



## **DEFENSE NUCLEAR FACILITIES SAFETY BOARD**

### **10 CFR Part 1703**

**[Docket No. DNFSB-2025-01]**

**RIN 3155-AA04**

### **Freedom of Information Act**

**AGENCY:** Defense Nuclear Facilities Safety Board.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This proposed rule amends the Defense Nuclear Facilities Board's (the Board or DNFSB) Freedom of Information Act (FOIA) regulations to incorporate certain changes made by the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016. This proposed rule also amends certain provisions to reflect developments in case law and changes in position titles to align with changes made by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 to the Atomic Energy Act of 1954 (AEA) and an agency reorganization. The proposed rule is amending a section to permit submission of FOIA requests by electronic mail to the Board or the government-wide portal. This proposed rule also adds multitrack processing which allows the Board to quickly process simple requests. Finally, the proposed rule defines what information should be included in a denial letter.

**DATES:** Comments will be accepted until [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments at any time prior to the comment deadline by the following methods:

Email: Send an email to [comment@dnfsb.gov](mailto:comment@dnfsb.gov). Please include "FOIA Regulations Comments" in the subject line of your email.

Mail: Send hard copy comments to the Defense Nuclear Facilities Safety Board, Attn: Office of the General Counsel, 625 Indiana Avenue NW, Suite 700, Washington, DC 20004-2901.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Hargrave, Associate General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW, Suite 700, Washington, DC 20004-2901, (202) 694-7000.

**SUPPLEMENTARY INFORMATION:**

I. Background

This proposed rule amends the Board's regulations under the Freedom of Information Act to incorporate changes made to the FOIA, 5 U.S.C. 552, by the Open Government Act of 2007, Public Law, 110-175 and the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (June 30, 2016). The OPEN Government Act of 2007 states that agencies may not charge fees for searches or copies if they miss the statutory timeframe for responding to a FOIA request unless unusual or exceptional circumstances exist. The FOIA Improvement Act of 2016 provides that agencies must allow a minimum of 90 days for requesters to file an administrative appeal. The FOIA Improvement Act also requires that agencies notify requesters of the availability of dispute resolution services and the FOIA public liaison at various times throughout the FOIA process. Finally, the FOIA Improvement Act provided additional duties for the Chief FOIA Officer. This proposed rule updates the DNFSB's regulations in 10 CFR part 1703 to reflect those statutory changes.

In addition, this proposed rule changes position titles to incorporate amendments to the AEA and to incorporate changes made after a reorganization. It also corrects a regulatory citation error that incorrectly referenced a reserved section. This proposed rule incorporates the new statutory restrictions on charging fees in certain circumstances.

Finally, this proposed rule removes language overruled by the Supreme Court regarding exemption 4 and revises the definitions of “representative of the news media” and “educational institution” to reflect developments in case law and to be consistent with definitions contained in the OPEN Government Act of 2007.

This proposed rule defines processing order and provides for multi-track processing and aggregating requests to provide for faster processing. Finally, this proposed rule defines what information should be included in denial letters as required by the FOIA and corrects a citation reference to align with the proposed new subsection added to 1703.108.

### III. Description of the Rule

#### **§ 1703.102 Definitions; words denoting number, gender and tense**

The section heading is revised to remove “words denoting number, gender and tense.”

The definitions paragraph is revised to change word “Chairman” to Chairperson. The DNFSB’s enabling legislation was amended by the FY 2022 NDAA, and it changed the word “Chairman” to Chairperson. This proposed rule is also revised to state the Designated FOIA Officer serves as the Chief FOIA Officer and to state that the Chief Administrative Officer, not the General Manager, is the chief administrative officer. The General Manager position was abolished during an agency reorganization. The proposed rule adds the responsibilities of the Chief FOIA Officer contained in the FOIA Improvement Act of 2016. These responsibilities include offering training to employees and serving as the primary liaison to the Office of Government Information Services and the Office of Information Policy and as a member of the Chief FOIA Officer Council.

#### **§1703.103 Requests for agency records available through the electronic reading room**

Section 103(b)(7) is revised to correct a regulatory citation error by removing 1703.104 and replacing it with 1704.4.

### **§ 1703.105 Requests for board records not available through the public reading room (FOIA request)**

Section 105 (b)(2) only permits submission of FOIA requests by mail. The Board is amending this paragraph to permit submission of FOIA requests by electronic mail at FOIA@dnfsb.gov and the government-wide FOIA.gov portal.

### **§ 1703. 107 Fees for record requests**

Section 107(b)(1) is also revised to conform to recent D.C. Circuit Court of Appeals decisions addressing two FOIA fee categories: representative of the news media and educational institution. *Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015) and *Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2016). The rule is also revised to conform with the definition of representative of news media under the OPEN Government Act of 2007.

The Board's existing regulations define a representative of the news media as "any person actively gathering news for an entity that is organized and operated to publish or broadcast to news to the public." In *Cause of Action*, the Court held that a representative of the news media need not work for an entity that is "organized and operated" to publish or broadcast news. Therefore, the definition of "representative of the news media" is revised to remove the "organized and operated" requirement and to adopt the definition contained in the OPEN Government Act of 2007. The definition of a representative of the news media is expanded to include gathering information, using editorial skills to turn raw materials into a distinct work, and distributing the work to an audience. The definition of "educational institution" is revised to reflect the holding, in *Sack*, 823 F.3d at 688, that students who make FOIA requests in furtherance of their coursework or other school-sponsored activities may qualify under this requester category.

Section (b)(2)(iv) is revised to conform with the OPEN Government Act. It is revised to state that the Board will not assess search fees or duplication fees from educational and noncommercial scientific institution if it has failed to meet the regulatory deadline.

Sections (b)(2)(ix) and (x) are added to state that Board may charge search fees or may charge duplication fees for requesters with preferred fee status if unusual circumstances apply and more than 5000 pages are necessary to respond to the request provided it has given notice of the unusual circumstances and how to limit the request. Similarly, if a court determines that “exceptional circumstances” exist, the Board’s failure to comply with a time limit will be excused by the court order.

**§ 1703.108 Processing of FOIA requests.**

Sections (c), (d), and (e) are added to include that requests will be processed in order of receipt. There will be a specific track for expedited requests and a different process track for simple and more complex requests based upon amount time and work needed to process the request. The proposed rule also provides for aggregating multiple requests for purposes of satisfying unusual circumstances when there are multiple requests by one requester or a group of requests acting in concert constitute a single request that would otherwise constitute unusual circumstances.

Other sections are renumbered, and section (g) adds a sentence that alerts the requester to the availability of Office of Government Information Services (OGIS) to provide dispute resolution services.

Section (i) is added and provides the information to be included in the denial of a request. It includes the identity of the person denying the request, the reason for denial and exemption used, number of pages being withheld, appeal procedures and the availability dispute resolution services from OGIS and assistance from the FOIA public liaison.

**§ 1703.109 Procedure for appeal of denial of requests for board records and denial of requests for fee waiver or reduction.**

Section (a)(1) is revised by removing 30 days to appeal a fee waiver denial and replacing it with 90 days as required by the FOIA Improvement Act. Section (b) is revised by removing the reference to § 1703.108(c) and replacing it with 1703.108(f). The proposed revisions to § 1703.108 redesignated paragraphs (c) through (f).

## **§ 1703.111 Requests for privileged treatment of documents submitted to the board**

This proposed rule changes the title of this section to “Privileged or confidential information” and removes the title of “Request for privileged treatment of documents submitted to the board.” This new title is consistent with the statutory language of exemption 4 of the FOIA under 5 USC 552(b)(4), which exempts from release trade secrets, and commercial or financial information obtained from a person that is privileged or confidential. When determining whether exemption 4 of the FOIA can be applied, the current regulation required the Board to determine substantial harm to a competitive position of the owner of the information. The Supreme Court, in *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019), overturned the current regulatory language. The proposed rule removes the language to make it consistent with the Supreme Court’s decision. The proposed rule also adds the word “confidential” to each relevant paragraph.

### III. Regulatory Analysis

#### **Regulatory Flexibility Act**

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, agencies must consider the impact of their rulemakings on “small entities” (small businesses, small organizations, and local governments) when publishing regulations subject to the notice and comment requirements of the Administrative Procedure Act. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. [5 U.S.C. 605\(b\)](#). The FOIA authorizes Federal agencies to charge fees only to certain requesters, and only to recover the direct costs of searching for, reviewing, and duplicating agency records. Under this proposed rule, the Board will continue to charge fees in accordance with the FOIA and guidelines from DOJ and OMB. The fees that the Board assesses for processing FOIA requests are nominal and will not

have a significant impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the Board certifies that the rule will not have a significant economic impact on a substantial number of small entities.

### **Unfunded Mandates Reform Act**

Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), requires Federal agencies to assess the effects of their regulatory actions on State, Tribal, and local governments, and the private sector to the extent that such regulations incorporate requirements specifically set forth in law. Before promulgating a rule that may result in the expenditure by a State, Tribal, or local government, in the aggregate, or by the private sector of \$100 million, adjusted annually for inflation, in any 1 year, an agency must prepare a written statement that assesses the effects on State, Tribal, and local governments and the private sector. 2 U.S.C. 1532. This proposed rule will apply only to requesters under the FOIA and will not result in expenditures of \$100 million or more for State, Tribal, and local governments, in the aggregate, or the private sector in any 1 year. This proposed rule also will not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of 2 U.S.C. 1531-1538.

### **Executive Orders (E.O.) 12866, 13563 and 14219**

E.O. 12866, “Regulation Planning and Review,” as supplemented and affirmed by, Executive Order 13563, “Improving Regulation and Regulatory Review,” provides that the Office of Information and Regulatory Affairs will review any regulatory action that qualifies as a “significant regulatory action” within the meaning of the E.O. This proposed rule has been reviewed in compliance with Executive Order 14219, “Ensuring Lawful Governance and Implementing the President’s ‘Department of Government Efficiency’ Deregulatory Initiative.” This proposed rule does not qualify as a significant regulatory action.

### **Executive Order 12988, Civil Justice Reform**

Under section 3(a) of E.O. 12988, agencies must review their proposed regulations to eliminate drafting errors and ambiguities, draft them to minimize litigation, and provide a clear legal standard for affected conduct. Section 3(b) provides a list of specific matters that agencies must consider when conducting the review required by section 3(a). The Board has conducted this review and determined that this proposed rule complies with the requirements of E.O. 12988.

### **Paperwork Reduction Act**

This proposed rule contains no new reporting or recordkeeping requirements under the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501 et seq. This update to the Board's FOIA regulations does not require or request information from members of the public. Therefore, this rulemaking is not covered by the restrictions of the PRA.

### **Congressional Review Act**

This proposed rule will not result in and is not likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this rule is not expected to be considered a “major rule” as defined in 5 U.S.C. 804(2) of the Congressional Review Act.

### **List of Subjects in 10 CFR Part 1703**

Freedom of information.

For the reasons described in the preamble, the Board proposes to amend 10 CFR part 1703 as follows:

**PART 1703—PUBLIC INFORMATION AND REQUESTS**

1. The authority for part 1703 continues to read as follows:

Authority: 5 U.S.C. 301, 552; 31 U.S.C. 9701; 42 U.S.C. 2286b.

2. In § 1703.102, revise the section heading and section (5) to read as follows:

**1703.102 Definitions.**

\* \* \* \* \*

(5) \* \* \*

*Chairperson* means the Chairperson of the Board.

*Designated FOIA Officer* serves as the Chief FOIA Officer and is the person designated by the Board's to administer the Board's activities pursuant to the regulations in this part. The Designated FOIA Officer shall also be the Board officer having custody or responsibility for agency records in the possession of the Board and shall be the Board officer responsible for authorizing or denying production of records upon requests filed pursuant to § 1703.105.

\* \* \* \* \*

*Chief Administrative Officer* means the chief administrative officer of the Board.

\* \* \* \* \*

3. In § 1703.103, revise paragraph (b)(7) to read as follows:

1703.103 Requests for agency records available through the electronic reading room.

\* \* \* \* \*

(b)\*\*\*

(7) Board correspondence, except that which is exempt from mandatory public disclosure under § 1704.4.

4. In § 1703.105, revise paragraph (b)(2) to read as follows:

(b)\*\*\*

(2) The request should be addressed to the Designated FOIA Officer and clearly marked “Freedom of Information Act Request.” The address for such requests is: Designated FOIA Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004, by email at FOIA@dnfsb.gov, or the government-wide FOIA.gov portal.\*\*\*

\* \* \* \* \*

5. In § 1703.107, revise the definitions in paragraphs (b)(1); revise paragraph (b)(2)(iv); and add subsections (ix) and (x) to paragraph (b)(2) to read as follows:

1703.107 Fees for record requests

\* \* \* \* \*

(b)\*\*\*

(1)\*\*\*

*Educational institution* refers to any school that operates a program of scholarly research. It includes students who make a request in furtherance of their coursework or other school-sponsored activity.

\* \* \* \* \*

*Representative of the news media* refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. \*\*\*

\* \* \* \* \*

(2) \*\*\*

(iv) The Board will not assess any search fees if has failed to meet its deadlines in 1703.108 or duplication fees from requesters described in paragraphs (ii) of this section.

\* \* \* \* \*

(ix) If the Board 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 Board may

charge search fees, or, in the case of requesters described in paragraph (b)(2)(ii) of this section, may charge duplication fees if the following steps are taken. The Board must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and must have discussed with the requester via written mail, email, 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 Board may charge all applicable fees incurred in the processing of the request.

(x) 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. In § 1703.108, redesignate paragraphs (c) through (e); add new paragraphs (c) through (e) and (i); and revise the redesignated paragraph (g) to read as follows:

Old section	New section
1703.108(c)	1703.108(f)
1703.108(d)	1703.108(g)
1703.108(e)	1703.108(h)

\* \* \* \* \*

(c) The Board ordinarily will respond to requests according to their order of receipt. In instances involving misdirected requests, the response time will commence on the date that the request is first received by any Board office.

(d) **Multitrack processing.** The Board will designate a specific track for requests that are granted expedited processing, in accordance with the standards set forth in 1703.105(e). The Board 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 Board may consider are the number of pages involved in processing the request and the need for consultations or referrals. The Board shall advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track.

(e) **Aggregating requests.** For the purposes of satisfying unusual circumstances under the FOIA, the Board 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 Board shall not aggregate multiple requests that involve unrelated matters.

\* \* \* \* \*

(g) If no determination has been made at the end of the ten day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the Board will nevertheless continue to process the request. If the Board is unable to provide a response within the statutory period, the Designated FOIA Officer shall inform the requester of the reason for the delay; the date on which a determination may be expected to be made; and that the requester can seek remedy through the courts but shall ask the requester to forgo such action until a determination is made. The Board must also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services.

\* \* \* \* \*

(i) **Denial of a request.** The denial of a request shall be signed by the Designated FOIA Officer and shall include:

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

- (2) A brief statement of reasons for the denial, including any FOIA exemption applied by the Board in denying the request;
- (3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;
- (4) A statement that the denial may be appealed and a description of the requirements under §1703.109; and
- (5) A statement notifying the requester of the assistance available from the FOIA Public Liaison, and the dispute resolution services offered by the Office of Government Information Services.

7. In § 1703.109, revise paragraph (a)(1) by removing 30 and replacing it with 90 and revise paragraph (b) by removing § 1703.108(c) and replacing it with § 1703.108(f) to read as follows:

(a) \*\*\*

(1) \*\*\*A person denied a fee waiver or reduction may appeal that determination to the General Counsel within 90 days. \*\*\*

\* \* \* \* \*

(b) In unusual circumstances, as defined in § 1703.108(f), the time limits prescribed for deciding an appeal pursuant to this section may be extended by up to ten working days, by the General Counsel, who will send written notice to the requester setting forth the reasons for such extension and the expected determination date.

7. In § 1703.111, revise the section heading and paragraphs (b)((1)-(4); (c)(1) and (2); and (d); remove the current paragraph (e); redesignate paragraph (f) to paragraph (e);

redesignate paragraph (g) to paragraph (f); and revise the redesignated paragraphs (e) and (f) to read as follows:

**§ 1703.111 Privileged or confidential information**

\* \* \* \* \*

(b) *Procedures.* A person claiming that information is privileged or confidential under paragraph (a) of this section must file:

- (1) An application, accompanied by an affidavit, requesting privileged or confidential treatment for some or all of the information in a document, and stating the justification for nondisclosure of the information;
- (2) The original document, boldly indicating on the front page “Contains Privileged or Confidential Information—Do Not Release” and identifying within the document the information for which the privileged or confidential treatment is sought;
- (3) Three copies of the redacted document (*i.e.*, without the information for which privileged or confidential treatment is sought) and with a statement indicating that information has been removed for privileged or confidential treatment; and
- (4) The name, title, address, telephone number, and email address of the person or persons to be contacted regarding the request for privileged or confidential treatment of documents submitted to the Board.

(c) \* \*\*

- (1) The Designated FOIA Officer shall place documents for which privileged or confidential treatment is sought in accordance with paragraph (b) of this section in a nonpublic file, while the request for privileged or confidential treatment is pending. By placing documents in a nonpublic file, the Board is not making a determination on any claim for privilege or confidentiality. The Board retains the right to make determinations with regard to any claim of privilege or confidentiality, and the discretion to release information as necessary to carry out its responsibilities.

(2) The Designated FOIA Officer shall place the request for privileged or confidential treatment described in paragraph (b)(1) of this section and a copy of the redacted document described in paragraph (b)(3) of this section in a public file while the request for privileged treatment is pending.

(d) ***Notification of request and opportunity to comment.*** When a FOIA requester seeks a document for which privilege or confidentiality is claimed, the Designated FOIA Officer shall so notify the person who submitted the document and give that person an opportunity (at least five days) in which to comment in writing on the request. A copy of this notice shall be sent to the FOIA requester.

(e) ***Notification before release.*** Notice of a decision by the Designated FOIA Officer to deny a claim of privilege or confidentiality, in whole or in part, shall be given to any person claiming that information is privileged or confidential no less than five days before public disclosure. The decision shall be made only after consultation with the General Counsel's Office. The notice shall briefly explain why the person's objections to disclosure were not sustained. A copy of this notice shall be sent to the FOIA requester.

(f) ***Notification of suit in Federal courts.*** When a FOIA requester brings suit to compel disclosure of privileged or confidential information, the Board shall notify the person who submitted documents containing such confidential information of the suit.

Dated: November 20, 2025.

**Mary Buhler,**

*Executive Director of Operations.*