

(i) The name, title, and address of a knowledgeable official in the veterinary services of the country of origin;

(ii) The details of scrapie control programs in the country of origin, including information on disease surveillance and border control activities and the length of time these activities have been in effect;

(iii) Any available information concerning additions, within the 5 years immediately preceding collection of the semen, to the flock or herd of the semen donor;

(iv) Any available data concerning disease incidence, within the 5 years immediately preceding collection of the semen in the donor animal's flock or herd, including, but not limited to, the results of diagnostic tests, especially histopathology tests, conducted on any animals in the flock or herd;

(v) Information concerning the health, within the 5 years immediately preceding collection of the semen, of other ruminants, flocks, and herds with which the donor animal and the donor animal's flock or herd might have had physical contact, and a description of the type and frequency of the physical contact; and

(vi) Any other information requested by the Administrator in specific cases as needed to make a determination.

(g) All progeny resulting from semen imported under this section are subject to the requirements of 9 CFR part 54 and all other applicable regulations.

Done in Washington, DC, this 3rd day of May 1995.

**George O. Winegar,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 95-11561 Filed 5-10-95; 8:45 am]

BILLING CODE 3410-34-P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### Office of Federal Housing Enterprise Oversight

#### 12 CFR Part 1710

RIN 2550-AA01

#### Releasing Information

**AGENCY:** Office of Federal Housing Enterprise Oversight, HUD.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Federal Housing Enterprise Oversight (OFHEO) is issuing a proposed rule to set forth the basic policies of OFHEO regarding information it maintains and the procedures for obtaining access to such

information. The rule contains regulations of OFHEO implementing the Freedom of Information Act (FOIA) and establishes a schedule of fees which will be charged for the processing of document requests under the FOIA. In addition, the proposed rule sets forth procedures to be followed with respect to testimony and the production of documents in legal proceedings in which OFHEO is not a named party as well as procedures for service of process upon OFHEO in any legal proceeding.

**DATES:** Written comments on the proposed rule must be received by July 10, 1995.

**ADDRESSES:** All comments concerning the proposed rule should be addressed to Anne E. Dewey, General Counsel, Office of Federal Housing Enterprise Oversight, 1700 G Street NW., Fourth Floor, Washington, DC 20552. Copies of all communications received will be available for public inspection and copying at the same location.

**FOR FURTHER INFORMATION CONTACT:** Christine C. Dion, Associate General Counsel, 1700 G Street NW., Fourth Floor, Washington, DC 20552 (202/414-3800) (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** Title XIII of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, known as the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. 4501 *et seq.*, established OFHEO as an independent office within the Department of Housing and Urban Development. The primary function of OFHEO is to ensure the financial safety and soundness and the capital adequacy of the nation's two largest housing finance institutions—the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises). OFHEO proposes to adopt this rule to explain matters relating to the availability of information generated and maintained by OFHEO and to set forth procedures for accessing such information. The proposed rule, among other things, implements the Freedom of Information Act. The rule establishes procedures by which the public may inspect OFHEO records, request and obtain copies of materials, and appeal denials of such requests. This rule includes a schedule of fees and procedures for determining when fees should be waived or reduced. The fee schedule conforms to guidelines published in the **Federal Register** by the Office of Management and Budget on March 27, 1987 (52 FR 10012). The proposed rule also implements Executive Order 12600 by providing

predisclosure notification procedures for confidential commercial or financial information.

In addition, the proposed rule sets forth the procedures to be followed with respect to testimony concerning official matters and production of official documents of OFHEO in legal proceedings in which OFHEO is not a named party. The proposed rule establishes the procedures for effecting service upon OFHEO in any legal process, including service of process by litigants seeking access to OFHEO records.

#### SECTION-BY-SECTION ANALYSIS

##### I. Information and Records Generally

Subpart A of the proposed rule contains general provisions relating to disclosure of information and records in the possession of OFHEO. Section 1710.1 sets forth procedures for disclosure of such materials by OFHEO employees. Section 1710.2 provides that the disclosure requirements of the FOIA and the proposed rule apply to all OFHEO records. It also provides that if another statute sets forth procedures for the disclosure of specific types of records, OFHEO will process a request for those records in accordance with the procedures that apply to those specific records. However, in cases where the record is not required to be released under the specific procedures set forth in another statute, OFHEO will consider the request under the FOIA. In addition, section 1710.2 describes the relationship between the FOIA and the Privacy Act of 1974 (Privacy Act), 5 U.S.C. 552a, and explains that records that are available through an established distribution system should preferably be obtained through that system, rather than pursuant to the provisions of the FOIA.

Section 1710.3 of subpart A contains a general provision providing that reports of examinations prepared by OFHEO are the property of OFHEO and may only be disclosed in accordance with this section or with the prior written consent of the Director of OFHEO. The section further provides that any unauthorized use or disclosure of such reports may be subject to penalties under federal law. Section 1710.3 explains that the Director will make available to each Enterprise a copy of the examination report of that Enterprise and that the Enterprise may not disclose or use such reports except as expressly permitted by the Director. The section also explains that the Director has discretion to make the examination reports available for the confidential use of governmental

agencies responsible for investigating and enforcing applicable laws.

## II. Availability of OFHEO Records

Subpart B implements the FOIA, 5 U.S.C. 552, and describes (1) The types of OFHEO records available to the public upon request, (2) the kinds of information exempt from disclosure, (3) the indexing procedures for OFHEO records that are available to the public, (4) the format for requesting records under the FOIA, (5) the procedures for responding to FOIA requests, (6) the format of the responses, (7) the procedures for appealing denials of requests, and (8) the time limits to which OFHEO will adhere in processing FOIA requests and appeals. Subpart B also contains OFHEO's procedures for disclosure of business information provided to OFHEO.

Section 1710.11 describes OFHEO records that are available pursuant to 5 U.S.C. 552(a) for public inspection and copying at the offices of OFHEO. These records include any final orders and agreements made in adjudication of cases, which are enumerated in section 1710.41 of the proposed rule. Section 1710.11 also describes the classes of OFHEO records that are exempt from disclosure. These exemptions follow the exemptions provided in the FOIA. These exemptions permit OFHEO's Freedom of Information Officer to withhold a requested record in certain circumstances. In deciding whether to withhold material, consideration will be given as to whether another statute, Executive order, or regulation prohibits release or, if not, whether it would be in the public interest to withhold it.

Section 1710.12 sets forth the indexing requirements as to any records OFHEO maintains which are required to be indexed under 5 U.S.C. 552(a)(2). The section contains the Director's determination that, because of the lack of requests to date for records required to be indexed, such indexes do not need to be published quarterly.

Section 1710.13 contains rules of procedure for requesting records under the FOIA. Requests for OFHEO records should be in writing and addressed to OFHEO's Freedom of Information Officer. Each request should contain sufficient detail to allow the Freedom of Information Officer to locate the record with a reasonable amount of effort. If a request is too broad or too vague to allow the record to be located with a reasonable amount of effort, OFHEO will assist the requester in revising the request as appropriate.

Procedures for OFHEO's response to FOIA requests are explained in sections 1710.14 and 1710.15. OFHEO's Freedom

of Information Officer has been designated responsibility in proposed section 1710.14 to grant or deny such requests and to determine fees. Paragraph (b) of the section also provides that OFHEO will ordinarily refer FOIA requests for records that originated in another government agency to that agency for response. In such cases, the requester will be notified of the referral. As specified in paragraph (c) of section 1710.14, in cases where a requester asks for a record in a format that does not currently exist, OFHEO will provide whatever records reasonably respond to the request, but will not create a new record in order to respond. Moreover, under paragraph (d) of section 1710.14, if a record cannot be located from the information supplied, the Freedom of Information Officer will so inform the requester.

Proposed section 1710.15 requires the Freedom of Information Officer to notify a requester in writing of the determination to grant a request in whole or in part. The response must describe the manner in which the record will be disclosed and inform the requester of any fees that will be charged. Similarly, the Freedom of Information Officer's determination to deny a request in whole or in part must be made in writing and signed by OFHEO's Freedom of Information Officer. Consistent with section 1710.15(b) as proposed, any denial is to contain a brief statement describing the basis of the denial, including the FOIA exemption(s) that is relied upon. Moreover, the denial must state that the requester has a right to appeal and must explain OFHEO's appeal procedures.

OFHEO's appeal procedures are set forth in section 1710.16 of the proposed rule. Denials may be appealed to OFHEO's Freedom of Information Appeals Officer within 30 days after receipt of a denial letter. Appeals must be in writing and must contain reasons for, or arguments in support of, disclosure. OFHEO will respond to appeals in writing and will specify the reason for affirming any original denial. When a denial is reversed in whole or in part, the request for disclosure will be processed promptly. The decision on appeal is OFHEO's final action on a request. Requesters have a right to seek judicial review of the final action under 5 U.S.C. 552(a)(4).

Section 1710.17 of the proposed rule describes the time limits to which OFHEO will adhere in responding to initial requests and appeals of denials of requests. The time limits applicable to either may be extended up to a total of ten days (excluding weekends and legal holidays) in unusual circumstances, *i.e.*,

when the records are in a location other than the main office of OFHEO, the request is for a large number of records, or OFHEO must consult with another agency or with various offices within OFHEO.

Proposed section 1710.18 contains OFHEO's procedures for disclosure of business information provided to OFHEO. Generally, the section would require submitters of business information to designate those portions of their submissions they believe may be exempt from disclosure under Exemption 4 of the FOIA. If records so designated are subsequently requested under the FOIA, in most cases the submitter will have an opportunity to provide a written objection to disclosure. The written objection must demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential and why disclosure would cause competitive harm. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter. Information provided by a submitter for the purpose of objecting to disclosure may itself be subject to disclosure under the FOIA.

## III. Fees for Provision of Information

Subpart C of the proposed rule contains provisions relating to the fees which will be assessed for services rendered in responding to and processing requests for records under the FOIA. Fees are to be based on the type of service provided, *e.g.*, search, review, and duplication, as well as the category of person making the request, *e.g.*, commercial user, educational institution, and news media. Generally, commercial requesters will pay the full amount of permissible fees relating to record search, review and duplication. Educational and noncommercial scientific institutions and the news media will pay only duplication costs, excluding charges for the first 100 pages. All other requesters will be assessed fees for search and duplication, except that the first 100 pages of duplication and the first two hours of search time will be furnished without charge. As a matter of policy, OFHEO will not charge fees for any individual request if the cost of collecting a fee would equal or exceed the fee itself.

Additionally, under the proposal, OFHEO may furnish records without charge or at a reduced charge where 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 federal government and is not primarily in the commercial interest of the requester. In making this determination, OFHEO will apply the six analytical factors set out by the Department of Justice in its advisory memorandum on making FOIA fee waiver determinations. The memorandum, titled "New FOIA Fee Waiver Policy Guidance," was issued by the Assistant Attorney General for Legal Policy to the heads of all federal agencies on April 2, 1987. The factors enumerated in the memorandum have been incorporated in proposed section 1710.24.

Section 1710.25 as proposed contains a number of miscellaneous provisions concerning fees, including a requirement that requesters pay in advance fees likely to exceed \$250.00. However, advance payment may not be required in the case of a requester who has a history of prompt payment. This section also includes a provision permitting interest to be charged on fees over 30 days past due at the rate prescribed in 31 U.S.C. 3717 for an outstanding debt on a U.S. Government claim.

#### **IV. Testimony and Production of Documents in Legal Proceedings in Which OFHEO Is Not a Named Party**

Subpart D prescribes the policies and procedures of OFHEO with respect to the testimony of official matters and production of official documents of OFHEO in legal proceedings in which OFHEO is not a named party. The subpart does not affect the rights and procedures governing public access to OFHEO documents pursuant to the FOIA or the Privacy Act.

Section 1710.31 sets forth the purpose of subpart D which is to (1) ensure the confidentiality of OFHEO documents and information, (2) maintain the impartial position of OFHEO in litigation in which OFHEO is not a named party, (3) conserve the time of OFHEO employees for their official duties, and (4) enable the Director to determine when to authorize testimony and the release of documents in legal proceedings in which OFHEO is not a named party.

Section 1710.32 contains the definitions applicable to the subpart. Section 1710.33 provides the general policy of OFHEO with respect to testimony and production of documents in any legal proceeding in which OFHEO is not a named party, i.e., OFHEO employees, including former OFHEO employees, are prohibited from disclosing any information obtained in or resulting from their official capacities

unless the Director determines in writing that disclosure would be in the best interest of OFHEO or in the public interest. Section 1710.33 further provides that, prior to any authorized testimony or release of official documents, the requesting party must obtain a protective order from the court before which the action is pending to preserve the confidentiality of the testimony or documents subsequently produced.

Section 1710.34 describes the procedures to which OFHEO will adhere to enable the Director to determine whether to grant requests for testimony concerning official matters or disclosure of official documents. Section 1710.35 provides that the scope of permissible testimony by an OFHEO employee is limited to that set forth in the written authorization granted that employee by the Director. The section also prohibits OFHEO employees from giving opinion testimony in any legal proceeding to which OFHEO is not a party. OFHEO believes that the use of OFHEO employees to give opinion testimony would hamper OFHEO's ability to carry out its statutory responsibilities and would impose an administrative burden on OFHEO's staff.

Section 1710.36 describes the manner in which authorized testimony of OFHEO employees will be made available. The section provides that the testimony will be available only through depositions or written interrogatories. A party requesting authorized testimony must serve a subpoena on the OFHEO employee in accordance with applicable federal or state rules of procedure, with a copy of the subpoena sent by registered mail to OFHEO's General Counsel. Upon completion of an authorized deposition at OFHEO's office, a copy of the transcript of the testimony shall be furnished at the requesting party's expense to OFHEO's General Counsel.

Section 1710.37 describes the manner in which official documents authorized for release by the Director will be produced. Certified or authenticated copies of OFHEO documents authorized by the Director to be released under subpart D will be provided upon request.

Section 1710.38 describes the fees charged for documents produced by OFHEO in connection with requests under subpart D. Unless waived or reduced, OFHEO will charge for searches for documents, duplication of documents, and certification or authentication of documents as detailed in the section.

Section 1710.39 provides that an OFHEO employee served with a demand in a legal proceeding, which requires his or her attendance as a witness concerning OFHEO or the production of official documents or information, must notify OFHEO's General Counsel of such service. The notification would assist the General Counsel in determining whether the individual should be authorized to testify or the material requested should be made available. When authorization to testify or produce documents is not granted by the Director, OFHEO's General Counsel shall provide the party issuing the demand or the court with a copy of the regulations contained in subpart D and also shall advise the party or the court that the OFHEO employee upon whom the demand has been made is prohibited from testifying or producing the documents without the Director's prior approval.

Proposed section 1710.39 also provides that any OFHEO employee who has official information that has not been approved for disclosure must respond to a legal process by attending at the time and place required. The individual shall respectfully decline to disclose the information on the basis of subpart D of the proposed rule. If a court orders disclosure contrary to the Director's instructions, the OFHEO employee shall continue to decline to disclose the information and shall advise OFHEO of the order for such action as OFHEO may deem appropriate. Notably, a determination by OFHEO to comply or not to comply with any demand shall not constitute any ground for noncompliance and OFHEO may oppose any demand on any legal basis independent of its determination under subpart D of the proposed rule.

Section 1710.40 pertains to persons who are not employees or former employees of OFHEO. Non-OFHEO persons may not disclose reports generated by OFHEO, or any related documents, to any person without the Director's prior written consent. Moreover, any non-OFHEO person served with a demand in a legal proceeding requiring that person to produce OFHEO documents or to testify with respect thereto, must (1) notify OFHEO's General Counsel regarding the service, (2) object to production of such documents or information contained therein on the basis that the documents are the property of OFHEO and cannot be released without OFHEO's consent, and (3) note that the documents' production must be sought from OFHEO following procedures set forth in proposed sections 1710.34(b) and (c)

and 1710.37(b) of subpart D of the proposed rule.

Section 1710.41 of the proposed rule enumerates documents that OFHEO shall make available to the public. The records include any final orders or agreements made in adjudication of cases and transcripts of public hearings on the record with respect to any action of the Director or notice of charges issued by the Director. The section does not authorize the withholding of any information from, or prohibit the disclosure of any information to, Congress.

#### V. Rules and Procedures for Service Upon OFHEO

Section 1710.51 provides that, with limited exceptions, any legal process on OFHEO must be issued and served upon OFHEO's General Counsel and any OFHEO personnel named in the caption of the documents. Service may be effected by either personal delivery or by registered or certified mail to the General Counsel at OFHEO's office.

#### Regulatory Impact

##### *Executive Order 12606, The Family*

The General Counsel, as the designated Official under Executive Order 12606, The Family, has determined that this proposed rule does not have potential for significant impact on family formation, maintenance, and general well-being, and thus, is not subject to review under Executive Order 12606.

##### *Executive Order 12612, Federalism*

The General Counsel, as Designated Official under section 6(a) of Executive Order 12612, Federalism, has determined that the policies contained in this proposed rule will not have substantial direct effects on states or their political subdivisions, or the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. As a result, the proposed rule does not warrant the preparation of a Federalism Assessment in accordance with Executive Order 12612.

##### *Executive Order 12866, Regulatory Planning and Review*

In promulgating this proposed rule, the Office of Federal Housing Enterprise Oversight has adhered to the regulatory philosophy and the applicable principles of regulations set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This proposed rule has been reviewed by the

Office of Management and Budget under that Executive Order.

#### *Regulatory Flexibility Act*

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the General Counsel has certified that this proposed rule will not have significant economic impact on a substantial number of small entities.

#### *Paperwork Reduction Act*

This proposed rule contains no information collection requirements that require the approval of the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

#### List of Subjects in 12 CFR Part 1710

Administrative practice and procedure, Confidential business information, Freedom of information.

Accordingly, for the reasons set out in the preamble, the Office of Federal Housing Enterprise Oversight proposes to amend Chapter XVII of Title 12 of the Code of Federal Regulations by adding Part 1710 to read as follows:

#### PART 1710—RELEASING INFORMATION

##### Subpart A—Information and Records Generally

Sec.

- 1710.1 General rule.
- 1710.2 Applicability.
- 1710.3 Office of Federal Housing Enterprise Oversight examination reports.

##### Subpart B—Availability of Records of the Office of Federal Housing Enterprise Oversight

- 1710.11 Official records of the Office of Federal Housing Enterprise Oversight.
- 1710.12 Index identifying information for the public.
- 1710.13 Request for records.
- 1710.14 Response to requests.
- 1710.15 Form and content of responses.
- 1710.16 Appeal of denials.
- 1710.17 Time limits.
- 1710.18 Business information.

##### Subpart C—Fees for Provision of Information

- 1710.21 Definitions.
- 1710.22 Fees to be charged—general.
- 1710.23 Fees to be charged—categories of requesters.
- 1710.24 Limitations on charging fees.
- 1710.25 Miscellaneous fee provisions.

##### Subpart D—Testimony and Production of Documents in Legal Proceedings in Which the Office of Federal Housing Enterprise Oversight is Not a Named Party

- 1710.31 General purposes.
- 1710.32 Definitions.
- 1710.33 General Policy.
- 1710.34 Request for testimony or production of documents.

1710.35 Scope of permissible testimony.

1710.36 Manner in which testimony is given.

1710.37 Manner in which documents will be produced.

1710.38 Fees.

1710.39 Responses to demands served on OFHEO employees.

1710.40 Responses to demands served on non-OFHEO employees or entities.

1710.41 Orders and agreements available to the public.

#### Subpart E—Rules and Procedures for Service Upon the Office of Federal Housing Enterprise Oversight

1710.51 Service of Process.

**Authority:** 5 U.S.C. 552; 12 U.S.C. 4513, 4526, 4639; E.O. 12600, 3 CFR, 1987 Comp., p. 235.

#### Subpart A—Information and Records Generally

##### § 1710.1 General rule.

Except as necessary in performing official duties or as authorized by §§ 1710.11 through 1710.39 of this part, no employee of the Office of Federal Housing Enterprise Oversight (OFHEO) shall in any manner disclose or permit disclosure of any information in the possession of OFHEO that is confidential or otherwise of a non-public nature, including information regarding OFHEO or the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises).

##### § 1710.2 Applicability.

(a) *General.* The Freedom of Information Act (FOIA) and the regulations in this part apply to all OFHEO records. However, if another law sets forth procedures for the disclosure of specific types of records, OFHEO will process a request for those records in accordance with the procedures that apply to those specific records. If there is any record which is not required to be released under those provisions, OFHEO will consider the request under the FOIA and the regulations in this part.

(b) *The relationship between the FOIA and the Privacy Act of 1974.* The Privacy Act of 1974 (Privacy Act), 5 U.S.C. 552a, applies to records that are about individuals, but only if the records are in a system of records as defined in the Privacy Act. Requests from individuals for records about themselves which are contained in an OFHEO system of records will be processed under the provisions of the Privacy Act as well as the FOIA. OFHEO will not deny access by a first party to a record under the FOIA or the Privacy Act unless the record is not available to

that individual under both the Privacy Act and the FOIA.

(c) *Records available through routine distribution procedures.* When the record requested includes material published and offered for sale, *e.g.*, by the Superintendent of Documents or the Government Printing Office, or which is available to the public through an established distribution system (such as that of the National Technical Information Service of the Department of Commerce), OFHEO will first refer the requester to those sources. Nevertheless, if the requester is not satisfied with the alternative sources, OFHEO will process the request under the FOIA.

**§ 1710.3 Office of Federal Housing Enterprise Oversight examination reports.**

(a) *General.* Reports of examinations prepared by OFHEO may be disclosed only in accordance with this part or with the prior written consent of the Director of OFHEO. No person, agency, or authority, or director, officer, employee, or agent thereof, shall disclose any such report or information contained therein in any manner except as authorized in accordance with this subpart. The report of examination is the property of OFHEO and any unauthorized use or disclosure of such report may be subject to the penalties provided in 18 U.S.C. 641.

(b) *Enterprises.* The Director makes available to each Enterprise a copy of OFHEO's report of examination of such Enterprise. The report of examination is the property of OFHEO and is loaned to the Enterprise for its confidential use only. Under no circumstance shall the Enterprise or any director, officer, employee, or agent thereof, make public or disclose in any manner the report of examination or any portion of the contents thereof to any person or organization not officially connected with the Enterprise as director, officer, employee, attorney, auditor, or independent auditor. Any other disclosure or use of this report except as expressly permitted by the Director may be subject to the penalties of 18 U.S.C. 641.

(c) *Government agencies.* The Director of OFHEO may make available reports of examination for the confidential use of federal agencies responsible for investigating or enforcing applicable federal laws.

**Subpart B—Availability of Records of the Office of Federal Housing Enterprise Oversight**

**§ 1710.11 Official records of the Office of Federal Housing Enterprise Oversight.**

(a) OFHEO shall, upon a written request for records which reasonably describes the information or records and is made in accordance with the provisions of this subpart, make the records available as promptly as practicable to any person for inspection and/or copying, except as provided in paragraph (d) of this section.

(b) *Records available.* OFHEO records which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying are maintained at OFHEO's offices located at 1700 G Street, NW., Fourth Floor, Washington, DC 20552. The records include—

(1) Any final opinions, as well as orders made in adjudication of cases as set forth in § 1710.41 of this part;

(2) Any statements of policy and interpretation that have been adopted by OFHEO and are not published in the **Federal Register**;

(3) Any administrative staff manuals and instructions to staff that affect a member of the public, and which are not exempt from disclosure under 5 U.S.C. 552(b); and

(4) Any current indexes providing identifying information for the public as to any matter which OFHEO has issued, adopted or promulgated, and is required by 5 U.S.C. 552(a)(2) to be made available or published.

(c) *Copying.* The cost of copying information available in the offices of OFHEO shall be imposed on a requester in accordance with the provisions of subpart C of this part.

(d) *Records not available.* Except as otherwise provided in this part, or as may be specifically authorized by the Director of OFHEO, the following information and records, or portions thereof, are not available to the public—

(1) Any record, or portion thereof, which is

(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(ii) Is in fact properly classified pursuant to such Executive order;

(2) Any record, or portion thereof, related solely to the internal personnel rules and practices of OFHEO;

(3) Any record, or portion thereof, which is 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, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Any matter that is a trade secret or that constitutes commercial or financial information obtained from a person and that is privileged or confidential;

(5) Any matter contained in inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with OFHEO;

(6) Any information contained in personnel and medical files and similar files (including financial files) the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Any 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 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 identity of a confidential source, including a State, local, or foreign agency or authority or any private institution or an Enterprise regulated and examined by OFHEO which furnished information on a confidential basis, and, in the case of a record of 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) Any matter that is contained in or related to examination, operating, or condition reports that are prepared by, on behalf of, or for the use of OFHEO; or

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

(e) Even if an exemption described in paragraph (d) of this section may be reasonably applicable to a requested record, or portion thereof, OFHEO may

elect under the circumstances of any particular request not to apply the exemption to such requested record, or portion thereof. The fact that the exemption is not applied by OFHEO to any requested record, or portion thereof, has no precedential significance as to the application or nonapplication of the exemption to any other requested record, or portion thereof, no matter when the request is received.

(f) Any reasonably segregable portion of a record shall be provided to any person properly requesting such record after deletion of the portions which are exempt under this subpart.

(g) To the extent necessary to prevent an invasion of personal privacy, the Director may delete identifying details from a document described in paragraph (b) of this section. In each case of such deletion, the justification therefore will be clearly explained in writing.

(h) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

#### § 1710.12 Index identifying information for the public.

(a) OFHEO will maintain and make available for public inspection and copying a current index of materials available at the office of OFHEO which are required to be indexed under 5 U.S.C. 552(a)(2).

(b) Because of the lack of requests to date for material required to be indexed, the Director of OFHEO has determined that it is unnecessary and impracticable to publish quarterly, or more frequently, and distribute (by sale or otherwise) copies of each index and supplements thereto, as provided in 5 U.S.C. 552(a)(2). However, OFHEO will provide a copy of such indexes to a member of the public upon request, at a cost not to exceed the direct cost of duplication and mailing, if sending records by other than ordinary mail.

#### § 1710.13 Requests for records.

(a) *Addressing requests.* Requests for records in the possession of OFHEO shall be made in writing. The envelope and the request both should be clearly marked "FOIA Request," and addressed to: Freedom of Information Officer, Office of Federal Housing Enterprise Oversight, 1700 G Street NW, Fourth Floor, Washington, DC 20552. A request improperly addressed will be deemed not to have been received for purposes of the ten-day time period set forth in § 1710.17(a) of this subpart until it is received, or would have been received with the exercise of due diligence by

OFHEO personnel, by the Freedom of Information Officer. Records requested in conformance with this subpart and which are not exempt records may be received in person or by mail as specified in the request. Records to be received in person will be available for inspection or copying during business hours on a regular business day in the office of OFHEO.

(b) *Description of records.* Each request must reasonably describe the desired records in sufficient detail to enable OFHEO personnel to locate the records with a reasonable amount of effort. A request for a specific category of records will be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of OFHEO operations.

(1) Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record.

(2) If the Freedom of Information Officer determines that a request does not reasonably describe the records sought, he or she will either advise the requester what additional information is needed to locate the record, or otherwise state why the request is insufficient. The Freedom of Information Officer will also extend to the requester an opportunity to confer with OFHEO personnel with the objective of reformulating the request in a manner which will meet the requirements of this section.

#### § 1710.14 Responses to requests.

(a) *Response to initial request.* The Freedom of Information Officer of OFHEO is authorized to grant or deny any request for a record and to determine appropriate fees.

(b) *Referral to another agency.* When a requester seeks records that originated in another federal government agency, OFHEO will normally refer the request to the other agency for response. If OFHEO refers the request to another agency, it will notify the requester of the referral. A request for any records classified by some other agency will be referred to that agency for response.

(c) *Creating records.* If a person seeks information from OFHEO in a format that does not currently exist, OFHEO will not ordinarily reformat the information for the purpose of responding to the request. OFHEO's Freedom of Information Officer will advise the requester that OFHEO does not have the record in the format sought, but will provide records in existing formats that would reasonably

respond to the request. Additionally, OFHEO will not develop a new record of information to satisfy a request.

(d) *Record cannot be located.* If a requested record cannot be located from the information supplied, the Freedom of Information Officer will so notify the requester in writing.

#### § 1710.15 Form and content of responses.

(a) *Form of notice granting a request.*

After the Freedom of Information Officer has made a determination to grant a request in whole or in part, the requester will be notified in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record with the response or at a later date, or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection may not unreasonably disrupt the operation of OFHEO. The response letter will also inform the requester of any fees to be charged in accordance with the provisions of subpart C of this part.

(b) *Form of notice denying a request.*

When the Freedom of Information Officer denies a request in whole or in part, he or she will so notify the requester in writing. The response will be signed by the Freedom of Information Officer and will include:

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the Freedom of Information Officer has relied upon in denying the request; and

(3) A statement that the denial may be appealed under § 1710.16 of this subpart, and a description of the requirements of that section.

#### § 1710.16 Appeals of denials.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial to: Freedom of Information Appeals Officer, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW, Fourth Floor, Washington, DC 20552.

(b) *Letter of appeal.* The appeal must be in writing and must be sent within 30 days of receipt of the denial letter. An appeal should include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons or arguments advanced in support of disclosure of the requested record. Both the envelope and the letter of appeal must be clearly marked "FOIA Appeal." An appeal improperly addressed shall be deemed not to have

been received for purposes of the 20-day time period set forth in paragraph (b) of § 1710.17 until it is received, or would have been received with the exercise of due diligence by OFHEO personnel, by the Freedom of Information Appeals Officer.

(c) *Action on appeal.* The disposition of an appeal will be in writing and will constitute the final action of OFHEO on a request. A decision affirming in whole or in part the denial of a request will include a brief statement of the reason or reasons for affirmance, including each FOIA exemption relied on. If the denial of a request is reversed in whole or in part on appeal, the request will be processed promptly in accordance with the decision on appeal.

(d) *Judicial review.* If the denial of the request for records is upheld in whole or in part, or, if a determination on the appeal has not been mailed at the end of the 20-day period or the last extension thereof, the requester is deemed to have exhausted his or her administrative remedies, giving rise to a right of judicial review under 5 U.S.C. 552(a)(4).

#### § 1710.17 Time limits.

(a) *Initial request.* Following receipt of a request for records, the Freedom of Information Officer will determine whether to comply with the request and will notify the requester in writing of his or her determination within ten days (excluding Saturdays, Sundays, and legal holidays) after receipt of the request.

(b) *Appeal.* A written determination on an appeal submitted in accordance with § 1710.16 of this subpart will be issued within 20 days (excluding Saturdays, Sundays, and legal holidays) after receipt of the appeal. When a determination cannot be mailed within the applicable time limit, the appeal will nevertheless be processed. In such case, upon the 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 mailed, and of that person's right to seek judicial review. The requester may be asked to forego judicial review until determination of the appeal.

(c) *Extension of time limits.* The time limits specified in either paragraph (a) or (b) of this section may be extended in unusual circumstances up to a total of ten days (excluding Saturdays, Sundays, and legal holidays) after written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be made. As used in this paragraph, *unusual circumstances* means that there is a need to—

(1) Search for and collect the requested records from facilities that are separate from the office processing the request;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) Consult with another agency having a substantial interest in the determination of the request, or consult with various offices within OFHEO that have a substantial interest in the records requested.

#### § 1710.18 Business Information.

(a) *In general.* Business information provided to OFHEO by a business submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.* For the purpose of this section, the following definitions shall apply:

(1) *Business information* means trade secrets or other commercial or financial information, provided to OFHEO by a submitter, which arguably is protected from disclosure under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4).

(2) *Business submitter* means any person or entity which provides business information, directly or indirectly, to OFHEO and who has a proprietary interest in the information.

(3) *Freedom of Information Officer* means the Freedom of Information Officer of OFHEO.

(4) *Freedom of Information Appeals Officer* means the Freedom of Information Appeals Officer of OFHEO.

(5) *Requester* means the person or entity making the FOIA request.

(c) *Designation of business information.* Submitters of business information should use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of their submissions which they deem to be protected under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). Any such designation will expire ten years after the records were submitted to the government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(d) *Predisclosure notification.* (1) Except as is provided for in paragraph (i) of this section, the Freedom of Information Officer shall, to the extent permitted by law, provide a submitter with prompt written notice of a FOIA request or administrative appeal encompassing its business information

whenever required under paragraph (e) of this section. Such notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information. The requester also shall be notified that notice and an opportunity to object are being provided to the submitter.

(2) Whenever the Freedom of Information Officer provides a business submitter with the notice set forth in paragraph (e)(1) of this section, the Freedom of Information Officer shall notify the requester that the request includes information that may arguably be exempt from disclosure under 5 U.S.C. 552(b)(4) and that the person or entity who submitted the information to OFHEO has been given the opportunity to comment on the proposed disclosure of information.

(e) *When notice is required.* OFHEO shall provide a business submitter with notice of a request whenever:

(1) The business submitter has in good faith designated the information as commercially or financially sensitive information deemed protected from disclosure under 5 U.S.C. 552(b)(4); or

(2) OFHEO has reason to believe that disclosure of the information may result in commercial or financial injury to the business submitter.

(f) *Opportunity to object to disclosure.* Through the notice described in paragraph (d) of this section, OFHEO shall, to the extent permitted by law, afford a business submitter a reasonable period within which it can provide OFHEO with a detailed written statement of any objection to disclosure. Such statement shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential and why disclosure would cause competitive harm. Whenever possible, the business submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the business submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* (1) The Freedom of Information Officer shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the Freedom of Information Officer decides to disclose business information over the objection of a business submitter, the Freedom of Information Officer shall forward to the business submitter a written notice at least ten days (excluding Saturdays,

Sundays, and legal holidays) before the date of disclosure containing—

(i) A statement of the reasons for which the business submitter's disclosure objections were not sustained,

(ii) A description of the business information to be disclosed, and

(iii) A specified disclosure date.

(2) Such notice of intent to disclose shall be forwarded to the submitter a reasonable number of days prior to the specified disclosure date and the requester shall be notified likewise.

(h) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information, the Freedom of Information Officer shall promptly notify the business submitter of such action.

(i) *Exceptions to predisclosure notification.* The requirements of this section shall not apply if—

(1) The Freedom of Information Officer determines that the information should not be disclosed;

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

(3) Disclosure of the information is required by law (other than 5 U.S.C 552); or

(4) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous; except that, in such a case, the Freedom of Information Officer will provide the submitter with written notice of any final administrative decision to disclose business information within a reasonable number of days prior to a specified disclosure date.

### Subpart C—Fees for Provision of Information

#### § 1710.21 Definitions.

For the purpose of this subpart, the following definitions shall apply:

(a) *Commercial use request* means a request for information that is from, or on behalf of, a requester seeking 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 being made. To determine whether a request is properly classified as a commercial use request, OFHEO shall determine the purpose for which the requested documents shall be used. If OFHEO has reasonable cause to doubt the purpose specified in the request for which a requester will use the records sought, or where the purpose is not clear from the request itself, OFHEO shall seek additional clarification before assigning the request to a specified category.

(b) *Direct costs* means the expenditures actually incurred by OFHEO in searching for and reproducing documents to respond to a request for information. In the case of a commercial use request, the term also means those expenditures OFHEO actually incurs in reviewing documents to respond to the request. The direct cost shall include the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplication equipment. 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.

(c) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(d) *Non-commercial scientific institution* refers to an institution that is not operated on a commercial, trade, or profit basis 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.

(e) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances in which the periodicals can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve, e.g., electronic dissemination of newspapers through telecommunication services, such alternative media would be included in this category. "Freelance" journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization even though they are not actually employed by the organization. A publication contract would be the clearest proof that a journalist is working for a news organization, but OFHEO may look to the requester's past publication record to determine whether

a journalist is working for a news organization.

(f) *Reproduce and reproduction* mean the process of making a copy of a document necessary to respond to a request for information. Such copies take the form of paper copy, microfilm, audio-visual materials, or machine readable documentation, e.g., magnetic tape or disk. The copy provided shall be in a form that is reasonably usable by requesters.

(g) *Review* means the process of examining documents located in response to a request for information 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 prepare the documents for release. The term *review* does not include the time spent resolving general legal or policy issues regarding the application of exemptions. OFHEO shall only charge fees for reviewing documents in response to a commercial use request.

(h) The term *search* includes all time spent looking for material that is responsive to a request for information, including page-by-page or line-by-line identification of material within documents. The term *search* includes the extraction of information from a computer using existing programming. Searching for materials shall be done in the most efficient and least expensive manner so as to minimize the costs of OFHEO and the requester. For example, a line-by-line search for responsive material should not be performed when merely reproducing an entire document would be less expensive and the faster method of complying with the request for information. A *search* for material that is responsive to a request should be distinguished from a *review* of material to determine whether the material is exempt from disclosure.

#### § 1710.22 Fees to be charged—general.

(a) *Policy.* Generally, the fees charged for requests for records pursuant to 5 U.S.C. 552 shall cover the full allowable direct costs of searching for, reproducing, and reviewing documents that are responsive to a request for information. Fees shall be assessed according to the schedule contained in paragraph (b) of this section and the category of requesters described in § 1710.23 of this subpart for services rendered by OFHEO staff in responding to, and processing requests for, records under this part. Fees assessed will be paid by check or money order payable to the Office of Federal Housing Enterprise Oversight.

(b) *Types of charges.* The types of charges that may be assessed in connection with the production of records in response to a FOIA request are as follows:

(1) *Searches.* (i) *Manual searches for records.* Whenever feasible, OFHEO will charge at the salary rate(s), *i.e.*, basic pay plus 16 percent, of the employee(s) making the search. Charges for search time will be billed by 15-minute segments.

(ii) *Computer searches for records.* Requesters will be charged at the actual direct costs of conducting a search using existing programming. These direct costs will include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for records and the operator/programmer salary, *i.e.*, basic pay plus 16 percent, apportionable to the search. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon the prevailing levels of costs to OFHEO for the type and amount of such supplies of materials that are used. Nothing in this paragraph shall be construed to entitle any person or entity, as of right, to any services in connection with computerized records, other than services to which such person or entity may be entitled under the provisions of this subpart. OFHEO will not alter or develop programming to conduct a search.

(iii) *Unproductive searches.* OFHEO will charge search fees even if no records are found which are responsive to the request, or if the records found are exempt from disclosure.

(2) *Duplication.* Records will be reproduced at a rate of \$.15 per page. For copies prepared by computer, such as tapes or printouts, the requester shall be charged the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction, the actual direct costs of reproducing the document(s) shall be charged.

(3) *Review.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for initial review, *i.e.*, the review undertaken the first time OFHEO analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that 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 are properly assessable.

(4) *Other services and materials.* Where OFHEO elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending records by special methods, the actual direct costs of providing the service or materials will be charged.

#### § 1710.23 Fees to be charged—categories of requesters.

(a) *Fees for various requester categories.* Paragraphs (b) through (e) of this section state, for each category of requester, the types of fees generally charged by OFHEO. However, for each of these categories, the fees may be limited, waived or reduced in accordance with the provisions set forth in paragraph (c) of § 1710.24. If OFHEO has reasonable cause to doubt the purpose specified in the request for which a requester will use the records sought, or where the purpose is not clear from the request itself, OFHEO will seek clarification before assigning the request a specific category.

(b) *Commercial use requester.* OFHEO shall charge fees for records requested by persons or entities making a commercial use request in an amount that equals the full direct costs for searching for, reviewing for release, and reproducing the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. In accordance with § 1710.22, commercial use requesters may be charged the costs of searching for and reviewing records even if there is ultimately no disclosure of records.

(c) *Educational and noncommercial scientific institutions.* OFHEO shall charge fees for records requested by, or on behalf of, educational institutions and non-commercial scientific institutions in an amount which equals the cost of reproducing the documents responsive to the request, excluding the cost of reproducing the first 100 pages. No search fee shall be charged with respect to requests by educational and noncommercial scientific institutions. For a request to be included in this category, requesters must show that the request being made is authorized by and under the auspices of a qualifying institution and that the records are not sought for commercial use but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a non-commercial scientific institution).

(d) *News media.* OFHEO shall charge fees for records requested by representatives of the news media in an amount which equals the cost of reproducing the documents responsive to the request, excluding the costs of reproducing the first 100 pages. No search fee shall be charged with respect to requests by representatives of the news media. For a request to be included in this category, the requester must qualify as a representative of the news media and the request must not be made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use.

(e) *All other requesters.* OFHEO shall charge fees for records requested by persons or entities that are not classified in any of the categories listed in paragraphs (b), (c), or (d) of this section in an amount that equals the full reasonable direct cost of searching for and reproducing records that are responsive to the request, excluding the first two hours of search time and the cost of reproducing the first 100 pages of records. In accordance with § 1710.22, requesters in this category may be charged the cost of searching for records even if there is ultimately no disclosure of records, excluding the first two hours of search time.

(f) For purposes of the exceptions contained in this section on assessment of fees, the word *pages* refers to paper copies of "8½×11" or "11×14." Thus, requesters are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or a computer disk containing the equivalent of 100 pages of computer printout meets the terms of the exception.

(g) For purposes of paragraph (e) of this section, the term *search time* has as its basis, manual search. To apply this term to searches made by computer, OFHEO will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary plus 16 percent of the person performing the search, *i.e.*, the operator, OFHEO will begin assessing charges for the computer.

#### § 1710.24 Limitations on charging fees.

(a) *In general.* Except for requesters seeking records for a commercial use as described in § 1710.23(b), OFHEO will provide, without charge, the first 100 pages of duplication and the first two

hours of search time, or their cost equivalent.

(b) *No fee charged.* OFHEO will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. The elements to be considered in determining the "cost of collecting a fee" are the administrative costs of receiving and recording a requester's remittance, and processing the fee.

(c) *Waiver or reduction of fees.* OFHEO may grant a waiver or reduction of fees if OFHEO determines that the 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 Federal government, and the disclosure of the information is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees will be considered on a case-by-case basis.

(1) The following factors will be considered by OFHEO in determining whether a waiver or reduction of fees is in the public interest:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject matter of the requested records, in the context of the request, must specifically concern identifiable operations or activities of the Federal government with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; a request for access to records for their intrinsic informational content alone will not satisfy this threshold consideration.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.* The disclosable portions of the requested records must be meaningfully informative on specific government operations or activities in order to hold potential for contributing to increased public understanding of those operations and activities. The disclosure of information that is already in the public domain, in either a duplicative or substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record.

(iii) *The contribution to an understanding of the subject by the general public: Whether disclosure of the requested information will contribute to the "public understanding."* The disclosure must

contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications, e.g., expertise in the subject area and ability and intention to convey information to the general public, will be considered.

(iv) *The significance of the contribution in public understanding: Whether the disclosure is likely to "significantly enhance" the public understanding of government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. The Freedom of Information Officer shall not make a separate value judgment as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is "important" enough to be made public.

(2) In order to determine whether the second fee waiver requirement is met, i.e., that disclosure of the requested information is not primarily in the commercial interest of the requester, OFHEO shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest: Whether the requester, or any person on whose behalf the requester may be acting, has a commercial interest that would be furthered by the requested disclosure.* In assessing the magnitude of identified commercial interests, consideration will be given to the effect that the information disclosed would have on those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) *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."* A fee waiver or reduction is warranted only where, once the "public interest" standard set out in paragraph (c)(1) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. OFHEO will ordinarily presume that, where a news media requester has satisfied the public interest standard,

the public interest will be serviced primarily by disclosure to that requester. Disclosure to requesters who compile and market Federal government information for direct economic return will not be presumed to primarily serve the "public interest."

(3) Where only a portion of the requested record satisfies the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(4) A request for a waiver or reduction of fees must accompany the request for disclosure of records, and should include—

(i) A clear statement of the requester's interest in the documents;

(ii) The proposed use of the documents and whether the requester will derive income or other benefit from such use;

(iii) A statement of how the public will benefit from release of the requested documents; and

(iv) If specialized use of the documents is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(5) A requester may appeal the denial of a request for a waiver or reduction of fees in accordance with the provisions of § 1710.16.

#### § 1710.25 Miscellaneous fee provisions.

(a) *Notice of anticipated fees in excess of \$25.00.* Where OFHEO determines or estimates that the fees chargeable will amount to more than \$25.00, OFHEO shall promptly notify the requester of the actual or estimated amount of fees or such portion thereof that can be readily estimated, unless the requester has indicated his or her willingness to pay fees as high as those anticipated. Where a requester has been notified that the actual or estimated fees may exceed \$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 the requester pursuant to this paragraph will include the opportunity to confer with OFHEO personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(b) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid the payment of fees. When OFHEO reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, OFHEO may aggregate such requests and charge accordingly. One

element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred. OFHEO will presume that multiple requests of this type made within a 30-day period have been made in order to evade fees. Where requests are separated by a longer period, OFHEO shall aggregate them only where there exists a solid basis for determining that such aggregation is warranted, e.g., where the requests involve clearly related matters. Multiple requests regarding unrelated matters will not be aggregated.

(c) *Advance payment of fees.* OFHEO does not require an advance payment before work is commenced or continued, unless:

(1) OFHEO estimates or determines that the fees are likely to exceed \$250.00. If it appears that the fees will exceed \$250.00, OFHEO will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees. In the case of requesters with no history of payment, OFHEO may require an advance payment of fees in an amount up to the full estimated charge that will be incurred; or

(2) The requester has previously failed to pay a fee in a timely fashion, i.e., within 30 days of the date of a billing. In such cases, OFHEO may require the requester to pay the full amount owed plus any applicable interest, as provided in paragraph (d) of this section, or demonstrate that the fee owed has been paid, prior to processing any further record request. Under these circumstances, OFHEO may require the requester to make an advance payment of the full amount of the fees anticipated before processing a new request or finishing processing of a pending request from that requester.

(3) A request for an advance deposit shall include an offer to the requester to confer with identified OFHEO personnel to attempt to reformulate the request in a manner which will meet the needs of the requester at a lower cost.

(4) When OFHEO requests an advance payment of fees, the administrative time limits described in 5 U.S.C. 552(a)(6) begin only after OFHEO has received the advance payment.

(d) *Interest.* OFHEO may assess interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Once a fee payment has been received by OFHEO, even if not processed, the accrual of interest shall be stayed. Interest charges shall be assessed at the rate prescribed in 31 U.S.C. 3717 and shall accrue from the date of the billing.

#### **Subpart D—Testimony and Production of Documents in Legal Proceedings in Which the Office of Federal Housing Enterprise Oversight is Not a Named Party**

##### **§ 1710.31 General purposes.**

The purposes of this subpart are to maintain the confidentiality of official documents and information of OFHEO, conserve the time of OFHEO employees for their official duties, maintain the impartial position of OFHEO in litigation in which OFHEO is not a named party, and enable the Director to determine when to authorize testimony and to produce documents in legal proceedings in which OFHEO is not a named party. This subpart sets forth the procedures to be followed with respect to testimony concerning official matters and production of official documents of OFHEO in legal proceedings in which OFHEO is not a named party. This subpart in no way affects the rights and procedures governing public access to official documents pursuant to the Freedom of Information Act or the Privacy Act.

##### **§ 1710.32 Definitions.**

For the purpose of this subpart:

(a) *Court* means any entity conducting a legal proceeding.

(b) *Demand* means any order, subpoena, or other legal process for testimony or documents.

(c) *Director* means the Director of OFHEO or his or her designee.

(d) *Document* means any record or paper, including but not limited to a report, credit review, audit, examination, letter, telegram, memorandum, study, calendar and diary entry, log, graph, pamphlet, note, chart, tabulation, analysis, statistical or information accumulation, any kind of record of meetings and conversations, film impression, magnetic tape, or any electronic media, disk, film, or mechanical reproduction that is generated, obtained, or adopted by OFHEO in connection with the conduct of its official business.

(e) *Employee* means any officer, former officer, employee, or former employee of OFHEO; any conservator appointed by OFHEO; or any agent or independent contractor acting on behalf of OFHEO, even though the appointment or contract has terminated.

(f) *General Counsel* means the General Counsel of OFHEO or his or her designee.

(g) *Legal proceeding* means any administrative, civil, or criminal proceeding, including a discovery proceeding therein, before a court of law, administrative board or

commission, hearing officer, or other body in which OFHEO is not a named party or in which OFHEO has not instituted the administrative investigation or administrative hearing.

(h) *Official* means concerning the authorized business of OFHEO.

(i) *OFHEO Counsel* means the General Counsel or his or her designee, a Department of Justice attorney, or counsel authorized by OFHEO to act on behalf of OFHEO or an employee.

(j) *OFHEO* means the Office of Federal Housing Enterprise Oversight.

(k) *Person* means any individual, or any agency, corporation, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, or any other form of entity not specifically listed herein but does not include OFHEO or any OFHEO employee.

##### **§ 1710.33 General policy.**

It is the policy of OFHEO that in any legal proceeding in which OFHEO is not a named party, no employee of OFHEO shall, in response to a demand, produce any material contained in the files of OFHEO, or disclose any information relating to, or based upon, material contained in the files of OFHEO, or disclose or produce any material acquired as part of the performance of that employee's official duties or because of that employee's official status. Under appropriate circumstances, the Director may grant exceptions in writing to this policy when the Director determines that the testimony of OFHEO employees or disclosure of official documents would be in the best interest of OFHEO or in the public interest. Prior to any authorized testimony or release of official documents, the requesting party shall obtain a protective order from the court before which the action is pending to preserve the confidentiality of the testimony or documents subsequently produced. The protective order shall be in a form satisfactory to OFHEO.

##### **§ 1710.34 Request for testimony or production of documents.**

(a) No OFHEO employee shall give testimony concerning official matters or produce any official documents in any legal proceeding to which OFHEO is not a named party without the prior written authorization of the Director.

(b) If testimony by an OFHEO employee concerning official matters or the production of official documents is desired, the requesting party, or his or her attorney, shall submit a letter to the Director setting forth the title of the case, the forum, the requesting party's interest in the case, a summary of the

issues in the litigation, the reasons for the request, and a showing that the desired testimony, documents, or information are not reasonably available from any other source. If an appearance or testimony is requested, the letter shall also set forth the intended use of the testimony, a general summary of the scope of the testimony requested, and a showing that no document could be provided and used in lieu of the testimony or other appearance requested.

(c) The General Counsel is authorized to consult with the requesting party or his or her attorney to refine and limit the request so that compliance is less burdensome, or obtain information necessary to make the determination described in § 1710.33 of this part. Failure of the requesting party, or his or her attorney, to cooperate in good faith with the General Counsel to enable the Director to make an informed determination under this subpart may serve as the basis for a determination not to comply with the request.

**§ 1710.35 Scope of permissible testimony.**

(a) The scope of permissible testimony by an OFHEO employee is limited to that set forth in the written authorization granted that employee by the Director.

(b) OFHEO employees are not authorized to give opinion testimony. OFHEO, as the regulatory agency charged with the responsibility of examining, supervising, and regulating the financial safety and soundness and capital adequacy of the Enterprises under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 12 U.S.C. 4501 *et seq.*, relies on the ability of its employees to gather full and complete information in order to carry out its statutory responsibilities. The use of OFHEO employees to give opinion testimony would hamper OFHEO's ability to carry out its statutory responsibilities and would cause a serious administrative burden on OFHEO's staff.

**§ 1710.36 Manner in which testimony is given.**

(a) Authorized testimony of OFHEO employees will be made available only through depositions or written interrogatories.

(b) Where, in response to a request, the Director determines that circumstances warrant authorizing testimony by an OFHEO employee, the requesting party shall cause a subpoena to be served on the employee in accordance with applicable Federal or State rules of procedure, with a copy of

the subpoena sent by registered or certified mail to the General Counsel.

(c) Normally, authorized depositions will be taken at OFHEO's office, and at a time arranged with the employee that is reasonably fixed to avoid substantial interference with the performance of the employee's duties.

(d) Upon completion of the deposition of an OFHEO employee, a copy of the transcript of the testimony shall be furnished, at the expense of the party requesting the deposition, to the General Counsel for OFHEO's files.

**§ 1710.37 Manner in which documents will be produced.**

(a) An OFHEO employee's authorization to produce official documents is limited to the authority granted that employee by the Director.

(b) Certified or authenticated copies of official OFHEO documents authorized by the Director to be released under this subpart will be provided upon request.

**§ 1710.38 Fees.**

Unless waived or reduced, the following fees shall be charged for documents produced by OFHEO in connection with requests subject to this subpart:

(a) *Searches for documents.* OFHEO will charge at the salary rate(s), *i.e.*, basic pay plus 16 percent, of the employee(s) making the search. Charges for search time will be billed by 15 minute segments.

(b) *Copying of documents.* The standard copying charge for documents in paper copy is \$.15 per page. When responsive information is provided in a format other than paper copy, such as in the form of computer tapes and disks, OFHEO will assess the direct costs of the tape, disk, or whatever medium is used to produce the information, as well as any related reproduction costs. Normally, only one copy will be provided. Additional copies will be provided only upon a showing of demonstrated need.

(c) *Certification or authentication of documents.* OFHEO will charge \$3.00 for each certification or authentication of documents.

(d) *Computer searches.* Services of personnel in the nature of a computer search shall be charged at rates prescribed in paragraph (a) of this section. A charge shall be made for the computer time involved, based upon the prevailing level of costs to OFHEO and upon the particular types of computer and associated equipment and the amount of time that such equipment is utilized. A charge shall also be made for any substantial amount of special supplies or materials used to contain,

present, or make available the output of computers, based upon prevailing levels of costs to OFHEO and upon the type and amount of such supplies or materials that are used.

(e) *Other costs.* When other services and materials not specifically identified in this section are requested and provided, their actual cost to OFHEO shall be charged.

(f) *Payments of fees.* A bill will be forwarded to the requesting party upon completion of the production. Payment shall be made by check or money order payable to the Office of Federal Housing Enterprise Oversight.

**§ 1710.39 Response to demands served on OFHEO employees.**

(a) *Advice by person served.* Any OFHEO employee who is served with a demand in a legal proceeding requiring his or her personal attendance as a witness or requiring the production of documents or information in any proceeding, shall immediately notify OFHEO's General Counsel of such service, of the testimony and documents described in the demand, and of all relevant facts which may be of assistance to the General Counsel in determining whether the individual in question should be authorized to testify or the material requested should be made available.

(b) When authorization to testify or to produce documents has not been granted by the Director, OFHEO Counsel shall provide the party issuing the demand or the court with a copy of the regulations contained in this subpart and shall inform the party issuing the demand or the court that the employee upon whom the demand has been made is prohibited from testifying or producing documents without the prior approval of the Director.

(c) *Appearance by person served.* Unless OFHEO has authorized disclosure of the information requested, any OFHEO employee who has OFHEO information that may not be disclosed, and who is required to respond to a subpoena or other legal process, shall attend at the time and place required and respectfully decline to disclose or to give any testimony with respect to the information, basing such refusal upon the provisions of this subpart. If the court nevertheless orders the disclosure of the information or the giving of testimony irrespective of instructions from the Director not to produce the documents or disclose the information sought, the OFHEO employee upon whom the demand has been made shall continue to decline respectfully to disclose the information and shall report promptly the facts to OFHEO for

such action as OFHEO may deem appropriate.

(d) A determination under this subpart to comply or not to comply with any demand shall not constitute an assertion or waiver of privilege, lack of relevance, technical deficiencies or any other ground for noncompliance. OFHEO reserves the right to oppose any demand on any legal ground independent of its determination under this subpart.

**§ 1710.40 Responses to demands served on non-OFHEO employees or entities for OFHEO documents.**

(a) OFHEO reports of examinations, or any documents related thereto, are the property of OFHEO and are not to be disclosed to any person without the Director's prior written consent.

(b) If any person who has possession of an OFHEO report of examination, or any documents related thereto, is served with a demand in a legal proceeding directing that person to produce such OFHEO documents or to testify with respect thereto, such person shall immediately notify OFHEO's General Counsel of such service, of the testimony and described documents in the demand, and of all relevant facts. Such person shall also object to the production of such documents or information contained therein on the basis that the documents are the property of OFHEO and cannot be released without OFHEO's consent and that their production must be sought from OFHEO following the procedures set forth in § 1710.33, § 1710.34 (b) and (c), and § 1710.37(b) of this part.

**§ 1710.41 Orders and agreements available to the public.**

(a) *General.* OFHEO shall make the following documents available to the public:

(1) Any written agreement or other written statement for which a violation may be redressed by the Director or any modification to or termination thereof, unless the Director, in the Director's discretion, determines that public disclosure would be contrary to the public interest;

(2) Any order that is issued with respect to any administrative enforcement proceeding initiated by the Director that has become final in accordance with 12 U.S.C. 4633 and 4634; and

(3) Any modification to or termination of any final order made public pursuant to this section.

(4) Transcripts of any public enforcement hearing on the record with respect to any action of the Director or notice of charges issued by the Director shall be available to the public.

(b) *Delay of public disclosure under exceptional circumstances.* If the Director makes a determination in writing that the public disclosure of any final order pursuant to paragraph (a) of this section would seriously threaten the financial health or security of the Enterprise, the Director may delay the public disclosure of such order for a reasonable time.

(c) *Documents filed under seal in public enforcement hearings.* The Director may file any document or part thereof under seal in any hearing commenced by the Director if the Director determines in writing that disclosure thereof would be contrary to the public interest.

(d) *Retention of documents.* The Director shall keep and maintain a record, for not less than six years, of all documents described in paragraph (a) of this section and all enforcement agreements and other supervisory actions and supporting documents issued with respect to or in connection with any enforcement proceedings initiated by the Director under 12 U.S.C. 4631-4641.

(e) *Disclosure to Congress.* This section may not be construed to authorize the withholding of any information from, or to prohibit the disclosure of any information to, the Congress or any committee or subcommittee thereof.

**Subpart E—Rules and Procedures for Service Upon the Office of Federal Housing Enterprise Oversight**

**§ 1710.51 Service of process.**

(a) Except as otherwise provided by OFHEO regulations, the Federal Rules of Civil Procedure, or order of a court with jurisdiction over OFHEO, any legal process upon OFHEO, including a legal process served on OFHEO demanding access to its records under the FOIA, shall be duly issued and served upon the General Counsel and any OFHEO personnel named in the caption of the documents.

(b) Service of process upon the General Counsel to OFHEO may be effected by personally delivering a copy of the documents to the General Counsel or by sending a copy of the documents to the General Counsel by registered or certified mail, postage prepaid, to the Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552.

Dated: May 5, 1995.

**Aida Alvarez,**

*Director, Office of Federal Housing Enterprise Oversight.*

[FR Doc. 95-11546 Filed 5-10-95; 8:45 am]

BILLING CODE 4220-01-P

**12 CFR Chapter XVII**

**RIN 2550-AA02**

**Risk-Based Capital**

**AGENCY:** Office of Federal Housing Enterprise Oversight, HUD.

**ACTION:** Extension of Public Comment Period for Advance Notice of Proposed Rulemaking.

**SUMMARY:** On February 8, 1995 (60 FR 7468), the Office of Federal Housing Enterprise Oversight (OFHEO) published an advance notice of proposed rulemaking (ANPR) entitled "Risk-Based Capital." This ANPR is a significant step in the process of developing a regulation to establish risk-based capital standards for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. To ensure that the public has ample opportunity to participate in the rulemaking process by commenting on a variety of technical and policy issues involved in the development of the risk-based regulation and the risk-based capital stress test, today's notice extends the public comment period from May 9, 1995 through June 8, 1995.

**DATES:** The comment period is extended until June 8, 1995.

**ADDRESSES:** Send written comments to Anne E. Dewey, General Counsel, Office of General Counsel, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552.

**FOR FURTHER INFORMATION CONTACT:** David J. Pearl, Director, Research, Analysis and Capital Standards; or Gary L. Norton, Deputy General Counsel, Office of Federal Housing Enterprise Oversight, 1700 G Street, NW., Fourth Floor, Washington, DC 20552, telephone (202) 414-3800 (not a toll-free number).

Dated: May 8, 1995.

**Aida Alvarez,**

*Director, Office of Federal Housing Enterprise Oversight.*

[FR Doc. 95-11687 Filed 5-8-95; 3:13 pm]

BILLING CODE 4220-01-P