

## § 1003.17

(8) The same or a substantially similar petition was previously dismissed by the OHA without prejudice, and the same basis for dismissal without prejudice exists upon refiling by the same petitioner.

(b) *Dismissal without prejudice.* The dismissal of a petition without prejudice by the OHA terminates the OHA's review of the petition but does not bar the petitioner from resubmitting the petition provided that the facts or circumstances leading to the dismissal have been resolved. In dismissing a petition without prejudice, the OHA may order that the petitioner may not resubmit the petition, or a substantially similar petition, for a period of time not to exceed 180 days. The OHA may dismiss a petition without prejudice if:

(1) The petitioner fails to include any of the required elements of a petition set forth in §1003.11 of this part;

(2) The petitioner fails to provide notice as required by §1003.12 of this part;

(3) The petitioner fails to timely provide documents or information at the request of the OHA pursuant to §1003.14 or §1003.15 of this part;

(4) The petition fails to state a claim upon which the OHA can grant relief; or

(5) The OHA determines that there is insufficient information upon which to base a decision.

## § 1003.17 Standard of review.

(a) The OHA will grant a petition that seeks an adjustment from a DOE rule, regulation or order under the authority of 42 U.S.C. 7194 only if it determines that doing so will alleviate or prevent serious hardship, gross inequity or unfair distribution of burdens.

(b) Except as provided by program, statute, rule, regulation, or DOE delegation of authority, the OHA will grant any other petition filed under this part upon a showing that the DOE acted arbitrarily, capriciously, or in violation of a law, rule, regulation, or delegation with respect to the final disposition of DOE that is the subject of the petition.

(c) Petitions shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous petitions of the same kind.

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## § 1003.18 Decision and Order.

(a) Upon consideration of the petition and other relevant information received or obtained during the proceeding, the OHA will issue a Decision and Order granting or denying the petition and ordering relief as appropriate. The OHA will serve the Decision and Order on the parties to the proceeding and make it available to the public.

(b) The Decision and Order will set forth its legal basis and the relevant facts, state whether it is a final agency action of the DOE, and state what further review, if any, is available.

(c) There is no administrative appeal of a Decision and Order, except as provided by federal statute.

## § 1003.19 Reconsideration.

A participant in the proceeding may submit to the OHA a motion for reconsideration of a Decision and Order. The motion for reconsideration must be filed by the 20th day after the OHA makes the Decision and Order available to the public. The motion must include a statement of the grounds on which the movant believes reconsideration is warranted. Such grounds may include, but are not limited to, procedural, legal, or factual errors in the Decision and Order. A motion for reconsideration may be granted if the Director determines the Decision and Order contains an error that materially impacted the outcome of the proceeding.

## PART 1004—FREEDOM OF INFORMATION ACT (FOIA)

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AUTHORITY: 5 U.S.C. 552; 16 U.S.C. 824o-1.

SOURCE: 53 FR 15661, May 3, 1988, unless otherwise noted.

### § 1004.1 Purpose and scope.

This part contains the regulations of the Department of Energy (DOE) that implement Freedom of Information (FOIA) 5 U.S.C. 552, Public Law 89-487, as amended by Public Law 93-502, 88 Stat. 1561, by Public Law 94-409, 90 Stat. 1241, by Public Law 99-570, 100 Stat. 3207-49, by Public Law 104-231, 110 Stat. 3048, by Public Law 110-175, 121 Stat. 2524, Public Law 111-83 §564, 123 Stat. 2142, 2184, and by Public Law 114-185, 130 Stat. 538. The regulations of this part provide information concerning the procedures by which records may be requested from all DOE offices, excluding the Federal Energy Regulatory Commission (FERC). Records of DOE made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this part. Persons seeking information or records of DOE may find it helpful to consult with a DOE FOIA Officer before invoking the formal procedures set out below. To the extent permitted by other laws, DOE will make records available which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

[81 FR 94918, Dec. 27, 2016]

### § 1004.2 Definitions.

As used in this part:

(a) *Appeal Authority* means the Office of Hearings and Appeals.

(b) *Authorizing or Denying Official* means that DOE officer having custody of or responsibility for records requested under 5 U.S.C. 552. In DOE Headquarters, the term refers to The Freedom of Information Act Officer and officials who report directly to either the Office of the Secretary or a Secretarial Officer as defined. In the field offices, the term refers to the head of a field location identified in paragraph (h) of this section and the heads of field offices to which they provide administrative support and have delegated this authority. In the National Nuclear Security Administra-

tion (NNSA), the term refers to the official appointed at such location as identified in paragraph (h)(8) of this section.

(c) *'Commercial use' request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine how the requester will use the documents requested. Moreover, where DOE has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not evident from the request itself, the DOE will seek additional clarification before assigning the request to a specific category.

(d) *Department or Department of Energy (DOE)* means all organizational entities which are a part of the executive department created by Title II of the DOE Organization Act, Pub L. 95-91. This specifically excludes the FERC.

(e) *Direct costs* means those expenditures which the DOE actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, 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. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(f) *Duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of, but are not limited to, paper copy, microform, audiovisual materials, or machine readable documentation (e.g., magnetic tape or disk). The copy provided must be in a form that can be reasonably used by requesters.

(g) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher

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education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(h) *Freedom of Information Act (FOIA) Officer* means the person designated to administer the Freedom of Information Act at the following DOE offices:

(1) Bonneville Power Administration, P.O. Box 3621CHI-7, Portland, OR 97208-3621.

(2) Carlsbad Field Office, P.O. Box 3090, Carlsbad, NM 88221.

(3) Chicago Office, 9800 S. Cass Avenue, Argonne, IL 60439.

(4) Environmental Management Consolidated Business Center, 250 East 5th Street, Suite 500, Cincinnati, OH 45202.

(5) Golden Field Office, 15013 Denver West Parkway, Mail Stop RSF DOE Golden, CO 80401.

(6) Headquarters, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

(7) Idaho Operations Office, 1955 Fremont Avenue, MS 1203, Idaho Falls, ID 83401.

(8) National Nuclear Security Administration Albuquerque Complex, P.O. Box 5400, Albuquerque, NM 87185.

(9) National Energy Technology Laboratory, 626 Cochran Mill Road, P.O. Box 10940, Pittsburgh, PA 15236-0940.

(10) Naval Reactors Laboratory Field Office, P.O. Box 109, West Mifflin, PA 15122-0109.

(11) Oak Ridge Office, P.O. Box 2001, Oak Ridge, TN 37831.

(12) Office of Naval Reactors, Headquarters, 1240 Isaac Hull Avenue SE., Washington Navy Yard, DC 20376-0822.

(13) Office of Scientific and Technical Information, P.O. Box 62, Oak Ridge, TN 37830.

(14) Richland Operations Office, P.O. Box 550, Mail Stop A7-75, Richland, WA 99352.

(15) Savannah River Operations Office, P.O. Box A, Aiken, SC 29801.

(16) Southeastern Power Administration, 1166 Athens Tech Road, Elberton, GA 30635-6711.

(17) Southwestern Power Administration, One West Third, S1200, Tulsa, OK 74103.

(18) Strategic Petroleum Reserve Project Management Office, 900 Com-

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merce Road East-MS FE-455, New Orleans, LA 70123.

(19) Western Area Power Administration, 12155 W. Alameda Parkway, P.O. Box 281213, Lakewood, CO 80228-8213.

(i) *General Counsel* means the General Counsel provided for in section 202(e) of the DOE Organization Act, or any DOE attorney designated by the General Counsel as having responsibility for counseling the Department on Freedom of Information Act matters. In the NNSA, the term refers to the NNSA General Counsel, or any attorney designated by the NNSA General Counsel for counseling the NNSA on Freedom of Information Act matters, as provided for in section 3217 of the National Nuclear Security Administration Act, 50 U.S.C. 2407, Pub. L. 106-65. The NNSA General Counsel is not a Secretarial Officer.

(j) *Headquarters* means all DOE facilities functioning within the Washington metropolitan area except the Office of Naval Reactors.

(k) *Non-commercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is referenced in §1004.2(c), and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(l) *Office* means any administrative or operating unit of the DOE, including those in field offices.

(m) *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 the raw materials into a distinct work, and distributes that work to an audience. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (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. Moreover, as methods of news delivery evolve (for example, the adoption of

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the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; DOE may also consider the past publication record of the requester in making such a determination.

(n) *Review* refers to the process of examining documents located in response to a commercial use request (see paragraph (c) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, *e.g.*, doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(o) *Search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The DOE will search for material in the most efficient and least expensive manner in order to minimize cost for both DOE and the requester. For example, DOE will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. "Search" will be distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

(p) *Secretarial Officer* means the Under Secretary; Under Secretary for Science; Administrator, Energy Information Administration; Administrator, National Nuclear Security Administration; Assistant Secretary for Congressional and Intergovernmental Affairs; Assistant Secretary for Energy Efficiency and Renewable Energy; Assistant Secretary for Environmental Management; Assistant Secretary for Fos-

sil Energy; Assistant Secretary for Policy and International Affairs; Assistant Secretary for Nuclear Energy; Chief Financial Officer; Chief Health, Safety and Security Officer; Chief Human Capital Officer; Chief Information Officer; Director, Advanced Research Projects Agency—Energy; Director, Office of Indian Energy Policy and Programs, and Director, Loan Programs Office, Director, Office of Economic Impact and Diversity; Director, Office of Electricity Delivery and Energy Reliability; Director, Office of Hearings and Appeals; Director, Office of Legacy Management; Director, Office of Management; Director, Office of Public Affairs; Director, Office of Science; General Counsel; Inspector General; and Senior Intelligence Officer.

(q) *Statute specifically providing for setting the level of fees for particular types of records*, at 5 U.S.C. 552(a)(4)(A)(vi), means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

[53 FR 15661, May 3, 1988, as amended at 71 FR 68734, Nov. 28, 2006; 79 FR 22857, Apr. 25, 2014; 81 FR 94919, Dec. 27, 2016]

### **§ 1004.3 Public inspection in an electronic format and policy on contractor records.**

(a) DOE will maintain, for public inspection in an electronic format, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for

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public inspection and copying. An electronic public reading room can be accessed via *www.energy.gov* and *nrsa.energy.gov*.

(b) *Contractor records.* (1) When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. 552(b).

(2) Notwithstanding paragraph (b)(1) of this section, records owned by the Government under contract that contain information or technical data having commercial value as defined in paragraph (b)(4) of this section or information for which the contractor claims a privilege recognized under Federal or State law shall be made available only when they are in the possession of the Government and not otherwise exempt under 5 U.S.C. 552(b).

(3) The policies stated in this paragraph:

(i) Do not affect or alter contractors' obligations to provide to DOE upon request any records that DOE owns under contract, or DOE's rights under contract to obtain any contractor records and to determine their disposition, including public dissemination; and

(ii) Will be applied by DOE to maximize public disclosure of records that pertain to concerns about the environment, public health or safety, or employee grievances.

(4) For purposes of paragraph (b)(2) of this section, "technical data and information having commercial value" means technical data and related commercial or financial information which is generated or acquired by a contractor and possessed by that contractor, and whose disclosure the contractor certifies to DOE would cause competitive harm to the commercial value or use of the information or data.

[53 FR 15661, May 3, 1988, as amended at 59 FR 63884, Dec. 12, 1994; 79 FR 22858, Apr. 25, 2014; 81 FR 94919, Dec. 27, 2016]

### § 1004.4 Elements of a request.

(a) *Addressed to the FOIA Officer.* A request for a record of DOE which is

not available for public inspection in an electronic format, as described in §1004.3, shall be: Addressed to the Headquarters or appropriate field FOIA Officer at DOE at a location listed in §1004.2(h), and both the envelope and the letter shall be clearly marked "Freedom of Information Act Request;" or submitted via facsimile or electronically, on an appropriate agency Web site. Except as provided in paragraph (e) of this section, a request will be considered to be received by DOE for purposes of 5 U.S.C. 552(a)(6) and the 20-day response period will start upon actual receipt by the appropriate FOIA Officer, or not later than ten days after receipt by a designated FOIA Officer at any location in §1004.2(h). Requests delivered after regular business hours are considered received on the next regular business day.

(b) *Request must be in writing and for reasonably described records.* A request for access to records must be submitted in writing and must reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any DOE officers or employees who have been contacted regarding the request prior to the submission of a written request. If the request relates to a matter in pending litigation, the court and its location should be identified to aid in locating the documents. If the records are known to be in a particular office of the DOE, the request should identify that office.

(c) *Categorical requests.* (1) Must meet reasonably described records requirement. A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described if DOE personnel can reasonably determine which particular records are sought in the request. The request must enable the DOE to identify and locate the records sought by a

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process that is not unreasonably burdensome or disruptive of DOE operations. The FOIA Officer may take into consideration problems of search which are associated with the files of an individual office within the Department and determine that a request is not one for reasonably described documents as it pertains to that office.

(2) *Assistance in reformulating a non-conforming request.* If a request does not reasonably describe the records sought, as specified in paragraph (c)(1) of this section, the DOE response will specify the reasons why the request failed to meet the requirements of paragraph (c)(1) of this section and will invite the requester to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to manageable proportions by reformulation or by agreeing on an orderly procedure for the production of the records. If DOE responds that additional information is needed from the requester to render records reasonably described, any reformulated request submitted by the requester will be treated as an initial request for purposes of calculating the time for DOE response.

(d) *Nonexistent records.* (1) 5 U.S.C. 552 does not require the compilation or creation of a record for the purpose of satisfying a request for records.

(2) 5 U.S.C. 552 does not require the DOE to honor a request for a record not yet in existence, even where such a document may be expected to come into existence at a later time.

(3) If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester will be so notified.

(e) *Assurance of willingness to pay fees.* A request shall include (1) an assurance to pay whatever fees will be assessed in accordance with §1004.9, (2) an assurance to pay those fees not exceeding some specified dollar amount, or (3) a request for a waiver or reduction of fees. No request will be deemed to have been received until the DOE has received some valid assurance of willingness to bear fees anticipated to be associated with the processing of the request or a specific request of a waiver or reduction of fees.

(f) *Requests for records or information of other agencies.* Some of the records in the files of the DOE have been obtained from other Federal agencies or contain information obtained from other Federal agencies.

(1) Where a document originated in another Federal agency, the Authorizing Official will refer the request to the originating agency and so inform the requester, unless the originator agrees to direct release by DOE.

(2) Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records except that the Authorizing Official will coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, will cite the other agency Denying Official as well as the appropriate DOE Denying Official if a denial by DOE is also involved.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014; 81 FR 94919, Dec. 27, 2016]

### § 1004.5 Processing requests for records.

(a) FOIA Officers will be responsible for processing requests for records submitted pursuant to this part. Upon receiving such a request, the FOIA Officer will, except as provided in paragraph (c) of this section, ascertain which Authorizing Official has responsibility for, custody of, or concern with the records requested. The FOIA Officer will review the request, consulting with the Authorizing Official where appropriate, to determine its compliance with §1004.4. Where a request complies with §1004.4, the FOIA Officer will acknowledge receipt of the request to the requester and forward the request to the Authorizing Official for action.

(b) The Authorizing Official will promptly identify and review the records encompassed by the request. The Authorizing Official or FOIA Officer will prepare a written response—

- (1) Granting the request;
- (2) Denying the request;
- (3) Granting/denying it in part;

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(4) Replying with a response stating that the request has been referred to another agency under §1004.4(f) or §1004.6(e); or

(5) Informing the requester that responsive records cannot be located or do not exist. The written response shall also notify the requester of the right to seek dispute resolution services from the DOE FOIA Public Liaison(s) or the Office of Government Information Services.

(c) Where a request involves records that are in the custody of or are the concern of more than one Authorizing Official, the FOIA Officer will identify all concerned Authorizing Officials that can reasonably be expected to have custody of the requested records. Upon identification of the appropriate Authorizing Officials, the FOIA Officer will forward them a copy of the request and a request for action. The Authorizing Officials will prepare a DOE response to the requester consistent with paragraph (b) of this section. The response will identify the Authorizing Official having responsibility for the determination to release or deny records.

(d) *Time for processing requests.* (1) Action pursuant to paragraph (b) of this section will be taken within 20 days of a request for DOE records being received (“received” is defined in §1004.4(a)), except that,

(i) One request can be made to the requester for information and the DOE can toll the 20-day response period while it waits for the requester’s response;

(ii) If necessary to clarify with the requester issues regarding fee assessment and the DOE can toll the 20-day response period; or

(iii) If unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Authorizing Official or FOIA Officer of the reasons for such extension and the date on which a determination is expected to be dispatched, then the Authorizing Official or FOIA Officer may take an extension not to exceed ten days. In cases where the Authorizing Official determines that unusual circumstances exist, the requester shall be notified in writing of the right to seek dispute res-

olution services from the DOE FOIA Public Liaison(s) or the Office of Government Information Services.

(2) For purposes of this section and §1004.8(d), the term “unusual circumstances” may include but is not limited to the following:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the offices processing the request;

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

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the Department having substantial subject matter interest therein.

(3) The requester must be promptly notified in writing of the extension, the reasons for the extension, and the date on which a determination is expected to be made.

(4) If no determination has been made at the end of the 20-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 responsible Authorizing Official or FOIA Officer will nevertheless continue to process the request. If DOE is unable to provide a response within the statutory period, the Authorizing Official or FOIA Officer will inform the requester of the reason for the delay; the date on which a determination may be expected to be made; and the requester’s right to seek remedy through the courts, but will ask the requester to forego such action until a determination is made.

(5) Nothing in this part shall preclude the Authorizing Official or FOIA Officer and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement will be confirmed in writing and

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will clearly specify the total time agreed upon.

(6) Expedited processing. Generally, the DOE will respond to requests in the order of receipt. Requests will be processed out of order and processed as soon as practicable when it is determined, based upon information supplied by the requester or otherwise known to the DOE, that a compelling need exists to provide the records in an expeditious manner. The FOIA states that a compelling need exists when failure to obtain records expeditiously could reasonably be expected to pose a threat to the life or physical safety of an individual or, when a request is submitted by a person primarily engaged in disseminating information and there is an urgency to inform the public about actual or alleged Federal Government activity.

(7) A determination to grant or deny a request for expedited processing will be made by the appropriate FOIA Officer within ten days after receipt of the request. The requester will be notified of the determination and informed that any denial may be appealed within 90 calendar days to the Office of Hearings and Appeals.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014; 81 FR 94920, Dec. 27, 2016]

### § 1004.6 Requests for classified records.

(a) All requests for classified records will be subject to the provisions of this part with the special qualifications noted below.

(b) All requests for records made in accordance with this part, except those requests for access to classified records which are made specifically pursuant to the mandatory review provisions of Executive Order 13526 and §1045 or any successor thereto, may be automatically considered a FOIA Act request.

(c) Concurrence of the Director of Classification is required on all responses involving the denial of classified information. The Director of Classification will be informed of the request by either the FOIA Officer or the Authorizing Official to whom the action is assigned, and will advise the office originating the records, or having responsibility for the records, and con-

sult with such office or offices prior to making a determination under this section.

(d) The written notice of a determination to deny records, or portions of records, which contain both classified material and other exempt material, will be concurred in by the Director of Classification who will be the Denying Official for the classified portion of such records in accordance with §§1004.5(c) and 1004.7(b)(2). If other DOE officials or appropriate officials of other agencies are responsible for denying any portion of the record, their names and titles or positions will be listed in the notice of denial in accordance with §§1004.5(c) and 1004.7(b)(2) and it will be clearly indicated what portion or portions they were responsible for denying.

(e) Requests for DOE records containing classified information received from another agency, and requests for classified documents originating in another agency, will be coordinated with or referred to the other agency consistent with the provisions of §1004.4(f). Coordination or referral of information or documents subject to this section will be effected by the Director of Classification (in consultation with the Authorizing Official) with the appropriate official of the other agency.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014]

### § 1004.7 Responses by authorizing officials: Form and content.

(a) *Form of grant.* Records requested pursuant to §1004.4 will be made available promptly, when they are identified and determined to be nonexempt under this Regulation, the FOIA, and where the applicable fees are \$15 or less or where it has been determined that the payment of applicable fees should be waived. Where the applicable fees exceed \$15, the records may be made available before all charges are paid.

(b) *Form of denial.* A reply denying a request for a record will be in writing. It will be signed by a FOIA Officer or the Denying Official pursuant to §1004.5 (b) or (c) and will include:

(1) *Reason for denial.* A statement of the reason for denial, containing a reference to the specific exemption under the FOIA authorizing the withholding



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of the record and a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate. The amount of information deleted and the applicable exemption will be indicated on the released portion of the record, unless the indication would harm an interest protected by the exemption.

(2) *Persons responsible for denial.* A statement setting forth the name and the title or position of each Denying Official and identifying the portion of the denial for which each Denying Official is responsible.

(3) *Segregation of nonexempt material.* A statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied.

(4) *Adequacy of search.* Although a determination that no such record is known to exist is not a denial, the requester will be informed that a challenge may be made to the adequacy of the search by appealing within 90 calendar days to the Office of Hearings and Appeals.

(5) *Administrative appeal.* A statement that the determination to deny documents made within the statutory time period may be appealed within 90 calendar days to the Office of Hearings and Appeals.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014; 81 FR 94920, Dec. 27, 2016]

### § 1004.8 Appeal of initial denials.

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing or Denying Official or FOIA Officer has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with § 1004.4(d), or when the FOIA Officer has denied a request for expedited processing consistent with § 1004.5(d) or for waiver of fees consistent with § 1004.9, the requester may, within 90 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) *Elements of appeal.* The appeal must be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Inde-

pendence Avenue SW., Washington, DC 20585-1615 and both the envelope and letter must be clearly marked “Freedom of Information Act Appeal.” The appeal may be delivered by U.S. Mail, commercial delivery service, or by electronic mail to *OHA.Filings@hq.doe.gov*. The appeal must contain a concise statement of the grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals, and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed must be submitted with the appeal. The appeal should also provide a telephone number, electronic mail address, or other means for communicating with the requester during business hours.

(c) *Receipt of appeal.* An appeal will be considered to be received for purposes of 5 U.S.C. 552(a)(6) upon receipt by the Appeal Authority. Documents delivered after the regular business hours of the Office of Hearings and Appeals are considered received on the next regular business day.

(d) *Action within 20 days.* (1) The Appeal Authority will act upon the appeal within 20 days of its receipt, except that if unusual circumstances (as defined in § 1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the Appeal Authority may extend the time for final action for an additional ten days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued. Notification will be sent by electronic mail, when possible, or by letter.

(3) If no determination on the appeal has been issued at the end of the 20-day period or the last extension thereof, the requester may consider his administrative remedies to be exhausted and seek a review in a district court of the

United States as specified in 5 U.S.C. 552(a)(4). When no determination can be issued within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester will be informed of the reason for the delay, of the date on which a determination may be expected to be issued, and of his right to seek judicial review in the United States district court in the district in which he resides or has his principal place of business, the district in which the records are situated, or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(4) Nothing in this part will preclude the Appeal Authority and a requester from agreeing to an extension of time for the decision on an appeal. Any such agreement will be confirmed in writing by the Appeal Authority and will clearly specify the total time agreed upon for the appeal decision.

(e) *Form of action on appeal.* The Appeal Authority's action on an appeal will be in writing and will set forth the reason for the decision. It will also contain a statement that it constitutes final agency action on the request and that judicial review will be available either in the district in which the requester resides or has a principal place of business, the district in which the records are situated, or in the District of Columbia. Documents determined by the Appeal Authority to be documents subject to release will be made promptly available to the requester upon payment of any applicable fees.

(f) *Classified records and records covered by section 148 of the Atomic Energy Act.* The Secretary of Energy or his or her designee will make the final determination concerning appeals involving the denial of requests for classified information or the denial of requests for information falling within the scope of section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

(g) *Appeal of the denial of expedited processing.* Any appeal of the determination to deny a request for expedited processing will be acted on expeditiously."

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, Apr. 25, 2014; 81 FR 94920, Dec. 27, 2016]

#### § 1004.9 Fees for providing records.

(a) *Fees to be charged.* DOE may charge fees that recoup the full allowable direct costs incurred. DOE will use the most efficient and least costly methods to comply with requests for documents made under FOIA. DOE may contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, DOE will ensure that the ultimate cost to the requester is no greater than it would be if DOE itself had performed these tasks. In no case will DOE contract out responsibilities which FOIA provides that only the agency may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees, which are determinations by Authorizing Officials or FOIA Officers. Where DOE can identify documents that are responsive to a request and are maintained for public distribution by other agencies such as the National Technical Information Service and the Government Publishing Office, the FOIA Officer will inform requesters of the procedures to obtain records from those sources.

(1) *Manual searches for records.* Whenever feasible, the DOE will charge for manual searches for records at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search.

(2) *Computer searches for records.* DOE will charge at the actual direct cost of providing the service.

(3) *Review of records.* The DOE will charge requesters who are seeking documents for commercial use for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges will be assessed only for the initial review (i.e., the review undertaken the first time the DOE analyzes the applicability of a specific exemption to a particular record or portion of a record. The DOE will not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may

be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable.

(4) *Duplication of records.* The DOE will make a per-page charge for paper copy reproduction of documents. At present, the charge for paper to paper copies will be ten cents per page and the charge for microform to paper copies will be ten cents per page. For computer generated copies, such as tapes or printouts, the DOE will charge the actual cost, including operator time, for production of the tape or printout. For other methods of reproduction or duplication, we will charge the actual direct costs of producing the document(s).

(5) *Other charges.* It shall be noted that complying with requests for special services such as those listed below is entirely at the discretion of this agency. Neither the FOIA nor its fee structure cover these kinds of services. The DOE will recover the full direct costs of providing services such as those enumerated below to the extent that we elect to provide them:

(i) Certifying that records are true copies;

(ii) Sending records by special methods such as express mail, etc.

(6) *Restrictions on assessing fees.* (i) With the exception of requesters seeking documents for a commercial use pursuant to 5 U.S.C. 552(a)(4)(A)(iv), DOE will provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, DOE will not charge fees to any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, DOE will not begin to assess fees until after the Department has provided the free search and reproduction. For example, if a request involves two hours and ten minutes of search time and results in 105 pages of documents, DOE will charge for only ten minutes of search time and only five pages of reproduction. If this cost is equal to or less than \$15.00, the amount DOE incurs to process a fee collection, no charges would be as-

sessed. For purposes of these restrictions on assessment of fees, the word "pages" refers to paper copies of a standard agency size which will be normally be "8½ × 11" or "11 × 14." Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction. Similarly, the term "search time" is based on a *manual or electronic search*. To apply this term, DOE will calculate the hourly rates of the subject matter expert and/or FOIA analysts conducting the search plus 16 percent.

(ii) When unusual or exceptional circumstances do not apply and time limits specified in FOIA are not met, DOE will not charge any search fees, or duplication fees for educational and non-commercial scientific institution requesters and requesters who are representatives of the news media.

(iii) Except as provided in paragraph (a)(6)(iv) of this section, DOE will not assess any search fees (or in the case of a requester who is an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media, duplication fees) under this paragraph (a)(6)(iii) if DOE has failed to comply with any time limit under §1004.5(d).

(iv)(A) If DOE has determined that unusual circumstances apply (as the term is defined in §1004.5(d)(2)) and DOE provided a timely written notice to the requester in accordance with §1004.5(d)(1)(iii), a failure described in paragraph (a)(6)(iii) of this section is excused for an additional 10 days. If DOE fails to comply with the extended time limit, DOE may not assess any search fees (or in the case of a requester described under paragraph (a)(6)(iii) of this section, duplication fees).

(B) If DOE has determined that unusual circumstances (as that term is defined in §1004.5(d)(2)) apply and more than 5,000 pages are necessary to respond to the request, DOE may charge search fees (or in the case of a requester described under paragraph (a)(6)(iii) of this section, duplication

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fees) if DOE has provided a timely written notice to the requester in accordance with §1004.5(d)(1)(iii) and DOE has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(C) If a court has determined that unusual circumstances exist (as that term is defined in §1004.5(d)(2)), a failure described in paragraph (a)(6)(iv) of this of this section shall be excused for the length of time provided by the court order.

(7) *Notification of charges.* If the DOE determines or estimates that the fees to be assessed under this section may amount to more than \$25.00, the requester will be informed of the estimated amount of fees, unless the requester has previously indicated a willingness to pay the amount estimated by the agency. In cases where a requester has been notified that actual or estimated fees may amount to more than \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to a requester pursuant to this paragraph will offer the opportunity to confer with DOE personnel in order to reformulate the request to meet his or her needs at a lower cost.

(8) *Waiving or reducing fees.* DOE will furnish documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and disclosure is not primarily in the commercial interest of the requester. This fee waiver standard thus sets forth two basic requirements, both of which must be satisfied before fees will be waived or reduced. First it must be established that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government. Second, it must be established that disclosure of the information is not primarily in the commercial interest of the requester. When

these requirements are satisfied, based upon information supplied by a requester or otherwise made known to DOE, the waiver or reduction of a FOIA fee will be granted. In determining when fees should be waived or reduced the appropriate FOIA Officer should address the following two criteria:

(i) That disclosure of the information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” Factors to be considered in applying this criteria include but are not limited to:

(A) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government”;

(B) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities;

(C) The contribution to an understanding by the general public of the subject likely to result from disclosure; and

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.

(ii) If disclosure of the information “is not primarily in the commercial interest of the requester.” Factors to be considered in applying this criteria include but are not limited to:

(A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”

(b) *Fees to be charged—categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The FOIA Officers will

make determinations regarding categories of requesters as defined at §1004.2. The Headquarters FOIA Officers will assist field FOIA Officers in categorizing requesters, and will resolve conflicting categorizations. FOIA prescribes specific levels of fees for each of these categories:

(1) *Commercial use requesters.* When DOE receives a request for documents which appears to be for commercial use, charges will be assessed to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. DOE will recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records.

(2) *Educational and non-commercial scientific institution requesters.* The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) *Requesters who are representatives of the news media.* The DOE will provide documents to requesters in this category for the cost of reproduction only, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in §1004.2(m), and his or her request must not be made for a commercial use. With respect to this class of requesters, a request for records supporting the news dissemination function of the requester will not be considered to be a request for a commercial use.

(4) *All other requesters.* The DOE will charge requesters who do not fall into any of the above categories fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of

reproduction and the first two hours of search time will be furnished without charge. Moreover, requests from individuals for records about themselves filed in DOE systems of records will continue to be processed under the fee provisions of the Privacy Act of 1974.

(5) *Charging interest—notice and rate.* Interest will be charged to those requesters who fail to pay fees. DOE will begin to assess interest charges on the amount billed on the 31st calendar day following the day on which the billing was sent to the requester. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

(6) *Charges for unsuccessful search.* DOE may assess charges for time spent searching even if the search fails to identify responsive records or if records located are determined to be exempt from disclosure. If DOE estimates that search charges are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice will offer the requester the opportunity to confer with agency personnel in order to reformulate the request to reduce the cost of the request.

(7) *Aggregating requests.* A requester may not file multiple requests each seeking portions of a document or documents, solely to avoid payment of fees. When the DOE reasonably believes that a requester or, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the DOE will aggregate any such requests and charge the appropriate fees. The DOE may consider the time period in which the requests have been made in its determination to aggregate the related requests. In no case will DOE aggregate multiple requests on unrelated subjects from one requester.

(8) *Advance payments.* Requesters are not required to make an advance payment (i.e., payment before action is commenced or continued on a request) unless:

(i) The DOE estimates or determines that allowable charges that a requester may be required to pay are likely to

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exceed \$250.00. In such cases, the DOE will notify the requester of the likely cost and obtain a satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(ii)(A) A requester has previously failed to pay a fee in a timely fashion (*i.e.*, within 30 calendar days of the date of the billing). DOE will require the requester to pay the full amount delinquent plus any applicable interest as provided in paragraph (b)(5) of this section, or demonstrate that he or she has, in fact, paid the delinquent fee; and to make an advance payment of the full amount of the estimated current fee before we begin to process a new request or a pending request from that requester.

(B) When DOE acts under paragraphs (b)(8) (i) or (ii) of this section, the administrative time limits prescribed in section (a)(6) of FOIA (*i.e.*, 20 days from receipt of initial requests and 20 days from receipt of appeals from initial denials, plus permissible extensions of these time limits) will begin only after DOE has received fee payments described.

(c) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365)*. The DOE will use the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and the use of collection agencies, where appropriate, to encourage payment of fees.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, 22859, Apr. 25, 2014; 81 FR 94921, Dec. 27, 2016]

### § 1004.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in paragraph (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory records; internal procedures and communications; materials exempted from disclosure by other statutes; confidential, commercial, and financial information; and matters involving personal privacy.

(b) Specifically, the exemptions in 5 U.S.C. 552(b) will be applied consistent with §1004.1 of these regulations to matters that are:

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue;

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld; for example Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) are covered by this exemption; or

(iii) If enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3).

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (i) could reasonably be expected to interfere with enforcement proceedings, (ii) would deprive a person of a right to a fair trial or an impartial adjudication, (iii) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (iv) could reasonably be expected to disclose the

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identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (v) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (vi) could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(c) DOE shall withhold information under this section only if—

(1) The agency reasonably foresees that disclosure would harm an interest protected by an exemption described in paragraph (b) of this section; or

(2) Disclosure is prohibited by law. DOE shall consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible and take reasonable steps necessary to segregate and release non-exempt information. Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure by paragraph (b)(3) of this section.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22859, Apr. 25, 2014; 81 FR 94922, Dec. 27, 2016]

**§ 1004.11 Handling information of a private business, foreign government, or an international organization.**

(a) Whenever a document submitted to DOE contains information which may be exempt from public disclosure, it will be handled in accordance with the procedures in this section. While DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, DOE will consider the submitter's views (as that term is defined in this section) in making its determination. Nothing in this section will preclude the submission of a submitter's views at the time of the submission of the document to which the views relate, or at any other time.

(b) When the DOE may determine, in the course of responding to a FOIA request, not to release information submitted to the DOE (as described in paragraph (a) of this section, and contained in a requested document) without seeking any or further submitter's views, no notice will be given the submitter.

(c) When the DOE, in the course of responding to a FOIA request, cannot make the determination described in paragraph (b) of this section without having for consideration the submitter's views, the submitter shall be promptly notified and provided an opportunity to submit his views on whether information contained in the requested document (1) is exempt from the mandatory public disclosure requirements of the FOIA Act, (2) contains information referred to in 18 U.S.C. 1905, or (3) is otherwise exempt by law from public disclosure. The DOE will make its own determinations as to whether any information is exempt from disclosure. Notice of a determination by the DOE that a claim of exemption made pursuant to this paragraph is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

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(d) When the DOE, in the course of responding to a FOIA request, cannot make the determination described in paragraph (b) of this section and, without recourse to paragraph (c) of this section, previously has received the submitter's views, the DOE will consider such submitter's views and will not be required to obtain additional submitter's views under the procedure described in paragraph (c) of this section. The DOE will make its own determination with regard to any claim that information be exempted from disclosure. Notice of the DOE's determination to deny a claim of exemption made pursuant to this paragraph will be given to a person making such a claim no less than seven (7) calendar days prior to its intended public disclosure.

(e) Notwithstanding any other provision of this section, DOE offices may require a person submitting documents containing information that may be exempt by law from mandatory disclosure to (1) submit copies of each document from which information claimed to be confidential has been deleted or (2) require that the submitter's views be otherwise made known at the time of the submission. Notice of a determination by the DOE that a claim of exemption is being denied will be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(f) *Criteria for determining the applicability of 5 U.S.C. 552(b)(4).* Subject to subsequent decisions of the Appeal Authority, criteria to be applied in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4 of the Freedom of Information Act include:

(1) Whether the information has been held in confidence by the person to whom it pertains;

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;

(3) Whether the information was transmitted to and received by the Department in confidence;

(4) Whether the information is available in public sources;

(5) Whether disclosure of the information is likely to impair the Government's ability to obtain similar information in the future; and

(6) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(g) When DOE, in the course of responding to a Freedom of Information Act request, determines that information exempt from the mandatory public disclosure requirements of the Freedom of Information Act is to be released in accordance with §1004.1, DOE will notify the submitter of the intended discretionary release no less than seven (7) calendar days prior to the intended public disclosure of the information in question.

(h) As used in this section, the term *submitter's views* means, with regard to a document submitted to the DOE, an item-by-item indication, with accompanying explanation, addressing whether the submitter considers the information contained in the document to be exempt from the mandatory public disclosure requirements of the Freedom of Information Act, to be information referred to in 18 U.S.C. 1905, or to be otherwise exempt by law from mandatory public disclosure. The accompanying explanation shall specify the justification for nondisclosure of any information under consideration. If the submitter states that the information comes within the exemption in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, the submitter shall include a statement specifying why such information is privileged or confidential and, where appropriate, shall address the criteria in paragraph (f) of this section excluding paragraph (f)(5). In all cases, the submitter shall address the question of whether or not discretionary disclosure would be in the public interest.

[53 FR 15661, May 3, 1988, as amended at 79 FR 22858, 22859, Apr. 25, 2014; 81 FR 94922, Dec. 27, 2016]



**§ 1004.12 Computation of time.**

Except as otherwise noted, in computing any period of time prescribed or allowed by this part, the day of the event from which the designated period of time begins to run is not to be included; the last day of the period so computed is to be included; and Saturdays, Sundays, and legal holidays are excepted.

**§ 1004.13 Critical electric infrastructure information.**

(a) *Filing Procedures and guidance.* Information regarding critical electric infrastructure information (CEII) filing procedures and further guidance for submitters and requesters is available on the website of the United States Department of Energy's Office of Electricity at <https://www.energy.gov/oe/office-electricity>.

(b) *Purpose and scope.* This part sets forth the regulations of the Department of Energy (DOE) that implement section 215A(d) of the Federal Power Act (FPA), codified at 16 U.S.C. 8240–1(d). The regulations in this part set forth the DOE procedures for the designation, sharing, and protection of CEII. This section applies to anyone who provides CEII to DOE or who receives CEII from DOE, including DOE employees, DOE contractors, and agents of DOE or of other Federal agencies, as well as individuals or organizations providing CEII or submitting a request for CEII designation to DOE or who have requested or have been permitted access to CEII by DOE.

(c) *Definitions*—(1) *Bulk-Power System* means the facilities and control systems necessary for operating an interconnected electric energy transmission network (and any portion thereof), and electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

(2) *Confidential Business Information* means commercial or financial information that is both customarily and actually treated as private by its owner and that is provided to the government as part of a claimed CEII submission.

(3) *Critical Electric Infrastructure* means a system or asset of the bulk-

power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.

(4) *Critical Electric Infrastructure Information (CEII)* is defined at FPA section 215(a)(3), with designation criteria codified at 18 CFR 388.113(c). CEII means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to FERC or another Federal agency, other than classified national security information, that is designated as CEII by FERC or the Secretary pursuant to section 215A(d) of the FPA. Such term includes information that qualifies as critical energy infrastructure information under FERC's regulations.

(5) *CEII Coordinator* means the Assistant Secretary or Principal Deputy Assistant Secretary of the DOE Office of Electricity, who shall coordinate and oversee the implementation of DOE's program for CEII-designation authority under section 215A of the FPA, assist all DOE Offices with respect to requests for CEII designation in determining whether particular information fits within the definition of CEII, and manage DOE's protection, storage, and sharing of CEII materials and oversight of the development of CEII international sharing protocols. The CEII Coordinator may delegate the daily implementation of the CEII Coordinator function as described in this rule, in whole or in part, to an appropriate DOE Office of Electricity official, to an Assistant Secretary in DOE, and to the Administrator of the Bonneville Power Administration, the Energy Information Administration, the Southeastern Power Administration, the Southwestern Power Administration, or the Western Area Power Administration (“Coordinator's designee”).

(6) *Department* means the United States Department of Energy.

(7) *Department of Energy (DOE)* means all organizational entities that are part of the Executive Department created by Title II of the DOE Organization Act (Pub. L. 95–91, 91 Stat. 565, 42 U.S.C. 7101 *et seq.*). For purposes of this Part, the definition of DOE specifically

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excludes the Federal Energy Regulatory Commission, which has promulgated its own CEII procedures at 18 CFR 388.113.

(8) *DOE Office* means any administrative or operating unit of DOE with authority at or above the level of Assistant Secretary, Principal Deputy Assistant Secretary, or Administrator.

(9) *Secretary* means the Secretary of Energy.

(d) *Authority to designate information as CEII.* The Secretary has the authority to designate information as CEII, in accordance with FPA section 215A. The Secretary may delegate the authority to designate information as CEII to any DOE Office.

(e) *Coordination among DOE Office designators.* The DOE CEII Coordinator shall be the primary point of contact for the submission of all requests for designation of information as CEII by DOE, as well as for requests made to DOE by organizations or individuals for information that may be protected, in whole or in part, as CEII.

(1) The CEII Coordinator or Coordinator's designee shall:

(i) Receive and review all incoming requests for CEII as defined in paragraph (c) of this section and in accordance with paragraph (g) of this section;

(ii) Make initial determinations as to whether particular information fits within the definition of CEII found in paragraph (c) of this section;

(iii) Assist any DOE Offices with delegated CEII designation authority to make determinations as to whether a particular requester's need for and ability and willingness to protect CEII warrants limited disclosure of the information to the requester;

(iv) Establish reasonable conditions for considering requests for release of CEII-designated material in accordance with paragraphs (g)(5) and (6) of this section;

(v) Make the Department's final determination regarding a request by any non-federal entity (organization or individual) for CEII-designated materials, in consultation with the appropriate DOE Office(s);

(vi) Notify a CEII submitter of a request for such information by a non-federal entity;

(vii) Convene a conference call between an affected DOE Office and a CEII submitter to discuss concerns related to a non-federal entity requesting release of CEII within no more than five (5) business days after the CEII submitter is notified of the request, providing the CEII submitter with a copy of the request prior to the conference call; and

(viii) Perform oversight of the DOE CEII program and establish guidance for the treatment, handling, and storage of all CEII materials in the Department in accordance with paragraph (g)(6) of this section, including those related to CEII international sharing protocols.

(2) DOE Offices with delegated authority to designate CEII in accordance with paragraph (d) of this section, as well as any CEII Coordinator designee(s), will meet regularly, at the discretion of the CEII Coordinator, but not less than once per year, to ensure coordinated implementation of DOE's CEII designation authority.

(3) DOE, at the discretion of the CEII Coordinator, shall meet with representatives from the Federal Energy Regulatory Commission semi-annually (or more often, as necessary) to ensure that both agencies are applying CEII designation criteria consistently and to share best practices.

(4) DOE, at the discretion of the CEII Coordinator, shall meet at least once per year with representatives from the Department of Commerce including the National Telecommunications and Information Administration, the Department of Homeland Security, the Nuclear Regulatory Commission, and other Federal agencies, as needed, to ensure shared understanding and consistent communication among Federal agencies that collect, maintain, and potentially release information that DOE may consider designating as CEII as defined in paragraph (c) of this section.

(f) *CEII FOIA Exemption.* All information designated by DOE as CEII is exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(3) and shall not be made available by any Federal, state, political subdivision, or tribal authority pursuant to any Federal, State, political

subdivision, or tribal law requiring public disclosure of information or records pursuant to section 215A(d)(1)(A) and (B) of the Federal Power Act.

(g) *Criteria and procedures for designating CEII—(1) Criteria.* The CEII Coordinator or Coordinator's designee shall apply the definition of CEII as provided in paragraph (c) of this section, consistent with FPA section 215A(a)(3), and with designation criteria codified at 18 CFR 388.113(c), to information sought by DOE and to information submitted to DOE with a request for designation.

(2) *Requesting CEII designation of information submitted to DOE.* Any person or entity requesting that information submitted to DOE be designated as CEII must submit such request to the DOE CEII Coordinator or Coordinator's designee according to the following procedures:

(i) The submitter must clearly label the cover page and pages or portions of the information for which CEII treatment is requested in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked "CEII—CRITICAL ELECTRIC INFRASTRUCTURE INFORMATION—DO NOT RELEASE."

(ii) The submitter must clearly label the cover page and pages or portions of information that it considers Confidential Business Information in bold, capital lettering, indicating that it contains Confidential Business Information, as appropriate, and marked "CONFIDENTIAL BUSINESS INFORMATION—DO NOT RELEASE." If combined with a CEII label, the information should be marked "CEII—CRITICAL ELECTRIC INFRASTRUCTURE INFORMATION and CONFIDENTIAL BUSINESS INFORMATION—DO NOT RELEASE."

(iii) The submitter must also clearly indicate the DOE Office(s) from which the CEII designation is being requested in bold, capital lettering on the cover page.

(iv) The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible.

(v) The submitter must also label and segregate information that it classifies as Confidential Business Information under the definition at paragraph (c)(2) of this section with the mark "CONFIDENTIAL BUSINESS INFORMATION—DO NOT RELEASE." Under separate cover, the submitter may, but is not required to, submit a written justification of why the labeled information meets the definition at paragraph (c)(2) of this section.

(vi) The submitter must submit a public version of the information where information designated CEII and information for which CEII designation is requested is redacted or otherwise protected through extraction from the non-CEII to the DOE CEII Coordinator and the Coordinator's designee in an appropriate DOE Office, where feasible. If the entirety of submitted information is CEII, the submitter must indicate that, but no separate public version is required.

(3) *Requesting CEII designation for information generated by DOE.* Any DOE employees, DOE contractors, or agents of DOE requesting that information generated by the Department be designated as CEII must submit such request to the DOE CEII Coordinator or the Coordinator's designee in an appropriate DOE Office according to the following procedures:

(i) The submitter must clearly label the cover page and pages or portions of the information for which CEII treatment is requested in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked "CEII—CRITICAL ELECTRIC INFRASTRUCTURE INFORMATION—DO NOT RELEASE."

(ii) The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible.

(iii) The submitter must submit a public version of the information where information designated CEII and information for which CEII designation is requested is redacted or otherwise protected through extraction from non-CEII.

(iv) CEII designation for information generated by DOE, to include all organizational entities that are a part of the Executive Department created by Title II of the DOE Organization Act, may be executed at any time, regardless of when such information was generated, where feasible.

(4) *Treatment of Submitted Information.*

(i) Upon receiving a request for CEII designation of information submitted to DOE, the DOE CEII Coordinator or Coordinator's designee shall review the submission made in accordance with paragraph (g)(2) of this section.

(ii) Information for which CEII treatment is requested will be maintained by the CEII Coordinator or Coordinator's designee in DOE's files as non-public unless and until DOE completes its determination that the information is not entitled to CEII treatment. This approach does not mean that DOE has made a determination regarding CEII designation, and should under no circumstances be construed as such. DOE will endeavor to make a determination as soon as practicable. The Department retains the right to make determinations about any request for CEII designation at any time, including the removal of a previously granted CEII designation. At such time that a determination is made that information does not meet the CEII criteria, DOE will follow the procedures for return of information not designated as CEII outlined in paragraph (g)(6)(iii) of this section.

(iii) When a requester seeks information for which CEII status has been requested but not designated, or when DOE itself is considering release of such information, DOE will render a decision on designation before responding to the requester or releasing such information. Subsequently, the release of information will be treated in accordance with the procedures established for CEII-designated material, or the return of information not designated as CEII.

(5) *Evaluation of CEII designation criteria to inform CEII designation determination.* (i) The DOE CEII Coordinator, or a Coordinator's designee, will execute the Department's evaluation as to whether the submitted information or portions of the information

meets the definition of CEII, as described at paragraph (c)(2) of this section, with the appropriate DOE Office with delegated CEII designation authority. The DOE Office will designate submitted information as soon as practicable and will inform submitters of the designation date if requested at the time of submission.

(ii) [Reserved]

(6) *CEII Determination.* (i) *DOE CEII Coordinator makes CEII designation determination.* The Secretary or delegated DOE Office will make a determination regarding CEII designation after considering the information against the criteria for CEII designation. The DOE CEII Coordinator or Coordinator's designee shall promptly communicate the decision of the Secretary or delegated DOE Office to the submitter.

(ii) *Review of determination.* DOE reserves the right to review at any time information designated by DOE as CEII to determine whether the information is properly designated. The designation of information as CEII, or the removal of such designation, must be reviewed when:

(A) A FOIA request is submitted for the information under §1004.10; or

(B) A request is made for reconsideration of the designation or removal of the designation under paragraph (i)(1) of this section.

(iii) *Return of Information not designated as CEII.* Because the submitter voluntarily provided the information to DOE, at the request of the submitter, DOE will return or destroy information for which CEII designation was requested but not granted, and will attempt to remove all copies of such information from DOE files, both physical and electronic. DOE shall return or destroy non-CEII consistent with the Federal Records Act, and DOE handling of agency records in accordance with DOE Order O.243.1A, Records Management Program, and related requirements and responsibilities for implementing and maintaining an efficient and economic records management program in accordance with law and regulatory requirements. DOE shall not remove electronic files in the ordinary course of business. If a submitter is required to provide information and

DOE denies CEII designation, the submitter may file a request for review under the procedures.

(7) *Protection of CEII*—(i) *Marking of CEII*. All information designated by DOE as CEII, whether submitted to or generated by DOE, shall be clearly labeled as such, and shall include the date on which the information was designated as CEII. For information that meets the definition of CEII but cannot be physically labeled, such as electronic information, the information shall be—

(A) Electronically marked with the words “CEII—CRITICAL ELECTRIC INFRASTRUCTURE INFORMATION—DO NOT RELEASE” in the electronic file name; or

(B) Transmitted under a Non-Disclosure Agreement or other agreements or arrangements, such as those identified in paragraph (j)(3) of this section, to an electronic system where such information is stored in a secure electronic environment that identifies the stored information as CEII.

(ii) *Protection and Exemption from Disclosure*. All information designated by DOE as CEII is exempt from FOIA and shall not be made available as provided in paragraph (f) of this section.

(iii) *Secure Storage*. DOE will store information for which CEII treatment is requested in a secure place in a manner that would prevent unauthorized access (e.g. locked room or file cabinet). Information submitted to DOE in electronic format shall be stored in a secure electronic environment that identifies the stored information as CEII.

(8) *Protection of Confidential Business Information—Exemption Determination*. DOE will evaluate information claimed as Confidential Business Information if, and at such time as, a valid FOIA request is submitted and the information is otherwise responsive to the request. DOE will conduct the evaluation pursuant to procedures set forth in this part. In its evaluation, DOE will consult any supplementary justification provided by the submitter as described at paragraph (f)(1)(iv) of this section.

(h) *Duration of designation*. Designation of information as CEII shall be a five-year period, unless removed or re-designated.

(1) *Expiration of designation*. (i) The Secretary or delegated DOE Office will determine the duration of designation at the time of designation.

(ii) A submitter may re-apply for CEII designation no earlier than one year prior to the date of expiration of the initial designation or re-designation in accordance with the application procedures in paragraph (g)(1) of this section.

(iii) The Secretary, the DOE CEII Coordinator, or a Coordinator’s designee may initiate CEII designation at any time prior to the date of expiration of the initial designation or re-designation.

(2) *Removal of designation*. The designation of information as CEII may be removed at any time, by the Secretary or the DOE CEII Coordinator in consultation with the DOE Office to which the Secretary has delegated the authority, in whole or in part, upon determination that the unauthorized disclosure of such information could no longer be used to impair the security or reliability of the bulk-power system or distribution facilities or any other form of energy infrastructure. If the CEII designation is to be removed, the submitter and the DOE Office that produced or maintains the CEII will receive electronic notice stating that the CEII designation will be removed at least nine (9) business days before disclosure. In such notice, the DOE CEII Coordinator or Coordinator’s designee will provide the submitter and the DOE Office that produced or maintains the CEII an opportunity (at least nine (9) business days) in which to comment in writing prior to the removal of the designation. The final determination will briefly explain DOE’s determination.

(3) *Treatment of information no longer designated as CEII*. If a FOIA request is received for information for which CEII designation has expired or has been removed, DOE will work with the submitter to review whether the information is subject to other FOIA exemptions. DOE will destroy non-CEII consistent with the Federal Records Act, and DOE handling of agency records in accordance with DOE Order O.243.1A, Records Management Program, and related requirements and responsibilities for implementing and maintaining an

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efficient and economic records management program in accordance with law and regulatory requirements.

(i) *Review or requests for reconsideration of designation*—(1) *Request for Reconsideration.* (i) Any person who has submitted information and requested such information to be designated as CEII may request reconsideration of a DOE decision not to designate that information as CEII, or to remove an existing CEII designation, on grounds that the information does not meet the required CEII criteria. Within ten (10) business days of notification by DOE of its CEII decision, the person must file a request for reconsideration. The request must be sent to the DOE CEII Coordinator and Coordinator's designee through a secure electronic submission or by mail according to the instructions at 10 CFR 205.12. The request must also be sent to the DOE Office that made the decision at issue and to DOE's Office of General Counsel in Washington, DC, according to the instructions at 10 CFR 205.12. A statement in support of the request for reconsideration must be submitted within twenty (20) business days of the date of the determination. The request and the supporting statement will be considered submitted upon receipt by the Office of the General Counsel.

(ii) Any person who has received a decision denying a request for the release of CEII, in whole or in part, or a decision denying a request to change the designation of CEII, may request reconsideration of that decision. A statement in support of the request for reconsideration must be submitted to the DOE Office of the General Counsel within twenty (20) business days of the date of the determination.

(iii) The Secretary or the DOE Office that made the decision at issue will make a determination, in coordination with the DOE CEII Coordinator or Coordinator's designee, with respect to any request for reconsideration within twenty (20) business days after the receipt of the request and will notify the person submitting the request of the determination and the availability of judicial review.

(iv) Before seeking judicial review in Federal District Court under section 215A(d)(11) of the FPA, a person who re-

ceived a determination from DOE concerning a CEII designation must first request reconsideration of that determination.

(v) A request for reconsideration triggers a stay of the underlying decision, except in instances where voluntary sharing of the disputed information is necessary for law enforcement purposes, to ensure reliable operation or maintenance of electric or energy infrastructure, to maintain infrastructure security, to address potential threats, or to address an urgent need to disseminate the information quickly due to an emergency or other unforeseen circumstance.

(j) *Sharing of CEII*—(1) *Federal Entities.* An employee of a Federal entity acting within the scope of his or her Federal employment may obtain CEII directly from DOE without following the procedures outlined in paragraph (k) of this section. DOE will evaluate requests by Federal entities for CEII on a programmatic, fact-specific basis. DOE may share CEII with affected agencies for those agencies to carry out their specific jurisdictional responsibilities, but it may impose additional restrictions on how the information may be used and maintained. To obtain access to CEII, an authorized agency employee must sign an acknowledgment and agreement that states the agency will protect the CEII in the same manner as the Department and will refer any requests for the information to the Department. Notice of each such request also must be given to the CEII Coordinator.

(2) *Non-federal Entities.* The Secretary or the CEII Coordinator shall make a final determination whether to share CEII materials requested by non-federal entities that are within the categories specified in section 215A(d)(2)(D) of the FPA. A request by such a non-federal entity shall not be entertained unless the requesting non-federal entity demonstrates that the release of information is in the national security interest and it has entered into a Non-Disclosure Agreement with DOE that ensures, at a minimum:

(i) Use of the information only for authorized purposes and by authorized recipients and under the conditions

prescribed by the Secretary or CEII Coordinator;

(ii) Protection of the information in a secure manner to prevent unauthorized access;

(iii) Destruction or return of the information after the intended purposes of receiving the information have been fulfilled;

(iv) Prevention of viewing or access by individuals or organizations that have been prohibited or restricted by the United States or the Department from viewing or accessing CEII;

(v) Compliance with the provisions of the Non-Disclosure Agreement, subject to DOE audit;

(vi) No further sharing of the information without DOE's permission; and

(vii) CEII provided pursuant to the agreement is not subject to release under the Freedom of Information Act, 5 U.S.C. 552(b)(3), and shall not be made available by any Federal, state, political subdivision, or tribal authority pursuant to any Federal, State, political subdivision, or tribal law requiring public disclosure of information or records pursuant to sections 215A(d)(1)(A) and (B) of the Federal Power Act.

(viii) The Non-Disclosure Agreement must state that the agreement applies to all subsequent releases of CEII during the calendar year in which the DOE and the non-federal entity enter into the agreement. As a result, the non-federal entity will not be required to file a Non-Disclosure Agreement with subsequent requests during the calendar year.

(3) *Security and Reliability Coordination.* In accordance with section 215A(d)(2)(D) of the FPA, DOE may, taking into account standards of the Electric Reliability Organization, facilitate voluntary sharing of CEII with, between, and by Federal, State, political subdivision, and tribal authorities; the Electric Reliability Organization; regional entities; information sharing and analysis centers or information sharing and analysis organizations; reliability coordinators; balancing authorities; owners, operators, and users of critical electric infrastructure in the United States; and other entities determined appropriate. All entities receiving CEII must execute either a Non-

Disclosure Agreement or an Acknowledgement and Agreement or participate in an Electric Reliability Organization or Regional Entity information sharing program that ensures the protection of CEII. A copy of each agreement or program will be maintained by the DOE Office with a copy to the CEII Coordinator or the Coordinator's designee. If DOE facilitates voluntary sharing of CEII under this subsection, DOE may impose additional restrictions on how the information may be used and maintained.

(4) *International Sharing Protocols.* The Secretary may delegate authority to DOE Offices to develop, after consultation with Canadian and Mexican authorities, protocols for the voluntary sharing of CEII with Canadian and Mexican authorities and owners, operators, and users of the bulk-power system outside the United States. The DOE CEII Coordinator or Coordinator's designee would provide assistance and advice to DOE Offices in the development of the international sharing protocols.

(5) *Notice for Sharing of CEII not Generated by DOE.* The DOE CEII Coordinator or Coordinator's designee will provide electronic notice to the CEII submitter no less than ten (10) business days before DOE releases CEII submitted to and not generated by DOE, except in instances where voluntary sharing is necessary for law enforcement purposes, to ensure reliable operation or maintenance of electric or energy infrastructure, to maintain infrastructure security, or to address potential threats; where there is an urgent need to quickly disseminate the information; or where prior notice is not practicable due to an emergency or other unforeseen circumstance. If prior notice is not given, DOE will provide notice as soon as practicable. The DOE CEII Coordinator or Coordinator's designee will convene a phone call within five (5) business days of electronic notice with the CEII submitter to discuss concerns about the proposed release of CEII-designated materials to the requester. DOE will make the final determination as to whether to share CEII not generated by DOE.

(k) *Procedures for requesting CEII.* DOE shall consider requests for CEII on

a case-by-case basis. Any person requesting CEII must include the following material with the request:

(1) *Contact Information.* Provide your name, title and employer, work address, work phone number, and work email. If you are requesting the information on behalf of a person or entity other than yourself, you must also list that person's or entity's work contact information, including name, title, address, phone number, and email.

(2) *Explanation of Need.* Provide a detailed statement explaining the particular need for and intended use of the information. This statement must include:

(i) The extent to which a particular function is dependent upon access to the information;

(ii) Why the function cannot be achieved or performed without access to the information;

(iii) An explanation of whether other information is available to the requester that could facilitate the same objective;

(iv) How long the information will be needed;

(v) Whether or not the information is needed to participate in a specific proceeding (with that proceeding identified); and

(vi) An explanation of whether the information is needed expeditiously.

(3) *Signed Non-Disclosure Acknowledgment/Agreement.* Provide an executed Non-Disclosure Acknowledgement (if the requester is a Federal entity) or an executed Non-Disclosure Agreement (if the requester is not a Federal entity) requiring adherence to limitations on the use and disclosure of the information requested.

(4) *DOE evaluation.* Upon receiving a request for CEII, the CEII Coordinator shall contact the DOE Office or Federal agency that created or maintains the CEII. In consultation with the DOE Office, the CEII Coordinator shall carefully consider the statement of need provided by the requester and determine if the need for CEII and the protection afforded to the CEII should result in sharing CEII for the limited purpose identified in the request. If the CEII Coordinator or Coordinator's designee denies the request, the requestor

may seek reconsideration, as provided in paragraph (i) of this section.

(1) *Disclosure—(1) Disclosure by submitter of information.* If the submitter of information deliberately discloses to the public information that has received a CEII designation, then the Department reserves the right to remove its CEII designation.

(2) *Disciplinary Action for Unauthorized Disclosure.* DOE employees or contractors who knowingly or willfully disclose CEII in an unauthorized manner will be subject to appropriate sanctions, including disciplinary action under DOE or DOE Office personnel rules or referral to the DOE Inspector General. Any action by a Federal or non-federal Entity who knowingly or willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry to obtain CEII may also constitute a violation of other applicable laws and is potentially punishable by fine and imprisonment.

(3) *Whistleblower protection.* In accordance with the Whistleblower Protection Enhancement Act of 2012 (Pub. L. 112-199, 126 Stat. 1465), the provisions of this rule are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute relating to:

(i) Classified information;

(ii) Communications to Congress;

(iii) The reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(iv) Any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling statutory provisions are not affected by this rule.

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