

Rockville, MD 20580, and the Office of the Federal Register, 800 North Capitol St. NW, suite 700, Washington DC.

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Dated: October 19, 1999.

**Margaret M. Dotzel,**

*Acting Associate Commissioner for Policy.*

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## FEDERAL MEDIATION AND CONCILIATION SERVICE

### 29 CFR Part 1401

RIN 3076-AA06

### Freedom of Information Act Regulations

**AGENCY:** Federal Mediation and Conciliation Service.

**ACTION:** Proposed rule.

**SUMMARY:** The Federal Mediation and Conciliation Service (FMCS) proposes to amend its rules under the Freedom of Information Act (FOIA) primarily to effectuate various provisions under the 1996 Electronic FOIA Amendments. The proposed revisions include the new response time for FOIA requests, procedures for requesting expedited processing, the availability of certain public information on FMCS's web site, and express inclusion of electronic records and automated searches along with paper records and manual searches. In addition, FMCS's proposed amendments would update its fee schedule. FMCS is also updating the names and addresses of the various offices within the agency responsible for FOIA related activities. This rulemaking only deals with such matters at FMCS; it is not an executive branchwide regulation.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before January 3, 2000.

**ADDRESSES:** Send comments to Jane Lorber, General Counsel, Federal Mediation and Conciliation Service, 2100 K Street, NW, Washington, DC 20427.

**FOR FURTHER INFORMATION CONTACT:** Jane Lorber, (202) 606-5444.

**SUPPLEMENTARY INFORMATION:** In this rulemaking, FMCS proposes to amend its regulations at 29 CFR part 1401, Subpart B under FOIA, 5 U.S.C. 552. The primary focus of these proposed amendments is to effectuate for this Agency various provisions under the 1996 Electronic FOIA Amendments,

Public Law 104-231. New provisions implementing the amendments are found at § 1401.21(c) (electronic reading room), §§ 1401.34(b), (c), (e), (f) (timing of responses), § 1401.22 (deletion marking), § 1401.34(d) (volume estimation), § 1401.36(a)(3) (format of disclosure) and § 1401.36(a)(2) (electronic searches).

Proposed revisions to the Service's fee schedule can be found at §§ 1401.36(b)(1), (3)(v). The duplication charge will remain the same at twenty cents per page, while document search and review charges will increase to \$4.00 and \$10.00 for clerical and professional time, respectively. The amount at or below which the Service will not charge a fee will decrease from \$50.00 to \$14.00.

Sections 1401.22(d), 1401.31(a),(b) and 1401.32(b) are being revised to reflect organizational name changes within FMCS. Sections 1401.24 and 1401.37 are being removed because they are neither required by law nor necessary to interpret the law.

### Regulatory Flexibility Act

The Director, in accordance with the Regulatory Flexibility Act (5 U.S.C. 606(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Under FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Thus, fees assessed by FMCS are nominal. Further, the "small entities" that make FOIA requests, as compared with individual requesters and other requesters, are relatively few in number.

### Executive Order 12866

This regulation has been reviewed in accordance with Executive Order 12866. It is not classified as significant because it does not meet the criteria for significant regulatory action established by the Executive Order.

### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small Governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

### Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with Foreign-based companies in domestic and export markets.

### List of Subjects in 29 CFR Part 1401

Administrative practice and procedure, Freedom of Information.

For the reasons set forth in the preamble, FMCS proposes to amend 29 CFR part 1401 as follows:

### PART 1401—PUBLIC INFORMATION

1. The authority citation for part 1401 is revised to read as follows:

**Authority:** 5 U.S.C. 552.

2. Subpart B of part 1401 is revised to read as follows:

#### Subpart B—Production or Disclosure of Information

Sec.

- 1401.20 Purpose and scope.
- 1401.21 Information policy.
- 1401.22 Partial disclosure of records.
- 1401.23 Preparation of new records.
- 1401.30 Applicability of procedures.
- 1401.31 Filing a request for records.
- 1401.32 Logging of written requests.
- 1401.33 Description of information requested.
- 1401.34 Time for processing requests.
- 1401.35 Appeals from denials of request.
- 1401.36 Freedom of Information Act fee schedules.

#### Subpart B—Production or Disclosure of Information

##### § 1401.20 Purpose and scope.

This subpart contains the regulations of the Federal Mediation and Conciliation Service providing for public access to information from records of the Service. These regulations implement the Freedom of Information Act, 5 U.S.C. 552, and the policy of the FMCS to disseminate information on matters of interest to the public and to disclose on request information contained in agency records insofar as is compatible with the discharge of its responsibilities and the principle of confidentiality and neutrality of dispute resolution by third party neutrals.

**§ 1401.21 Information policy.**

(a) Except for matters specifically excluded by subsection 552(b) of title 5, United States Code, matters covered by the Privacy Act, or other applicable statutes, all documents and records maintained by this agency or in its custody shall be available to the public upon request filed in accordance with these regulations. To the extent permitted by other laws, the Service also will make available records which it is authorized to withhold under 5 U.S.C. 552(b) whenever it determines that such disclosure is in the public interest.

(b) Any document released for inspection under the provisions of this part may be manually copied by the requesting party. The Service shall provide facilities for copying such documents at reasonable times during normal working hours so long as it does not interfere with the efficient operation of the agency.

(c) The Service maintains a public reading room that contains the records that the FOIA requires to be made regularly available for public inspection and copying. FMCS shall maintain and make available for public inspection and copying a current subject-matter index of its reading room records. Each index shall be updated regularly, at least quarterly, with respect to newly included records. FMCS shall also make reading room records created by the Service on or after November 1, 1996, available electronically through FMCS's World Wide Web Site (which can be found at <http://www.fmcs.gov>)

(d) Records or documents prepared by the Service for routine public distribution, e.g., pamphlets and brochures, will be furnished upon request to Office of the Director, Federal Mediation and Conciliation Service, 2100 K Street, NW, Washington, DC 20427, as long as the supply lasts. The provisions of § 1401.36 (fees) is not applicable to such requests except when the supply of such material is exhausted and it is necessary to reproduce individual copies upon specific request.

(e) All existing FMCS records are subject to routine destruction according to standard record retention schedules.

**§ 1401.22 Partial disclosure of records.**

(a) If a record contains both disclosable and nondisclosable information, the nondisclosable information will be deleted and the remaining record will be disclosed unless the two are so inextricably intertwined that it is not feasible to separate them or release of the disclosable information would

compromise or impinge upon the nondisclosable portion of the record.

(b) Records disclosed in part shall be marked or annotated to show both the amount and the location of the information deleted wherever practicable.

**§ 1401.23 Preparation of new records.**

(a) The Freedom of Information Act and the provisions of this part apply only to existing records that are reasonably described in a request filed with the Federal Mediation and Conciliation Service pursuant to the procedures established in §§ 1401.31–1401.36.

(b) The Director may, in his or her discretion, prepare new records in order to respond to a request for information when he or she concludes that it is in the public interest and promotes the objectives of the Labor-Management Relations Act, 1947, as amended.

**§ 1401.30 Applicability of procedures.**

Requests for inspection or copying of information from records in the custody of the FMCS which are reasonably identifiable and available under the provisions of this part shall be made and acted upon as provided in the following sections of this subpart. The prescribed procedure shall be followed in all cases where access is sought to official records pursuant to the provisions of the Freedom of Information Act, except with respect to records for which a less formal disclosure procedure is provided specifically in this part.

**§ 1401.31 Filing a request for records.**

(a) Any person who desires to inspect or copy any record covered by this part shall submit a written request to that effect to the Office of the General Counsel, Federal Mediation and Conciliation Service, 2100 K Street, NW, Washington, DC 20427.

(b) The Office of the General Counsel will determine what office or division within FMCS is custodian of the records. The Office will then send the request to the appropriate FMCS office or division as provided in § 1401.32(b) of this part.

**§ 1401.32 Logging of written request.**

(a) All requests for records should be clearly and prominently identified as a request for information under the Freedom of Information Act, and if submitted by mail or otherwise submitted in an envelope or other cover, should be clearly and prominently identified as such on the envelope or other cover.

(b) Upon receipt of a request for records from the Office of the General

Counsel, the FMCS office or division responding to the request shall enter it in a public log. The log shall state the date and time received, the name and address of person making the request, the nature of the records requested, the action taken on the request, the date of the determination letter sent pursuant to § 1401.34(b) and (d), the date(s) any records are subsequently furnished, the number of staff hours and grade levels of persons who spent time responding to the request, and the payment requested and received.

**§ 1401.33 Description of information requested.**

(a) Each request should reasonably describe the records being sought, in a way that they can be identified and located. A request should include all pertinent details that will help identify the records sought.

(b) If the description is insufficient, the officer processing the request will so notify the person making the request and indicate the additional information needed. Every reasonable effort shall be made to assist in the identification and location of the records sought.

**§ 1401.34 Time for processing requests.**

(a) All time limitations established pursuant to this section shall begin as of the time at which a request for records is logged in by the officer or employee processing the request pursuant to § 1401.32(b). An oral request for records shall not begin any time requirement. A written request for records sent to an office or division of FMCS other than the one having authority to grant or deny access to the records shall be redirected to the appropriate office for processing, and the time shall begin upon its being logged in there in accordance with § 1401.32(b).

(b) The officer or employee passing upon the request for records shall, within twenty (20) working days following receipt of the request, respond in writing to the requester, determining whether, or the extent to which, the Agency shall comply with the request.

(1) If all of the records requested have been located and a final determination has been made with respect to disclosure of all the records requested, the response shall so state.

(2) If all of the records have not been located or a final determination has not been made with respect to disclosure of all records requested, the response shall state the extent to which the records involved will be disclosed pursuant to the rules established in this part.

(3) If the request is expected to involve an assessed fee in excess of \$50.00, the response shall specify or

estimate the fee involved and shall require prepayment before the records are made available.

(4) Whenever possible, the response relating to a request for records that involves a fee of less than \$50.00, shall be accompanied by the requested records. Where this is not possible, the records shall be forwarded as soon as possible thereafter, consistent with other obligations of the Agency.

(c) Where the time limits for processing a request cannot be met because of unusual circumstances and FMCS determines to extend the time limit on that basis, FMCS will, as soon as practicable, notify the requester in writing of the unusual circumstances and of the date by which the processing can be expected to be completed. Where the extension is for more than 10 working days, FMCS will provide the requester with an opportunity either to modify the request so that it may be processed within the time limits or to arrange an alternative time period for processing the request or a modified request. If FMCS reasonably believes that multiple requests submitted by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, they may be aggregated.

(d) If any request for records is denied in whole or in part, the response required by paragraph (b) of this section shall notify the requester of the denial. Such denial shall specify the reason therefor and also advise that the denial may be appealed to the Office of Deputy Director of the Agency as specified in § 1401.35. In addition, such denial shall include an estimate of the volume of records or information withheld, in numbers of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable estimation.

(e) FMCS offices may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and or time needed to process the request. A person making a request that does not qualify for the fastest multitrack processing should be given an opportunity to limit the scope of the request in order to qualify for faster processing.

(f) Requests and appeals will be taken out of order and given expedited processing in cases where the requester demonstrates a compelling need.

(1) The term "compelling need" means:

(i) Circumstances in which failure to obtain copies of the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

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

(2) A requester seeking expedited processing should so indicate in the initial request, and should state all the facts supporting the need to obtain the requested records quickly. The requester must also certify in writing that these facts are true and correct to the best of the requester's knowledge and belief.

(3) Within 10 calendar days of its receipt of a request for expedited processing, FMCS will notify the requester of its decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

#### § 1401.35 Appeals from denials of request.

(a) Whenever any request for records is denied, a written appeal may be filed with the Deputy Director, Federal Mediation and Conciliation Service, 2100 K Street, NW, Washington, DC 20427, within 30 days after the requester receives notification that the request has been denied or after the requester receives any records being made available, in the event of partial denial. The appeal shall state the grounds for appeal, including any supporting statements or arguments.

(b) Final action on the appeal shall be taken within 20 working days from the time of receipt of the appeal. Where novel and complicated questions have been raised or unusual difficulties have been encountered, the Deputy Director may extend the time for final action up to an additional 10 days, depending upon whether there had been an extension pursuant to § 1401.34(c) at the initial stage. In such cases, the applicant shall be notified in writing of the reasons for the extension of time and the approximate date on which a final response will be forthcoming.

(c) If on appeal the denial of the request for records is upheld in whole or in part, the Deputy Director shall notify the applicant of the reasons therefor, and shall advise the requester of the provisions for judicial review under 5 U.S.C. 552(a)(4) and (6).

#### § 1401.36 Freedom of Information Act fee schedules.

(a) *Definitions.* For purpose of § 1401.36, the following definitions apply:

(1) *Direct costs* means those expenditures which are actually incurred in searching for and duplicating and, in the case of commercial use requesters, reviewing to respond to a FOIA request.

(2) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(3) *Duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Copies may be in various forms including machine readable documentation (e.g. magnetic tape or disk) among others. A requester's specified preference of form or format of disclosure will be honored if the record is readily reproducible with reasonable efforts in the requested form or format.

(4) *Review* refers to the process of examining documents located in response to a request that is for commercial use, to determine whether a document or any portion of any document located is permitted to be withheld. It includes processing any documents for disclosure to the requester, e.g., doing all that is necessary to excise them or otherwise prepare them for release.

(5) *Commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial trade or profit interest of the requester or the person on whose behalf the request is made.

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

(7) *Representative of the news media* refers to 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. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a reasonable

expectation of publication through the organization, even though not actually employed by it.

(8) *Non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as defined under "commercial use request" in paragraph (a)(5) of this section, 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.

(b) *Fee schedules and waivers.* Requests submitted shall be subject to direct costs, including search, duplication and review, in accordance with the following schedules, procedures and conditions.

(1) *Schedule of charges.—(i) Clerical time.* For each one-quarter hour or portion thereof of clerical time, \$4.00.

(ii) *Professional time.* For each one-quarter hour or portion thereof of professional time, \$10.00.

(iii) *Duplication.* For each sheet of duplication (not to exceed 8½ by 14 inches) of requested records, \$.20.

(iv) *Computer time.* For computer time, \$3.00 per minute of time expended for production programming, searching and production of any record. Computer time expressed in fractions of minutes will be rounded to the next whole minute.

(v) *Certification or authorization of records.* The fee per certification or authentication is \$2.00.

(vi) *Forwarding material to destination.* No charge will be assessed for ordinary packaging and mailing costs. The FMCS may assess a charge if compliance with the request requires special handling procedures such as express mail or other unusual procedures. Such charges will be made on the basis of actual costs.

(vii) *Other costs.* All other direct costs of preparing a response to a request shall be charged to requester in the same amount as incurred by FMCS. Charges may also be assessed for searches even if the records requested are not found, or the records are determined to be exempted from disclosure.

(2) *Rules of construction.* (i) In providing the foregoing the schedules pursuant to the provisions of 5 U.S.C. 552(a)(4)(A), it is the intent of FMCS to apply 29 CFR part 70 and the user charge statute, 31 U.S.C. 9701, to cover those situations in which the Agency is performing for a requester services which are not required under the Freedom of Information Act.

(ii) For those matters coming within the scope of this regulation, the FMCS will look to the provisions of the guidance published by the Office of

Management and Budget (52 FR 10012, March 27, 1987) and the Department of Justice (Attorney General's, memorandum on the 1986 Amendments to the Freedom of Information Act, December 1987) for making such interpretations as may be necessary.

(3) *Fee categories.* Fees shall be determined in accordance with the following categories of requesters.

(i) Commercial use requesters will be assessed charges to recover the full direct cost of searching for, reviewing for release, and duplicating the records sought. This includes the full direct costs of computer production programming, searching and production of records. Commercial use requesters are not entitled to 2 hours of free search time nor 100 free pages of reproduction of documents, as described below.

(ii) Educational and non-commercial scientific institution requesters will be assessed charges for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution pursuant to the criteria in paragraphs (a)(6) and (a)(8) of this section, and that the records are not sought for commercial use, but are sought in furtherance of scholarly or scientific research.

(iii) Requesters who are representatives of the news media will be assessed charges for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (a)(7) of this section, 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.

(iv) All other requesters will be assessed charges to recover the full reasonable direct costs of searching for and reproducing records that are responsive to the request, including costs of computer production programming, searching and production, except that the first 100 pages of reproduction, and the first 2 hours of search time shall be furnished without charge.

(v) In no event shall fees be charged when the total charges are less than \$14.00, which is the Agency cost of collecting and processing the fee itself.

(4) *Waiver or reduction of charge.* Documents are to be furnished without charge or at reduced levels if disclosure of the information is in the public interest; that is, because it is likely to contribute significantly to public

understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester.

(c) *Fee payments.* (1) Payments shall be made by check or money order payable to "Federal Mediation and Conciliation Service" and shall be sent to: Director, Financial Management Staff, Federal Mediation and Conciliation Service, 2100 K Street NW, Washington, DC 20427.

(2) If a requester fails to pay chargeable fees that were incurred as a result of this Agency's processing of the information request, the Agency beginning on the 31st day following the date on which the notification of charges was sent, may assess interest charges against the requester in the manner prescribed in 31 U.S.C. 3717.

(3) The Agency may use the provisions of the Debt Collection Act of 1982, (Pub. L. 97-365, 29 CFR part 1450) including disclosure to consumer reporting agencies, for the purpose of obtaining payment.

(d) *Advance payments.* FMCS may require a requester to make an advance payment of anticipated fees under the following circumstances:

(1) If the anticipated charges are likely to exceed \$250.00, FMCS may notify the requestor of the likely cost and obtain satisfactory assurance of full payment when the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payments.

(2) If a requester has previously failed to pay fees that have been charged in processing a request, within 30 days of the date when the notification of fees was sent, the requester may be required to:

(i) Pay the entire amount of fees that are owed, plus any applicable interest as provided for in paragraph (c)(2) of this section, and

(ii) To make an advance payment of the full amount of the estimated fee before the Agency will process the new pending request.

Dated: October 28, 1999.

**Vella M. Traynham,**

*Deputy Director.*

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