice referenced in paragraph (c) of this section.

(2) If a submitter has any objections to disclosure, it must provide the NEA a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in paragraph (e)(1) of this section will be considered to have no objection to disclosure of the information. The NEA is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

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

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

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

(2) A description of the information to be disclosed or copies of the records as the NEA intends to release them; and

(3) A specified disclosure date, which will be a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the NEA will promptly notify the submitter.

(i) *Requester notification.* The NEA will notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 1148.8 How can I appeal a denial of my request?

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the NEA's office designated to receive FOIA appeals ("FOIA Appeals Office"). Examples of adverse determinations are provided in §1148.6(e). Requesters can submit appeals by mail by writing to NEA Chairman, c/o Office of General Counsel, National Endowment for the Arts, 400 7th Street, SW, Washington, DC 20506, or online in accordance with instructions on the NEA's website (<https://www.arts.gov/freedom-information-act-guide>). The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the adverse determination. The appeal should clearly identify the NEA's determination that is being appealed and the assigned request number. To facilitate handling, the

requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The NEA Chairperson or his/her designee will act on behalf of the NEA's Chief FOIA Officer on all appeals under this section.

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

(c) *Decisions on appeals.* The NEA will provide its decision on an appeal in writing. A decision that upholds the NEA's determination in whole or in part will contain a statement that identifies the reasons for its decision, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the dispute resolution services offered by the Office of Government Information Services (OGIS) of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the NEA's decision is remanded or modified on appeal, the NEA will notify the requester of that determination in writing. The NEA will then further process the request in accordance with that appeal determination and will respond directly to the requester.

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

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

(f) *Timing of appeal.* After receiving the NEA's adverse determination, a requester has 90 calendar days to file an appeal in order for it to be considered timely. The NEA will not process

or consider appeals that were not filed within 90 calendar days of the date of an adverse determination.

§ 1148.9 What are the NEA's policies regarding preservation of records?

The NEA will preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration. The NEA will not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 1148.10 How will fees be charged?

(a) *In general.* (1) The NEA will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters:

- (i) Commercial use requesters;
- (ii) Non-commercial scientific or educational institutions or news media requesters; and
- (ii) All other requesters.

(2) Different fees are assessed depending on the category. Requesters may seek a fee waiver. The NEA will consider requests for fee waiver in accordance with the requirements in paragraph (k) of this section. To resolve any fee issues that arise under this section, the NEA may contact a requester for additional information. The NEA will ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The NEA ordinarily will collect all applicable fees before sending copies of records to a requester.

Requesters must pay fees by check or money order made payable to the Treasury of the United States, or by another method as determined by the NEA.

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

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

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

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

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. The NEA may seek verification from the requester that the request is in furtherance of scholarly research and the NEA will advise requesters of their placement in this category.

Example 1 to § 1148.10(b)(4). A request from a professor of architecture at a university for records relating to NEA grants related to architecture, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2 to § 1148.10(b)(4). A request from the same professor of architecture seeking translation grant information from the NEA in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3 to § 1148.10(b)(4). A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

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

(6) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast “news” to the public at large and

publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the NEA may also consider a requester’s past publication record in making this determination. The NEA will advise requesters of their placement in this category.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under §1148.7, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the NEA will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section.

Because the fee amounts provided in paragraphs (c)(1) through (3) of this section already account for the direct costs associated with a given fee type, the NEA will not add any additional costs to charges calculated under this section.

(1) *Searches.* The following fee policies apply to searches:

(i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The NEA will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The NEA may properly charge for time spent searching even if the NEA does not locate any responsive records or if the NEA determines that the records are entirely exempt from disclosure.

(ii) For manual searches, the fee charged will be the salary rate or rates of the employee or employees conducting the search. For computer searches, the fee charged will be the actual direct cost of providing the service, including the salary rate or rates of the operator(s) or programmer(s) conducting the search. The salary rate is calculated as the particular employee's basic pay plus 16.1 percent. The NEA may charge fees even if the documents are determined to be exempt from disclosure or cannot be located.

(iii) The NEA will charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The NEA will notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by the NEA at a Federal records center operated by the National Archives and Records Administration (NARA), the NEA will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* The NEA will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The NEA will honor a requester's preference for receiving a record in a particular form or format where the NEA can readily reproduce it in the form or format requested. Where photocopies are supplied, the NEA will provide one copy per request at the cost of \$.10 per single sided page, and \$.20 per double sided page. For copies of records produced on tapes, disks, or other media, the NEA will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, the NEA will charge the direct costs.

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

(d) *Restrictions on charging fees.* The NEA will adhere to the following restrictions regarding fees it charges:

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

(2) If the NEA fails to comply with the FOIA's time limits in which to respond to a request, it will not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(3) through (5) of this section.

(3) If the NEA has determined that unusual circumstances as defined by the FOIA apply and the NEA provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days.

(4) If the NEA has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the NEA may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken:

(i) The NEA provided timely written notice of unusual circumstances to the requester in accordance with the FOIA; and

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

(5) 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.

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

(7) Except for requesters seeking records for a commercial use, the NEA will provide without charge:

- (i) The first 100 pages of duplication (or the cost equivalent for other media); and
- (ii) The first two hours of search.

(8) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.

(e) *Notice of anticipated fees in excess of \$25.00.* The following procedures apply when the NEA anticipates fees to be in excess of \$25.00.

(1) When the NEA determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the NEA will notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the NEA will advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If the NEA notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester

must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The NEA is not required to accept payments in installments.

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

(4) The NEA will make available its FOIA Public Liaison or other designated FOIA contact to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

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

(g) *Charging interest.* The NEA may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the NEA. The NEA will follow the provisions of the Debt Collection Act of 1982 (Public Law 97-

365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

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

(i) *Advance payments.* The following policies and procedures apply to advanced payments of fees:

(1) For requests other than those described in paragraph (i)(2) or (3) of this section, the NEA will not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

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

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 calendar days of the billing date, the NEA may require that the requester pay

the full amount due, plus any applicable interest on that prior request, and the NEA may require that the requester make an advance payment of the full amount of any anticipated fee before the NEA begins to process a new request or continues to process a pending request or any pending appeal. Where the NEA has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

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

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

(k) *Requirements for waiver or reduction of fees.* The following policies and procedures apply to fee waivers or reductions of fees.

(1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

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

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

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

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

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

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

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

(B) If there is an identified commercial interest, the NEA will determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The NEA ordinarily will presume that when a news media requester has satisfied the factors in paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

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

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the NEA and should address the criteria referenced in paragraphs (k)(1) through (3) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

§ 1148.11 What other rules apply to NEA FOIA requests?

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Dated: October 23, 2018

Gregory Gendron,

Director of Administrative Services, National Endowment for the Arts

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