



COMMISSION OF FINE ARTS

45 CFR Part 2105

Freedom of Information Act Regulations

AGENCY: Commission of Fine Arts.

ACTION: Interim final rule; request for comments.

SUMMARY: This rule replaces the Commission of Fine Arts (CFA) Freedom of Information Act (FOIA) regulations, last updated in 1986, with regulations that incorporate FOIA-related mandates since the last update, including the FOIA Improvement Act of 2016

DATES: This rule is effective June 1, 2019. Comments are due by May 20, 2019.

ADDRESSES: Please address comments concerning this interim rule to foia@cfa.gov.

FOR FURTHER INFORMATION CONTACT: Thomas Luebke, Secretary, (202) 504-2200.

SUPPLEMENTARY INFORMATION: As established by Congress in 1910, the Commission of Fine Arts (CFA) is a small independent advisory body made up of seven presidentially appointed “well qualified judges of the arts” whose primary role is architectural review of designs for buildings, parks, monuments and memorials erected by the Federal or District of Columbia governments in Washington, DC. In addition to architectural review, the Commission considers and advises on the designs for coins, medals, and U.S. memorials on foreign soil. The Commission also advises the District of Columbia government on private building projects within the Georgetown Historic District, the Rock Creek Park perimeter, and the Monumental Core area. The

Commission advises Congress, the President, Federal agencies, and the District of Columbia government on the general subjects of design, historic preservation, and on orderly planning on matters within its jurisdiction.

The Commission of Fine Arts routinely and promptly responds to requests from concerned citizens and interested parties to review a wide variety of agency documents. To this end, the staff regularly posts agendas for upcoming meetings and draft documents relevant to those meetings to the agency website (<https://www.cfa.gov/>). Agendas, meeting minutes, recommendation letters, and actions taken under the Shipstead-Luce and Old Georgetown Acts are posted on the website in a timely manner. In that same spirit of openness and transparency, the CFA strives to organize and fulfill Freedom of Information Act (FOIA) requests efficiently and expediently, within the perimeters of current legislation. Therefore, the CFA revises regulations to replace those published in 1986 and invites public commentary.

List of Subjects 45 CFR Part 2105

Administrative practice and procedure, Freedom of information.

For reasons stated in the preamble, the Commission of Fine Arts revises 45 CFR part 2105 to read as follows:

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Authority: 5 U.S.C. 552, as amended by Public Law No. 110-175, 121 Stat. 2524 and Pub. L. 114-185, 130 Stat. 538.

Subpart A—Introduction

§2105.1 What should you know up front?

(a) This part contains the rules that the Agency follows in processing records under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

(b) Definitions of terms used in this part are found at §2105.68.

(c) This part should be read in conjunction with the text of the FOIA and the OMB Fee Guidelines.

(d) This part does not entitle any person to any service or to the disclosure of any record that is not required under the FOIA.

§2105.2 What kinds of records are not covered by the regulations in this part?

This part does not apply to records that fall under the law enforcement exclusions in 5 U.S.C. 552(c)(1)-(3). These exclusions may be used only in the limited circumstances delineated by the statute and require both prior approval from legal counsel and the recording of their use and approval process.

Subpart B—How To Make a Request

§2105.3 Where should you send a FOIA request?

(a) To make a request for Agency records, you must contact the Agency directly.

(b) Address requests to the FOIA Officer found in the Agency contacts at

<https://www.cfa.gov/foia>.

§2105.4 How should you describe the records you seek?

(a) You must reasonably describe the records sought. A reasonable description contains sufficient detail to enable Agency personnel familiar with the subject matter of the request to locate the records with a reasonable amount of effort.

(b) You should include as much detail as possible about the specific records or types of records that you are seeking. This will assist the Agency in identifying the requested records (for example, time frames involved or specific personnel who may have the requested records). For example, whenever possible, identify:

(1) The date, title or name, author, recipient, and subject of any particular records you seek;

(2) The office that created the records you seek;

(3) The timeframe for which you are seeking records; and

(4) Any other information that will assist the Agency in locating the records.

(c) The Agency's FOIA Officer or Public Liaison can assist you in formulating or reformulating a request in an effort to better identify the records you seek.

(d) If the Agency determines that your request does not reasonably describe the records sought, the Agency will inform you what additional information you need to provide in order to reasonably describe the records that you seek so the requested records can be located with a reasonable amount of effort. The Agency will also notify you that it will not be able to comply with your request unless the additional information it has requested is received from you in writing within 20 workdays after the Agency has requested it and that you may appeal its determination. If you receive this type of notification, you may wish to discuss it with the Agency's designated FOIA contact or the FOIA Public Liaison

(see §2105.64). If the Agency does not receive your written response containing the additional information within 20 workdays after the Agency has requested it, the Agency will presume that you are no longer interested in the records and will close the file on the request.

§2105.5 How will fee information affect the processing of your request?

(a) Your request must explicitly state that you will pay all fees associated with processing the request, that you will pay fees up to a specified amount, and/or that you are seeking a fee waiver.

(b) If the Agency anticipates that the fees for processing the request will exceed the amount you have agreed to pay, or if you did not agree in writing to pay processing fees or request a fee waiver and the Agency anticipates the processing costs will exceed \$50 (see §2105.35(g)) or will exceed your entitlements (see §2105.37), the Agency will notify you:

- (1) Of the estimated processing fees;
- (2) Of its need for either an advance payment (see §2105.48) or your written assurance that you will pay the anticipated fees (or fees up to a specified amount); and
- (3) That it will not be able to fully comply with your request unless you provide a fee waiver request and/or the requested written assurance or advance payment.

(c) If the Agency does not receive a written response from you within 20 workdays after requesting the information in paragraph (b) of this section, it will presume that you are no longer interested in the records and will close the file on the request.

(d) If you are seeking a fee waiver, your request must include a justification that addresses and meets the criteria in §§2105.43 and 2105.46. Failure to provide sufficient justification will result in a denial of the fee waiver request. If you are seeking a fee waiver, you may also indicate the amount you are willing to pay if the fee waiver is denied. This allows the Agency to process the request for records while it considers your fee waiver request. You may also inform the Agency of why you believe your request meets one or more of the criteria for a discretionary fee waiver under §2105.54.

(e) The Agency will begin processing your request only after all issues regarding fees are resolved.

(f) If you are required to pay a fee and it is later determined on appeal that you were entitled to a full or partial fee waiver, you will receive an appropriate refund.

§2105.6 What information should you include about your fee category?

(a) A request should indicate your fee category (that is, whether you are a commercial-use requester, news media, educational or noncommercial scientific institution, or other requester as described in §§2105.36 and 2105.37).

(b) If you submit a FOIA request on behalf of another person or organization (for example, if you are an attorney submitting a request on behalf of a client), the Agency will determine the fee category by considering the underlying requester's identity and intended use of the information.

(c) If your fee category is unclear, the Agency may ask you for additional information (see §2105.49).

§2105.7 Can you ask for records to be disclosed in a particular form or format?

(a) Generally, you may choose the form or format of disclosure for records requested.

The Agency must provide the records in the requested form or format if the Agency can readily reproduce the record in that form or format. If the Agency cannot readily reproduce the record in that form or format, it must explain why it cannot.

(b) The Agency may charge you the direct costs involved in converting records to the requested format if the Agency does not normally maintain the records in that format (see §2105.42).

§2105.8 What if your request seeks records about another person?

(a) When a request seeks records about another person, you may receive greater access by submitting proof that the person either:

(1) Consents to the release of the records to you (for example, a notarized authorization signed by that person); or

(2) Is deceased (for example, a copy of a death certificate or an obituary).

(b) The Agency can require you to supply additional information if necessary to verify that a particular person has consented to disclosure or is deceased.

§2105.9 May you ask for the processing of your request to be expedited?

You may ask for the processing of your request to be expedited. If you are seeking expedited processing, your request must include a justification that addresses and meets the criteria in §2105.18 and includes the certification required at §2105.18(b)(2). Failure to provide sufficient justification or the required certification will result in a denial of the expedited processing request.

§2105.10 What contact information should your request include?

A request should include your name and a way (such as a mailing or email address) for the Agency to send responsive records to you and/or to request additional information or clarification of your request. You may also wish to include a daytime telephone number (or the name and telephone number of an appropriate contact).

Subpart C—Processing Requests

§2105.11 What should you know about how the Agency processes requests?

- (a) Except as described in §2105.12, the Agency is responsible for responding to the request and for making a reasonable effort to search for responsive records.
- (b) In determining which records are responsive to a request, the Agency will include only records in its possession and control on the date that it begins its search.
- (c) The Agency will make reasonable efforts to search for the requested records. As part of its reasonable efforts, the Agency will search paper and/or electronic records (for example, emails), as appropriate. The Agency will not search for records in an electronic form or format if these efforts would significantly interfere with the operation of the Agency's automated information system.
- (d) If the Agency receives a request for records in its possession that it did not create or that another Federal agency is substantially concerned with, it may undertake consultations and/or referrals as described in §2105.12.

§2105.12 How do consultations and referrals work?

- (a) Consultations and referrals generally occur outside the Agency.
- (1) Paragraphs (b) through (e) of this section address consultations and referrals that occur outside the Agency when the Agency has responsive records.

(2) Paragraph (f) of this section addresses what happens when the Agency has no responsive records but believes responsive records may be in the possession of a Federal agency outside the Agency.

(b) If, while responding to a request, the Agency locates records that originated with another Federal agency, it usually will refer the request and any responsive records to that other agency for a release determination and direct response.

(c) If the Agency refers records to another agency, it will document the referral and maintain a copy of the records that it refers and notify you of the referral in writing, unless the notification will itself disclose a sensitive, exempt fact. When the Agency notifies you of the referral, it will tell you whether the referral was for part or all of your request and provide the name and contact information for the other agency. You may treat such a response as a denial of records and file an appeal, in accordance with the procedures in §2105.57.

(d) If the Agency locates records that originated with another Federal agency while responding to a request, the Agency will make the release determination itself (after consulting with the originating agency) when:

(1) The record is of primary interest to the Agency (for example, a record may be of primary interest to the Agency if it was developed or prepared according to the Agency's regulations or directives, or in response to an Agency request);

(2) The Agency is in a better position than the originating agency to assess whether the record is exempt from disclosure;

(3) The originating agency is not subject to the FOIA; or

(4) It is more efficient or practical depending on the circumstances.

(e) If the Agency receives a request for records that another Federal agency has classified under any applicable Executive order concerning record classification, it must refer the request to that agency for response.

(f) If the Agency receives a request for records not in its possession, but that the Agency believes may be in the possession of a Federal agency outside the Agency, the Agency will return the request to you, may advise you to submit it directly to the other agency, will notify you that the Agency cannot comply with the request, and will close the request. If you believe this response was in error, you may file an appeal in accordance with the procedures in §2105.57.

Subpart D—Timing of Responses to Requests

§2105.13 In what order are responses usually made?

The Agency ordinarily will respond to requests according to their order of receipt within their processing track.

§2105.14 What is multitrack processing and how does it affect your request?

(a) Processing tracks are used to distinguish simple requests from more complex ones on the basis of the estimated number of workdays needed to process the request.

(b) In determining the number of workdays needed to process the request, the Agency considers factors such as the number of pages involved in processing the request or the need for consultations.

(c) The basic processing tracks are designated as follows:

(1) Simple: requests in this track will take between one to five workdays to process;

(2) Normal: requests in this track will take between six to twenty workdays to process;

(3) Complex: requests in this track will take between twenty-one workdays and sixty workdays to process; or

(4) Exceptional/Voluminous: requests in this track involve very complex processing challenges, which may include a large number of potentially responsive records, and will take over sixty workdays to process.

(d) The Agency also has a specific processing track for requests that are granted expedited processing under the standards in §2105.18. These requests will be processed as soon as practicable.

(e) The Agency must advise you of the track into which your request falls and, when appropriate, will offer you an opportunity to narrow your request so that it can be placed in a different processing track. If you request placement in a particular processing track but the Agency places you in a different processing track, the Agency will provide you with an explanation of why you were not placed in the processing track you requested.

(f) The use of multitrack processing does not alter the statutory deadline for an Agency to determine whether to comply with your FOIA request (see §2105.15).

(g) You may inquire about the status of your request, including its estimated processing completion date, by contacting the FOIA Public Liaison, whose contact information may be found at <https://www.cfa.gov/foia>.

§2105.15 What is the basic time limit for responding to a request?

(a) Ordinarily, the Agency has 20 workdays (including the date of receipt) to determine whether to comply with a request, but unusual circumstances may allow the Agency to take longer than 20 workdays (see §2105.17).

(b) A consultation or referral under §2105.12 does not restart the statutory time limit for responding to a request.

§2105.16 When can the Agency suspend the basic time limit?

(a) The basic time limit in §2105.15 may be temporarily suspended for the time it takes you to respond to one written communication from the Agency reasonably asking for clarifying information.

(b) The basic time limit in §2105.15 may also repeatedly be temporarily suspended for the time it takes you to respond to written communications from the Agency that are necessary to clarify issues regarding fee assessment (see §2105.49).

§2105.17 When may the Agency extend the basic time limit?

(a) The Agency may extend the basic time limit, if unusual circumstances exist, by notifying you in writing of:

- (1) The unusual circumstances involved; and
- (2) The date by which it expects to complete processing the request.

(b) If the processing time will extend beyond a total of 30 workdays, the Agency will:

- (1) Give you an opportunity to limit the scope of the request or agree to an alternative time period for processing; and

(2) Make available its FOIA Public Liaison (see §2105.64) to assist in resolving any disputes between you and the Agency, and notify you of your right to seek dispute resolution from the Office of Government Information Services (OGIS).

(c) If the Agency extends the time limit under this section and you do not receive a response in accordance with §2105.15(a) in that time period, you may consider the request denied and file an appeal in accordance with the procedures in §2105.57.

(d) Your refusal to reasonably modify the scope of a request or arrange an alternative time frame for processing a request after being given the opportunity to do so may be considered for litigation purposes as a factor when determining whether exceptional circumstances exist.

§2105.18 When will expedited processing be provided and how will it affect your request?

(a) The Agency will provide expedited processing upon request if you demonstrate to the satisfaction of the Agency that there is a compelling need for the records. The following circumstances demonstrate a compelling need:

(1) Where failure to expedite the request could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) Where there is an urgency to inform the public about an actual or alleged Federal Government activity and the request is made by a person primarily engaged in disseminating information.

(i) In most situations, a person primarily engaged in disseminating information will be a representative of the news media.

(ii) If you are not a full time member of the news media, to qualify for expedited processing here, you must establish that your main professional activity or occupation is information dissemination, although it need not be your sole occupation.

(iii) The requested information must be the type of information which has particular value that will be lost if not disseminated quickly; this ordinarily refers to a breaking news story of general public interest.

(iv) Information of historical interest only or information sought for litigation or commercial activities would not qualify, nor would a news media deadline unrelated to breaking news.

(b) If you seek expedited processing, you must submit a statement that:

(1) Explains in detail how your request meets one or both of the criteria in paragraph (a) of this section; and

(2) Certifies that your explanation is true and correct to the best of your knowledge and belief.

(c) You may ask for expedited processing of your request by writing to the appropriate FOIA contact in the Agency that maintains the records requested any time before the Agency issues its final response to your request. When making a request for expedited processing of an administrative appeal, submit the request to the appropriate deciding official for FOIA appeals.

(d) The Agency must notify you of its decision to grant or deny expedited processing within 10 calendar days of receiving an expedited processing request.

(e) If expedited processing is granted, the request will be given priority, placed in the processing track for expedited requests, and be processed as soon as practicable.

(f) If expedited processing is denied, the Agency will:

(1) Inform you of the basis for the denial, including an explanation of why the expedited processing request does not meet the Agency's expedited processing criteria under this section; and

(2) Notify you of the right to appeal the decision on expedited processing in accordance with the procedures in subpart H of this part.

(g) If you appeal the Agency's expedited processing decision, that portion of your appeal (if it is properly formatted under §2105.57) will be processed before appeals that do not challenge expedited processing decisions.

(h) If the Agency has not responded to the request for expedited processing within 10 calendar days, you may file an appeal (for nonresponse in accordance with §2105.55(a)(8)).

Subpart E—Responses to Requests

§2105.19 How will the Agency respond to requests?

(a) When the Agency informs you of its decision to comply with a request by granting, partially granting, or denying the request, it will do so in writing and in accordance with the deadlines in subpart D of this part. The Agency's written response will include a statement about the services offered by its FOIA Public Liaison. The Agency's written response will also include a statement about the services offered by the Office of Government Information Services (OGIS).

(b) If the Agency determines that your request will take longer than 10 workdays to process, the Agency immediately will send you a written acknowledgment that includes the request's individualized tracking number and processing track (see §2105.14(e)). The acknowledgement may also include a brief description of the subject of your request.

§2105.20 How will the Agency grant requests?

(a) Once the Agency makes a determination to grant a request in full or in part, it must notify you in writing.

(b) The notification will inform you of any fees charged under subpart G of this part.

(c) The Agency will release records (or portions of records) to you promptly upon payment of any applicable fees (or before then, at its discretion).

(d) If the records (or portions of records) are not included with the Agency's notification, the Agency will advise you how, when, and where the records will be released or made available.

§2105.21 When will the Agency deny a request or procedural benefits?

(a) The Agency denies a request when it makes a decision that:

(1) A requested record is exempt, in full or in part;

(2) The request does not reasonably describe the records sought;

(3) A requested record does not exist, cannot be located, or is not in the Agency's possession and/or control; or

(4) A requested record is not readily reproducible in the form or format you seek.

(b) The Agency denies a procedural benefit only, and not access to the underlying records, when it makes a decision that:

- (1) A fee waiver, or another fee-related issue, will not be granted; or
- (2) Expedited processing will not be provided.
- (c) The Agency must consult with legal counsel before it denies a fee waiver request or withholds all or part of a requested record.

§2105.22 How will the Agency deny requests?

- (a) The Agency must notify you in writing of any denial of your request.
- (b) The denial notification must include:
 - (1) The name and title or position of the person responsible for the denial, along with an office phone number or email address;
 - (2) A statement of the reasons for the denial;
 - (3) A reference to any FOIA exemption applied by the Agency to withhold records in full or in part, along with a statement that the Agency reasonably foresees that disclosure would harm an interest protected by the applied exemption(s) or disclosure is prohibited by law;
 - (4) An estimate of the volume of records withheld in full or in part (for example, by providing the number of pages or some other reasonable form of estimation), unless including an estimate would harm an interest protected by an exemption used to withhold the records and the Agency explains this harm to you;
 - (5) The name and title of legal counsel consulted (if the Agency is denying a fee waiver request or withholding all or part of a requested record); and
 - (6) A statement that the denial may be appealed under subpart H of this part and a description of the procedures in subpart H of this part.

§2105.23 What if the requested records contain both exempt and nonexempt material?

If responsive records contain both exempt and nonexempt material, the Agency will consult with legal counsel, as discussed in §2105.21(c). After consultation, the Agency will partially grant and partially deny the request by:

- (a) Segregating and releasing the nonexempt information, unless the nonexempt material is so intertwined with the exempt material that disclosure of it would leave only meaningless words and phrases;
- (b) Indicating on the released portion of the record the amount of information deleted and the FOIA exemption under which the deletion was made, unless doing so would harm an interest protected by the FOIA exemption used to withhold the information; and
- (c) If technically feasible, indicating the amount of information deleted and the FOIA exemption under which the deletion was made at the place in the record where the deletion was made.

Subpart F—Handling Confidential Information

§2105.24 May submitters of possibly confidential information designate information as confidential when making submissions?

- (a) The Agency encourages, but does not require, submitters to designate confidential information in good faith (in other words, to identify specific information as information the submitter considers protected from disclosure under Exemption 4 of the FOIA, found at 5 U.S.C. 552(b)(4)), at the time of submission or reasonably soon thereafter.

(b) The designations discussed in paragraph (a) of this section assist the Agency in identifying what information obtained from the submitter is possibly confidential and triggers the requirement for Agency-provided notifications under §2105.25(a)(1).

§2105.25 When will the Agency notify a submitter of a request for their possibly confidential information?

(a) Except as outlined in §2105.27, an Agency must promptly notify a submitter in writing when it receives a FOIA request if:

(1) The requested information has been designated by the submitter as confidential information under §2105.24(a); or

(2) The requested information has not been designated as confidential information by the submitter under §2105.24(a), but the Agency identifies it as possibly confidential information.

(b) If a voluminous number of submitters are involved, the Agency may publish a notice in a manner reasonably calculated to reach the attention of the submitters (for example, in newspapers or newsletters, the Agency's Web site, or the Federal Register) instead of providing a written notice to each submitter.

§2105.26 What information will the Agency include when it notifies a submitter of a request for their possibly confidential information?

A notice to a submitter must include:

(a) Either a copy of the request, the exact language of the request, or (for notices published under §2105.25(b)) a general description of the request;

(b) Either a description of the possibly confidential information located in response to the request or a copy of the responsive records, or portions of records, containing the information;

(c) A description of the procedures for objecting to the release of the possibly confidential information under §§2105.28 and 2105.29;

(d) A time limit for responding to the Agency—no less than 10 workdays from receipt or publication of the notice (as set forth in §2105.25(b))—to object to the release and to explain the basis for the objection;

(e) Notice that information contained in the submitter's objections may itself be subject to disclosure under the FOIA;

(f) Notice that the Agency, not the submitter, is responsible for deciding whether the information will be released or withheld;

(g) A request for the submitter's views on whether they still consider the information to be confidential if the submitter designated the material as confidential commercial or financial information 10 or more years before the request; and

(h) Notice that failing to respond within the time frame specified under paragraph (d) of this section will create a presumption that the submitter has no objection to the disclosure of the information in question.

(i) Except as outlined in §2105.27, an Agency must promptly notify a submitter in writing when it receives a FOIA request if:

(1) The requested information has been designated by the submitter as confidential information under §2105.24(a); or

(2) The requested information has not been designated as confidential information by the submitter under §2105.24(a), but the Agency identifies it as possibly confidential information.

§2105.27 When will the Agency not notify a submitter of a request for their possibly confidential information?

The notice requirements of §2105.26 will not apply if:

- (a) The information has been lawfully published or officially made available to the public; or
- (b) Disclosure of the information is required by a statute other than the FOIA or by a regulation (other than this part) issued in accordance with the requirements of Executive Order 12600.

§2105.28 How and when may a submitter object to the disclosure of confidential information?

- (a) If a submitter has any objections to the disclosure of confidential information, the submitter should provide a detailed written statement to the Agency that specifies all grounds for withholding the particular information under any FOIA exemption (see §2105.29 for further discussion of Exemption 4 objection statements).
- (b) A submitter who does not respond within the time period specified under §2105.26(d) will be considered to have no objection to disclosure of the information. Responses received by the Agency after this time period will not be considered by the Agency unless the appropriate Agency FOIA contact determines, in his or her sole discretion, that good cause exists to accept the late response.

§2105.29 What must a submitter include in a detailed Exemption 4 objection statement?

(a) To rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information is confidential information. To do this, the submitter must give the Agency a detailed written statement. This statement must include a specific and detailed discussion of why the information is a trade secret or, if the information is not a trade secret, the following three categories must be addressed (unless the Agency informs the submitter that a response to one of the first two categories will not be necessary):

(1) Whether the submitter provided the information voluntarily and, if so, how disclosure will impair the Government's ability to obtain similar information in the future and/or how the information fits into a category of information that the submitter does not customarily release to the public;

(2) Whether the Government required the information to be submitted, and if so, how disclosure will impair the Government's ability to obtain similar information in the future and/or how substantial competitive or other business harm would likely result from disclosure; and

(3) A certification that the information is confidential, has not been disclosed to the public by the submitter, and is not routinely available to the public from other sources.

(b) If not already provided, the submitter must include a daytime telephone number, an email and mailing address, and a fax number (if available).

§2105.30 How will the Agency consider the submitter's objections?

(a) The Agency must carefully consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(b) The Agency, not the submitter, is responsible for deciding whether the information will be released or withheld.

§2105.31 What if the Agency determines it will disclose information over the submitter's objections?

If the Agency decides to disclose information over the objection of a submitter, the Agency must notify the submitter by certified mail or other traceable mail, return receipt requested. The notification must be sent to the submitter's last known address and must include:

(a) The specific reasons why the Agency determined that the submitter's disclosure objections do not support withholding the information;

(b) Copies of the records or information the Agency intends to release; and

(c) Notice that the Agency intends to release the records or information no less than 10 workdays after receipt of the notice by the submitter.

§2105.32 Will a submitter be notified of a FOIA lawsuit?

If you file a lawsuit seeking to compel the disclosure of confidential information, the Agency must promptly notify the submitter.

§2105.33 Will you receive notification of activities involving the submitter?

If any of the following occur, the Agency will notify you:

(a) The Agency provides the submitter with notice and an opportunity to object to disclosure;

(b) The Agency notifies the submitter of its intent to disclose the requested information;

or

(c) A submitter files a lawsuit to prevent the disclosure of the information.

§2105.34 Can an Agency release information protected by Exemption 4?

If an Agency determines that the requested information is protected from release by

Exemption 4 of the FOIA, the Agency has no discretion to release the information.

Release of information protected from release by Exemption 4 is prohibited by the Trade Secrets Act, a criminal provision found at 18 U.S.C. 1905.

Subpart G—Fees

§2105.35 What general principles govern fees?

(a) The Agency will charge for processing requests under the FOIA in accordance with this subpart and with the OMB Fee Guidelines.

(b) The Agency may contact you for additional information to resolve fee issues.

(c) The Agency ordinarily will collect all applicable fees before sending copies of records to you.

(d) You may usually pay fees by check, certified check, or money order made payable to the “Commission of Fine Arts.”

(1) Where appropriate, the Agency may require that your payment be made in the form of a certified check.

(e) The Agency should ensure that it conducts searches, review, and duplication in the most efficient and the least expensive manner so as to minimize costs for both you and the Agency.

(f) If the Agency does not comply with any of the FOIA's statutory time limits:

(1) Except as provided in paragraph (f)(2) of this section, the Agency cannot assess any search fees (or, if you are in the fee category of a representative of the news media or an educational and noncommercial scientific institution, duplication fees).

(2)(i) If the Agency has determined that unusual circumstances apply (as the term is defined in §2105.68) and the Agency provided you a timely written notice to extend the basic time limit in accordance with §2105.17, the noncompliance is excused for an additional 10 workdays.

(ii) If the Agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the noncompliance is excused if the Agency has provided you a timely written notice in accordance with §2105.17 and has discussed with you via written mail, email, or telephone (or made not less than 3 good-faith attempts to do so) how you could effectively limit the scope of the request.

(iii) If a court has determined that exceptional circumstances exist (as that term is defined in §2105.68), the noncompliance is excused for the length of time provided by the court order.

(g) If the fee for processing your request is less than \$50, you will not be charged unless multiple requests are aggregated under §2105.52 to an amount that is \$50 or more.

(h) If you fail to pay any FOIA-related fee within 30 calendar days of the date of billing, the processing of any new or ongoing requests and/or appeals from you shall ordinarily be suspended.

(i) If you would like to reformulate your request so it will meet your needs at a lower cost, you may wish to seek assistance from the Agency's designated FOIA contact or its FOIA Public Liaison (see §2105.64).

§2105.36 What are the requester fee categories?

(a) There are four categories of requesters for the purposes of determining fees—commercial-use, educational and noncommercial scientific institutions, representatives of news media, and all others.

(b) The Agency's decision to place you in a particular fee category will be made on a case-by-case basis based on your intended use of the information and, in most cases, your identity. If you do not submit sufficient information in your FOIA request for the Agency to determine your proper fee category, the Agency may ask you to provide additional information (see §2105.49). If you request placement in a particular fee category but the Agency places you in a different fee category, the Agency will provide you with an explanation of why you were not placed in the fee category you requested (for example, if you were placed in the commercial use requester category rather than the category you requested, the Agency will describe how the records would further your commercial, trade, or profit interests).

(c) See §2105.68 for the definitions of each of these fee categories.

§2105.37 How does your requester category affect the fees you are charged?

You will be charged as shown in the following table:

Table 1 to §2105.37

Requester Category	Search fees	Review fees	Duplication fees
Commercial use	Yes	Yes	Yes

requester			
Educational and noncommercial scientific institutions	No	No	Yes (first 100 pages, or equivalent volume, free)
Representative of news media requester	No	No	Yes (first 100 pages, or equivalent volume, free)
All other requesters	Yes (first two hours free)	No	Yes (first 100 pages, or equivalent volume, free)

§2105.38 How will fee amounts be determined?

(a) The Agency will charge the types of fees discussed in this subpart unless a waiver of fees is required under §2105.37 or has been granted under §2105.43 or §2105.54.

(b) Because the types of fees discussed in this subpart already account for the overhead costs associated with a given fee type, the Agency should not add any additional costs to those charges.

§2105.39 What search fees will you have to pay?

(a) The Agency will charge search fees for all requests, subject to the restrictions of §§2105.35(f), 2105.37, and 2105.38(a). The Agency may charge you for time spent searching even if it does not locate any responsive records or if it determines that the records are entirely exempt from disclosure.

(b) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be the average hourly General Schedule (GS) base salary, plus the District of Columbia locality payment, plus 16 percent for benefits, of employees in the following three categories, as applicable:

(1) Clerical—Based on GS-6, Step 5, pay (all employees at GS-7 and below are classified as clerical for this purpose);

(2) Professional—Based on GS-11, Step 7, pay (all employees at GS-8 through GS-12 are classified as professional for this purpose); and

(3) Managerial—Based on GS-14, Step 2, pay (all employees at GS-13 and above are classified as managerial for this purpose).

(c) You can review the current fee schedule for the categories discussed above in paragraph (b) of this section at <https://www.cfa.gov/foia>.

(d) Some requests may require retrieval of records stored at a Federal records center operated by the National Archives and Records Administration. For these requests, the Agency will charge additional costs in accordance with the Transactional Billing Rate Schedule established by the National Archives and Records Administration.

§2105.40 What duplication fees will you have to pay?

(a) The Agency will charge duplication fees, subject to the restrictions of §§2105.35(f), 2105.37, and 2105.38(a).

(b) If photocopies or scans are supplied, the Agency will provide one copy per request at the cost determined by the table in appendix A to this part.

(c) For other forms of duplication, the Agency will charge the actual costs of producing the copy, including the time spent by personnel duplicating the requested records. For each quarter hour spent by personnel duplicating the requested records, the fees will be the same as those charged for a search under §2105.39(b).

(d) If the Agency must scan paper records to accommodate your preference to receive records in an electronic format or print electronic records to accommodate your preference to receive records in a paper format, you will pay both the per page amount

noted in appendix A to this part and the time spent by personnel scanning or printing the requested records. For each quarter hour spent by personnel scanning or printing the requested records, the fees will be the same as those charged for a search under §2105.39(b).

§2105.41 What review fees will you have to pay?

(a) The Agency will charge review fees if you make a commercial-use request, subject to the restrictions of §§2105.35(f), 2105.37, and 2105.38(a).

(b) The Agency will assess review fees in connection with the initial review of the record (the review conducted by the Agency to determine whether an exemption applies to a particular record or portion of a record).

(c) The Agency will not charge for reviews at the administrative appeal stage of exemptions applied at the initial review stage. However, if the appellate authority determines that an exemption no longer applies, any costs associated with the Agency's re-review of the records to consider the use of other exemptions may be assessed as review fees.

(d) The Agency will charge review fees at the same rates as those charged for a search under §2105.39(b).

(e) The Agency can charge review fees even if the record(s) reviewed ultimately is not disclosed.

§2105.42 What fees for other services will you have to pay?

(a) Although not required to provide special services, if the Agency chooses to do so as a matter of administrative discretion, it will charge you the direct costs of providing the service.

(b) Examples of these services include providing multiple copies of the same record, converting records that are not already maintained in a requested format to the requested format, obtaining research data under §2105.67, sending records by means other than first class mail, and conducting a search that requires the creation of a new computer search program to locate the requested records.

(c) The Agency will notify you of these fees before they accrue and will obtain your written assurance of payment or an advance payment before proceeding. See §§2105.47 and 2105.48.

§2105.43 When will the Agency waive fees?

(a) The Agency will release records responsive to a request without charge (in other words, it will give you a full fee waiver) or at a reduced charge (in other words, it will give you a partial fee waiver, as discussed further in paragraph (b) of this section) if the Agency determines, based on all available information, that you have demonstrated (by addressing and meeting each of the criteria listed in §2105.46) that disclosing the information is:

- (1) In the public interest because it is likely to contribute significantly to public understanding of Government operations or activities, and
- (2) Not primarily in your commercial interest.

(b) A partial fee waiver may be appropriate if some but not all of the requested records are likely to contribute significantly to public understanding of the operations and activities of the Government.

(c) When deciding whether to waive or reduce fees, the Agency will rely on the fee waiver justification submitted in your request letter. If the letter does not include sufficient justification, the Agency will deny the fee waiver request. The Agency may, at its discretion, request additional information from you (see §2105.49).

(d) The burden is on you to justify entitlement to a fee waiver. Requests for fee waivers are decided on a case-by-case basis under the criteria discussed in paragraph (a) of this section and §2105.46. If you have received a fee waiver in the past, that does not mean you are automatically entitled to a fee waiver for every request submitted.

(e) Discretionary fee waivers are addressed in §2105.54.

(f) The Agency must not make value judgments about whether the information at issue is “important” enough to be made public; it is not the Agency's role to attempt to determine the level of public interest in requested information.

§2105.44 When may you ask the Agency for a fee waiver?

(a) You should request a fee waiver when your request is first submitted to the Agency (see §2105.5).

(b) You may submit a fee waiver request at a later time if the Agency has not yet completed processing your request.

§2105.45 How will the Agency notify you if it denies your fee waiver request?

If the Agency denies your request for a fee waiver, it will notify you, in writing, of the following:

- (a) The basis for the denial, including a full explanation of why the fee waiver request does not meet the Agency's fee waiver criteria in §2105.46;
- (b) The name and title or position of each person responsible for the denial;
- (c) The name and title of legal counsel consulted;
- (d) Your right to appeal the denial under subpart H of this part and a description of the requirements set forth therein, within 30 workdays from the date of the fee waiver denial letter; and
- (e) Your anticipated fees, in accordance with §2105.47.

§2105.46 How will the Agency evaluate your fee waiver request?

(a) In deciding whether your fee waiver request meets the requirements of §2105.43(a)(1), the Agency will consider the criteria listed in paragraphs (a)(1) through (4) of this section. You must address and meet each of these criteria in order to demonstrate that you are entitled to a fee waiver.

- (1) How the records concern the operations or activities of the Federal Government.
- (2) How disclosure is likely to contribute to public understanding of those operations or activities, including:
 - (i) How the contents of the records are meaningfully informative;
 - (ii) The logical connection between the content of the records and the operations or activities;

(iii) How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding;

(iv) Your identity, vocation, qualifications, and expertise regarding the requested information and information that explains how you plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding; and

(v) Your ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject (for example, how and to whom do you intend to disseminate the information). If we have categorized you as a representative of the news media under §2105.36, we will presume you have this ability and intent.

(3) How disclosure is likely to significantly contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding, including:

(i) Whether the information being requested is new;

(ii) Whether the information would confirm or clarify data that has been released previously;

(iii) How disclosure will increase the level of public understanding of the operations or activities of the Agency that existed prior to disclosure; and

(iv) Whether the information is already publicly available. If the Government previously has published the information you are seeking or it is routinely available to the public in a library, reading room, through the Internet, or as part of the administrative record for a particular issue, it is less likely that there will be a significant contribution from release.

(4) How the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure.

(b) In deciding whether the fee waiver meets the requirements in §2105.43(a)(2), the Agency will consider any commercial interest of yours that would be furthered by the requested disclosure.

(1) You are encouraged to provide explanatory information regarding this consideration.

(2) The Agency will not find that disclosing the requested information will be primarily in your commercial interest where the public interest is greater than any identified commercial interest in disclosure.

(3) If you do have a commercial interest that would be furthered by disclosure, explain how the public interest in disclosure would be greater than any commercial interest you or your organization may have in the documents.

(i) Your identity, vocation, and intended use of the requested records are all factors to be considered in determining whether disclosure would be primarily in your commercial interest.

(ii) If you are a representative of a news media organization seeking information as part of the news gathering process, we will presume that the public interest outweighs your commercial interest.

(iii) If you represent a business/corporation/association or you are an attorney representing such an organization, we will presume that your commercial interest outweighs the public interest unless you demonstrate otherwise.

§2105.47 When will you be notified of anticipated fees?

(a) The Agency will notify you under this section unless:

(1) The anticipated fee is less than \$50 (see §2105.35(g));

(2) You have been granted a full fee waiver; or

(3) You have previously agreed to pay all the fees associated with the request.

(b) If none of the exceptions in paragraph (a) of this section apply, the Agency will:

(1) Promptly notify you of the estimated costs for search, review, and/or duplication;

(2) Ask you to provide written assurance within 20 workdays that you will pay all fees or fees up to a designated amount;

(3) Notify you that it will not be able to comply with your FOIA request unless you provide the written assurance requested; and

(4) Give you an opportunity to reduce the fee by modifying the request.

(c) If the Agency does not receive your written response containing the additional information that resolves any fee issues, in accordance with paragraphs (b)(2) and/or (4) of this section, within 20 workdays after the Agency has requested it, the Agency will presume that you are no longer interested in the records and will close the file on the request.

(d) After the Agency begins processing a request, if it finds that the actual cost will exceed the amount you previously agreed to pay, the Agency will:

(1) Stop processing the request;

(2) Promptly notify you of the higher amount and ask you to provide written assurance of payment; and

(3) Notify you that it will not be able to fully comply with your FOIA request unless you provide the written assurance requested; and

(4) Give you an opportunity to reduce the fee by modifying the request.

(e) If you wish to modify your request in an effort to reduce fees, the Agency's FOIA Officer or Public Liaison can assist you.

§2105.48 When will the Agency require advance payment?

(a) The Agency will require advance payment before starting further work when it finds the estimated fee is over \$250 and:

(1) You have never made a FOIA request to the Agency requiring the payment of fees; or

(2) You did not pay a previous FOIA fee within 30 calendar days of the date of billing.

(b) If the Agency believes that you did not pay a previous FOIA fee within 30 calendar days of the date of billing, the Agency will require you to either:

(1) Demonstrate you paid prior fee within 30 calendar days of the date of billing; or

(2) Pay any unpaid amount of the previous fee, plus any applicable interest penalties (see §2105.51), and pay in advance the estimated fee for the new request.

(c) When the Agency notifies you that an advance payment is due under paragraph (a) of this section, it will give you an opportunity to reduce the fee by modifying the request.

(d) Your payment of the funds you owe the Agency for work it has already completed before records are sent to you is not an advance payment under paragraph (a) of this section.

(e) If the Agency requires advance payment, it will start further work only after receiving the advance payment. It will also notify you that it will not be able to comply with your

FOIA request unless you provide the advance payment. Unless you pay the advance payment within 20 workdays after the date of the Agency's fee letter, the Agency will presume that you are no longer interested and will close the file on the request.

§2105.49 What if the Agency needs clarification about fee issues?

(a) If your FOIA request does not contain sufficient information for the Agency to determine your proper fee category or leaves another fee issue unclear, the Agency may ask you to provide additional clarification. If it does so, the Agency will notify you that it will not be able to comply with your FOIA request unless you provide the clarification requested.

(b) If the Agency asks you to provide clarification, the 20-workday statutory time limit for the Agency to respond to the request is temporarily suspended.

(1) If the Agency receives a written response within 20 workdays after the Agency has requested the additional clarification, the 20-workday statutory time limit for processing the request will resume (see §2105.15).

(2) If you still have not provided sufficient information to resolve the fee issue, the Agency may ask you again to provide additional clarification and notify you that it will not be able to comply with your FOIA request unless you provide the additional information requested within 20 workdays after the Agency has requested the additional clarification.

(3) If the Agency asks you again for additional clarification, the statutory time limit for response will be temporarily suspended again and will resume again if the Agency

receives a written response from you within 20 workdays after the Agency has requested the additional clarification.

(c) If the Agency asks for clarification about a fee issue and does not receive a written response from you within 20 workdays after the Agency has requested the additional clarification, it will presume that you are no longer interested and will close the file on the request.

§2105.50 How will you be billed?

If you are required to pay a fee associated with a FOIA request, the Agency will send a bill for collection.

§2105.51 How will the Agency collect fees owed?

(a) The Agency may charge interest on any unpaid bill starting on the 31st day following the billing date.

(b) The Agency will assess interest charges at the rate provided in 31 U.S.C. 3717 and interest will accrue from the billing date until the Agency receives payment.

(c) The Agency 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 to collect overdue amounts and interest.

(d) This section does not apply if you are a state, local, or tribal government.

§2105.52 When will the Agency combine or aggregate requests?

(a) The Agency may aggregate requests and charge accordingly when it reasonably believes that you, or a group of requesters acting in concert with you, are attempting to

avoid fees by dividing a single request into a series of requests on a single subject or related subjects.

(1) The Agency may presume that multiple requests of this type made within a 30-day period have been made to avoid fees.

(2) The Agency may aggregate requests separated by a longer period only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved.

(b) The Agency will not aggregate multiple requests involving unrelated matters.

§2105.53 What if other statutes require the Agency to charge fees?

(a) The fee schedule in appendix A to this part does not apply to fees charged under any statute that specifically requires the Agency to set and collect fees for particular types of records.

(b) If records otherwise responsive to a request are subject to a statutorily-based fee schedule, the Agency will inform you whom to contact to obtain the records.

§2105.54 May the Agency waive or reduce your fees at its discretion?

(a) The Agency may waive or reduce fees at its discretion if a request involves furnishing:

(1) A copy of a record that the Agency has reproduced for free distribution;

(2) One copy of a personal document (for example, a birth certificate) to a person who has been required to furnish it for retention by the Agency;

(3) One copy of the transcript of a hearing before a hearing officer in a grievance or similar proceeding to the employee for whom the hearing was held;

- (4) Records to donors with respect to their gifts;
- (5) Records to individuals or private nonprofit organizations having an official, voluntary, or cooperative relationship with the Agency if it will assist their work with the Agency;
- (6) A reasonable number of records to members of the U.S. Congress; state, local, and foreign governments; public international organizations; or Indian tribes, when to do so is an appropriate courtesy, or when the recipient is carrying on a function related to an Agency function and the waiver will help accomplish the Agency's work;
- (7) Records in conformance with generally established business custom (for example, furnishing personal reference data to prospective employers of current or former Agency employees); or
- (8) One copy of a single record to assist you in obtaining financial benefits to which you may be entitled (for example, veterans or their dependents, employees with Government employee compensation claims).

(b) You cannot appeal the denial of a discretionary fee waiver or reduction.

Subpart H—Administrative Appeals

§2105.55 When may you file an appeal?

(a) You may file an appeal when:

- (1) The Agency withholds records, or parts of records;
- (2) The Agency informs you that your request has not adequately described the records sought;
- (3) The Agency informs you that it does not possess or cannot locate responsive records and you have reason to believe this is incorrect or that the search was inadequate;

- (4) The Agency did not address all aspects of the request for records;
- (5) You believe there is a procedural deficiency (for example, fees are improperly calculated or you have been placed in the wrong fee category);
- (6) The Agency denied your request for a fee waiver;
- (7) The Agency did not make a decision within the time limits in §2105.15 or, if applicable, §2105.16; or
- (8) The Agency denied, or was late in responding to, a request for expedited processing filed under the procedures in §2105.18.

(b) An appeal under paragraph (a)(8) of this section relates only to the request for expedited processing and does not constitute an appeal of the underlying request for records. Special procedures apply to requests for expedited processing of an appeal (see §2105.61).

(c) Before filing an appeal, you may wish to communicate with the contact person listed in the FOIA response, the Agency's FOIA Officer, and/or the FOIA Public Liaison to see if the issue can be resolved informally. However, appeals must be received by the FOIA Appeals Officer within the time limits in §2105.56 or they will not be processed.

§2105.56 How long do you have to file an appeal?

- (a) Appeals covered by §2105.55(a)(1) through (5) must be received by the FOIA Appeals Officer no later than 90 workdays from the date of the final response.
- (b) Appeals covered by §2105.55(a)(6) must be received by the FOIA Appeals Officer no later than 90 workdays from the date of the letter denying the fee waiver.

(c) Appeals covered by §2105.55(a)(7) may be filed any time after the time limit for responding to the request has passed.

(d) Appeals covered by §2105.55(a)(8) should be filed as soon as possible.

(e) Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday.

§2105.57 How do you file an appeal?

(a) You must submit the appeal in writing by mail, fax or email to the FOIA Appeals Officer (using the address available at <https://www.cfa.gov/foia/>). Your failure to send an appeal directly to the FOIA Appeals Officer may delay processing.

(b) The appeal must include:

(1) Copies of all correspondence between you and the Agency concerning the FOIA request, including the request and the Agency's response (if there is one); and

(2) An explanation of why you believe the Agency's response was in error.

(c) The appeal should include your name, mailing address, daytime telephone number (or the name and telephone number of an appropriate contact), email address, and fax number (if available) in case the Agency needs additional information or clarification.

(d) An appeal concerning a denial of expedited processing or a fee waiver denial should also demonstrate fully how the criteria in §2105.18 or §§2105.43 and 2105.46 are met.

(e) All communications concerning an appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL."

(f) The Agency will reject an appeal that does not attach all correspondence required by paragraph (b)(1) of this section, unless the FOIA Appeals Officer determines, in his or

her sole discretion, that good cause exists to accept the defective appeal. The time limits for responding to an appeal will not begin to run until the correspondence is received.

§2105.58 Who makes decisions on appeals?

- (a) The FOIA Appeals Officer is the deciding official for FOIA appeals.
- (b) When necessary, the appropriate deciding official for FOIA appeals will consult other appropriate offices, including legal counsel, for denials of records and fee waivers.
- (c) The deciding official for FOIA appeals normally will not make a decision on an appeal if the request becomes a matter of FOIA litigation.

§2105.59 How are decisions on appeals issued?

- (a) A decision on an appeal must be made in writing.
- (b) A decision that upholds the Agency's determination will notify you of the decision and your statutory right to file a lawsuit.
- (c) A decision that overturns, remands, or modifies the Agency's determination will notify you of the decision. The Agency then must further process the request in accordance with the appeal determination.

§2105.60 When can you expect a decision on your appeal?

- (a) The basic time limit for responding to an appeal is 20 workdays after receipt of an appeal meeting the requirements of §2105.57.
- (b) If the Agency is unable to reach a decision on your appeal within the given time limit for response, the appropriate deciding official for FOIA appeals will notify you of your statutory right to seek review in a United States District Court.

§2105.61 Can you receive expedited processing of appeals?

(a) To receive expedited processing of an appeal, you must demonstrate to the Agency's satisfaction that the appeal meets one of the criteria under §2105.18 and include a statement that the need for expedited processing is true and correct to the best of your knowledge and belief.

(b) The appropriate deciding official for FOIA appeals will advise you whether the Agency will grant expedited processing within 10 calendar days of receiving the appeal.

(c) If the appropriate deciding official for FOIA appeals decides to grant expedited processing, he or she will give the appeal priority over other pending appeals and process it as soon as practicable.

§2105.62 Must you submit an appeal before seeking judicial review?

Before seeking review by a court of the Agency's adverse determination, you generally must first submit a timely administrative appeal.

Subpart I—General Information

§2105.63 Where are records made available?

Records that are required by the FOIA to be made proactively available for public inspection and copying are accessible on the Agency's Web site. They may also be available at the Agency's office location.

§2105.64 What are public liaisons?

(a) The Agency has a FOIA Officer or Public Liaison who can assist requesters who have concerns about the service they received when seeking records or who are seeking assistance under §2105.3 or §2105.35(i).

(b) FOIA Public Liaisons report to the Agency's Chief FOIA Officer and you can raise concerns to them about the service you have received.

(c) FOIA Public Liaisons are responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in resolving disputes.

(d) A list of the Agency's FOIA Public Liaisons is available at <https://www.cfa.gov/foia>.

§2105.65 When will the Agency make records available without a FOIA request?

(a) Each Agency must:

(1) Determine which of its records must be made publicly available under the FOIA (for example, certain frequently requested records);

(2) Identify additional records of interest to the public that are appropriate for public disclosure; and

(3) Post those records in FOIA libraries.

(b) Because of these proactive disclosures, you are encouraged to review the Agency's FOIA libraries before filing a FOIA request. The material you seek may be immediately available electronically at no cost.

§2105.66 How will FOIA materials be preserved?

(a) Each Agency must preserve all correspondence pertaining to the requests that it receives under subpart B of this part, as well as copies of all requested records, until disposition or destruction is authorized by the General Records Schedule 4.2 of the National Archives and Records Administration (NARA) or another NARA-approved records schedule.

(b) Materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal or lawsuit is pending. This is true even if they would otherwise be authorized for disposition or destruction under the General Records Schedule 4.2 of NARA or another NARA-approved records schedule.

§2105.67 How will an Agency handle a request for federally-funded research data?

(a) If you request research data that were used by the Federal Government in developing certain kinds of agency actions, and the research data relate to published research findings produced under an award, in accordance with OMB Circular A-110:

- (1) If the Agency was the awarding agency, it will request the research data from the recipient;
- (2) The recipient must provide the research data within a reasonable time; and
- (3) The Agency will review the research data to see if it can be released under the FOIA.

(b) If the Agency obtains the research data solely in response to your FOIA request, the Agency may charge you a reasonable fee equaling the full incremental cost of obtaining the research data.

- (1) This fee should reflect costs incurred by the Agency, the recipient, and applicable subrecipients.
- (2) This fee is in addition to any fees the Agency may assess under the FOIA.

(c) The Agency will forward a copy of the request to the recipient, who is responsible for searching for and reviewing the requested information in accordance with these FOIA regulations. The recipient will forward a copy of any responsive records that are located,

along with any recommendations concerning the releasability of the data, and the total cost incurred in searching for, reviewing, and providing the data.

(d) The Agency will review and consider the recommendations of the recipient regarding the releasability of the requested research data. However, the Agency, not the recipient, is responsible for deciding whether the research data will be released or withheld.

§2105.68 What definitions apply to this part?

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

Agency means the Commission of Fine Arts.

Commercial interest means a commercial, trade, or profit interest as these terms are commonly understood. Your status as profitmaking or non-profitmaking is not the deciding factor in determining whether you have a commercial interest.

Commercial use means a use that furthers your commercial, trade or profit interests or that of the person on whose behalf the request is made.

Confidential information means trade secrets or commercial or financial information (that is privileged or confidential and obtained by the Agency from a person) that may be protected from disclosure under Exemption 4 of the FOIA.

Direct costs means those resources that the Agency expends in searching for and duplicating (and, in the case of commercial-use requests, reviewing) records to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery, 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.

Duplication means 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.

Educational institution means any school that operates a program of scholarly research. In order to fall within this category, you must show that the request is authorized by and made under the auspices of, a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research.

Exceptional circumstances means a delay that does not result from a predictable workload of requests (unless the Agency demonstrates reasonable progress in reducing its backlog of pending requests).

Exempt means the record in question, or a portion thereof, is not subject to disclosure due to one or more of the FOIA's nine statutory exemptions, found at 5 U.S.C. 552(b)(1)-(9).

Exemption means one or more of the FOIA's nine statutory exemptions, found at 5 U.S.C. 552(b)(1)-(9).

Expedited processing means giving a FOIA request priority and processing it ahead of other requests pending in the Agency because you have shown a compelling need for the records.

Fee category means one of the four categories, discussed in §§2105.36 and 2105.37, that agencies place you in for the purpose of determining whether you will be charged fees for search, review, and duplication.

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

FOIA libraries means a physical or electronic compilation of records required to be made available to the public for inspection and copying under 5 U.S.C. 552(a)(2). It also includes a physical or electronic compilation of records that the Agency, at its discretion, makes available to the public for inspection and copying.

Frequently requested records means records that have been released to any person in response to a FOIA request and that have been requested, or that the Agency anticipates will be requested, at least two more times under the FOIA.

Multitrack processing means placing simple requests, requiring relatively minimal review, in one processing track and more voluminous and complex requests in one or more other tracks. Requests in each track are ordinarily processed on a first-in/first-out basis.

Noncommercial scientific institution means an institution that is not operated for commerce, trade or profit, 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. To be in this category, you must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

OMB Fee Guidelines means the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget on March 27, 1987.

Published means, for the purposes of §2105.67 only, when:

(1) Research findings are published in a peer-reviewed scientific or technical journal; or

(2) A Federal agency publicly and officially cites the research findings in support of an agency action that has the force and effect of law.

Recipient means, for the purposes of §2105.67 only, an organization receiving financial assistance directly from Federal awarding agencies to carry out a project or program. The term includes public and private institutions of higher education, public and private hospitals, and other quasi-public and private non-profit organizations. The term may include commercial organizations, foreign or international organizations (such as agencies of the United Nations) which are recipients, subrecipients, or contractors or subcontractors of recipients or subrecipients at the discretion of the Federal awarding agency. The term does not include Government-owned contractor-operated facilities or research centers providing continued support for mission-oriented, large-scale programs that are Government-owned or controlled, or are designated as federally-funded research and development centers.

Record means an agency record that is either created or obtained by an agency and is under agency possession and control at the time of the FOIA request, or is maintained by an entity under Government contract for the purposes of records management.

Representative of the news media means 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 as used in this definition means information that is about current events or that would be of current interest to the public. Examples of news media entities are newspapers, television, Web sites, or radio stations broadcasting to the public at large, and publishers of

periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all inclusive. As methods of news delivery evolve, alternative representatives of news media may come into being. A freelance journalist will qualify as a news-media entity if he or she can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by that entity (for example, a publication contract would present a solid basis for such an expectation).

Research data means, for the purposes of §2105.67 only, the recorded factual material commonly accepted in the historic and/or architectural communities as necessary to validate research findings, but not any of the following: preliminary analyses, drafts of scientific papers, plans for future research, peer reviews, or communications with colleagues. The term recorded as used in this definition excludes physical objects (e.g., laboratory samples). Research data also do not include:

- (1) Trade secrets, commercial information, materials necessary to be held confidential by a researcher until they are published, or similar information which is protected under law; and
- (2) Personnel and medical information and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, such as information that could be used to identify a particular person in a research study.

Review means the examination of a record located in response to a request 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 time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential information submitter under subpart G of this part, but it excludes time spent resolving general legal or policy issues regarding the application of FOIA exemptions.

Search means the process of looking for and retrieving records 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 electronic records.

Submitter means any person or entity outside the Federal Government from whom the Agency obtains confidential information, directly or indirectly. The term includes, but is not limited to individuals, corporations, and state, local, tribal, and foreign governments.

Unusual circumstances means the need to search for and collect requested records from field facilities or other establishments that are separate from the office processing the request; the need to search for, collect, and examine a voluminous amount of separate and distinct records which are demanded in a single request; or the need for consultation, which shall be conducted with all practicable speed, with another agency, or among two or more components of the Agency, having a substantial interest in the determination of the request.

Workday means a regular Federal workday. It excludes Saturdays, Sundays, or Federal legal public holidays. Items arriving or delivered after 5 p.m. Eastern Time will be deemed received on the next workday.

You means a person requesting records, or filing an appeal, under the FOIA.

Appendix A to Part 2105—Fee Schedule

Types of Records	Fee
(1) Physical records:	
Pages no larger than 8.5 × 14 inches, when reproduced by standard office copying machines or scanned into an electronic format	\$.15 per page (\$.30 for double-sided copying)
Color copies of pages no larger than 8.5 × 11 inches	\$.90 per page
Pages larger than 8.5 × 14 inches	Direct cost to CFA
Color copies of pages no larger than 11 × 17 inches	\$1.50 per page
Photographs and records requiring special handling (for example, because of age, size, or format)	Direct cost to CFA
(2) Electronic records:	
Charges for services related to processing requests for electronic records	Direct cost to CFA
Certification	
Each certificate of verification attached to authenticate copies of records	\$.25
(4) Postage:	
Charges that exceed the cost of first class postage, such as express mail or overnight delivery	Postage or delivery charge
(5) Other Services:	
Cost of special services or materials, other than those provided for by this fee schedule, when requester is notified of such costs in advance and agrees to pay them	Direct cost to CFA

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Thomas Luebke,
Secretary.

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