

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 15

[Docket No. FR-5069-F-02]

RIN 2501-AD22

**Revisions to the Public Access to HUD
Records Under the Freedom of
Information Act (FOIA) Regulations**

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule.

SUMMARY: This final rule clarifies and explains the procedures to be followed by requesters seeking a waiver or a reduction of fees under the Freedom of Information Act (FOIA). This final rule describes the information that must be included in a FOIA request and the demonstrations that must be made in order for a waiver or reduction of fees to be granted. This final rule also revises the FOIA fee schedule, clarifies the time at which HUD will begin processing a FOIA request, and modifies HUD's policy on the use of outside contractors to fulfill FOIA requests. HUD undertook this effort in order to make the regulations governing fee waivers more informative and helpful in accordance with the President's recently issued Executive Order 13392, "Improving Agency Disclosure of Information." This final rule also makes technical and conforming changes to reflect the realignment of FOIA correspondence processing functions within HUD, to correct HUD's definition of "representative of the news media requester" to ensure conformance with the Office of Management and Budget (OMB) Fee Guidelines, and to update a cross-reference to time limits applicable to HUD for responding to a FOIA request. This final rule follows publication of an October 5, 2006, proposed rule on which HUD received one public comment.

DATES: *Effective Date:* April 16, 2007.

FOR FURTHER INFORMATION CONTACT:

Vicky Lewis, Assistant Executive Secretary, Freedom of Information Act (FOIA) Office, Office of the Executive Secretariat, Office of Administration, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10139, Washington, DC 20410-5000; telephone (202) 708-3054 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-(800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

On December 14, 2005, President Bush issued Executive Order 13392, entitled "Improving Agency Disclosure of Information," which acknowledged the importance of participation by an informed citizenry in the effective functioning of our constitutional democracy. Executive Order 13392 was published in the **Federal Register** on December 19, 2005 (70 FR 75373). The Freedom of Information Act (5 U.S.C. 552) (FOIA) provides the means by which the public can obtain information regarding federal agencies. Under FOIA, the public can request records from any agency, which the agency must provide, subject to certain exemptions and statutory exclusions.

HUD's regulations at 24 CFR part 15, entitled "Public Access to HUD Records under the Freedom of Information Act and Testimony and Production of Information by HUD Employees," describe the policies and procedures governing public access to HUD records under FOIA. Those regulations describe how the public is to make a FOIA request, what must be included in the request, how the request will be processed, any applicable fees that will be charged, and the process for appealing a denial of a request or a fee determination.

II. The October 5, 2006, Proposed Rule

On October 5, 2006 (71 FR 58994), HUD published a proposed rule to respond to Executive Order 13392. This Executive Order has served as an impetus for each agency to review its FOIA regulations to determine whether its regulations are as helpful as they can be, especially since these regulations reach out to the public generally and are not specific to participants in particular government programs. HUD issued the proposed rule to amend HUD's regulations at 24 CFR part 15 in order to clarify and explain the procedures to be followed by requesters seeking a waiver or reduction of fees under FOIA. HUD also proposed to revise the FOIA fee schedule, clarify the time at which HUD would begin processing a FOIA request, and modify HUD's policy on the use of outside contractors to fulfill FOIA requests. For more detailed information regarding the regulatory changes, please refer to the preamble of the October 5, 2006, proposed rule.

**III. This Final Rule; Discussion of
Public Comments Received on the
October 5, 2006, Proposed Rule**

This final rule follows publication of the October 5, 2006, proposed rule. The public comment period on the proposed

rule closed on December 4, 2006. HUD received one public comment in response to the proposed rule. The commenter expressed support for FOIA and for the proposed rule, and stated that the proposed changes would allow for a better and easier understanding of requests for fee waivers or reductions. HUD appreciates the commenter's interest in the proposed rule. This final rule adopts the proposed regulatory changes contained in the October 5, 2006, proposed rule without change.

IV. Technical and Conforming Changes

In addition to adopting the revisions and amendments outlined in the proposed rule, this final rule makes technical and conforming changes to §§ 15.103, 15.106, and 15.110 to reflect the realignment of HUD's FOIA processing functions, to correct HUD's definition of "representative of the news media requester," and to update a cross-reference to time limits for HUD to respond to a FOIA request.

Executive Order 13392 required Federal agencies to develop agency-specific plans to ensure the efficient and timely administration of FOIA requests. Such plans were to include specific activities that the agency would implement to eliminate or reduce the agency's FOIA backlog, and activities that would increase public awareness of the agency's FOIA processing. HUD submitted its plan to OMB and the Attorney General on June 14, 2006. (See <http://www.hud.gov/offices/ogc/foia/hudfoiaplanfinal.pdf>.) An integral part of HUD's plan is the realignment of FOIA processing functions from the Office of General Counsel to the Office of the Executive Secretariat in the Office of Administration. The realignment of FOIA processing functions will improve the efficiency and consistency of HUD's FOIA operations. This final rule updates HUD's FOIA regulations at § 15.103 (which describes the procedures for obtaining records from HUD) and § 15.106 (which describes how HUD will respond to requests for records) by replacing outdated references to the Office of General Counsel with references to the Office of Administration.

In addition to the conforming changes described above, HUD has also taken the opportunity afforded by this final rule to correct two technical errors in its FOIA regulations. Section 552(a)(4)(A)(i) of FOIA requires federal agencies to conform their fee schedules to the uniform schedule of fees developed by the Office of Management and Budget (OMB). (See "Uniform Freedom of Information Act Fee Schedule and Guidelines" published by OMB in the

Federal Register on March 27, 1987 (52 FR 10012)). HUD's definition of "representative of the news media requester" is not in conformance with the OMB uniform fee guidelines. Specifically, § 15.110(a)(4) defines a representative of a news media requester as someone who gathers news for an entity that is "primarily" organized and operated to publish or broadcast news to the public. The OMB uniform guidelines, however, do not use the word "primarily" in the corresponding definition. (See 52 FR 10018). This final rule makes the necessary correction to § 15.110(a)(4) by removing the word "primarily" from the definition of news media requester.

This final rule also updates a cross-reference in § 15.106(b). Presently, the cross-reference in § 15.106(b) is to "the time limit described in § 15.103." However, time limitations are discussed in § 15.104. Therefore, the cross-reference should be to time limits described in § 15.104.

V. Findings and Certifications

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The regulatory amendments made by this final rule are procedural and explanatory in nature. The FOIA statute establishes criteria by which waivers of fees or reduction of fees may be obtained for a FOIA request. Furthermore, the fees charged under this rule are limited by FOIA to direct costs of searching for, reviewing, and duplicating the records processed for requesters and are not economically significant.

Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This final rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this final rule is categorically excluded from the requirements of the National

Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This final rule does not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of UMRA.

List of Subjects in 24 CFR Part 15

Classified information, Courts, Freedom of information, Government employees, Reporting and recordkeeping requirements.

■ Accordingly, for the reasons discussed in the preamble, HUD amends 24 CFR part 15 to read as follows:

PART 15—PUBLIC ACCESS TO HUD RECORDS UNDER THE FREEDOM OF INFORMATION ACT AND TESTIMONY AND PRODUCTION OF INFORMATION BY HUD EMPLOYEES

■ 1. The authority citation for part 15 continues to read as follows:

Authority: 42 U.S.C. 3535(d).

■ 2. In § 15.103, revise the first sentence of paragraph (c) and paragraph (d)(4) to read as follows:

§ 15.103 How can I get other records from HUD?

* * * * *

(c) *Records located in HUD headquarters.* If you are submitting a request for records located in HUD Headquarters, you should deliver or mail your request to the FOIA Office, Office of the Executive Secretariat in the Office of Administration. * * *

(d) * * *

(4) *State your agreement to pay the fee.* You may specify a dollar amount

above which you want HUD to consult with you before you will agree to pay the fee. If you are seeking a waiver or reduction of fees, you must include such a request at the same time as your request for disclosure, and you must describe how the disclosure of the requested information is in the public interest and not primarily in the commercial interest of the requester (see § 15.110(h));

* * * * *

■ 3. In § 15.106, revise paragraph (a), paragraph (b) introductory text, and the second sentence of paragraph (b)(2) to read as follows:

§ 15.106 How will HUD respond to my request?

(a) *Who will respond to my request?*

(1) The FOIA Office of the Office of the Executive Secretariat in the Office of Administration in HUD Headquarters and the FOIA liaisons in each HUD Field Office are authorized to release copies of any HUD records unless disclosure is clearly not appropriate under FOIA.

(2) The FOIA Office of the Office of the Executive Secretariat in the Office of Administration in HUD Headquarters and the FOIA liaisons in each HUD Field Office may deny a request for a record in accordance with the provisions of FOIA and this part.

(b) *What type of response will I receive?* Within the time limit described in § 15.104, HUD will either:

* * * * *

(2) * * * Any denial or partial denial of a requested record must be concurred in by the FOIA Office of the Office of the Executive Secretariat in the Office of Administration in HUD Headquarters, by counsel in the Field Offices, or by counsel in HUD's Departmental Enforcement Center Satellite Offices.

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■ 4. Amend § 15.110 as follows:

■ a. Revise paragraph (b)(4)(i);

■ b. Revise the chart captioned "FOIA Fee Schedule" in paragraph (c);

■ c. Revise paragraphs (h) and (i); and

■ d. In paragraph (k), remove the first three sentences and add two new sentences in their place to read as follows:

§ 15.110 What fees will HUD charge?

* * * * *

(b) * * *

(4) * * *

(i) You are a representative of the news media requester if you actively gather news for an entity that is organized and operated to publish or broadcast news to the public.

* * * * *

(c) * * *

FOIA FEE SCHEDULE

Activity	Rate	Commercial use requester	News media, educational research, or scientific research requester	Other requester
(1) Professional search	Actual salary rate of employee involved, plus 16 percent of salary rate.	Applies	Does not apply	Applies. No charge for first two hours of cumulative search time.
(2) Professional review	Actual salary rate of employee involved, plus 16 percent of salary rate.	Applies	Does not apply	Does not apply.
(3) Clerical search	Actual salary rate of employee involved, plus 16 percent of salary rate.	Applies	Does not apply	Applies. No charge for first two hours of cumulative search time.
(4) Clerical review	Actual salary rate of employee involved, plus 16 percent of salary rate.	Applies	Does not apply	Does not apply.
(5) Programming services	\$35 per hour	Applies	Does not apply	Applies.
(6) Computer run time (includes only mainframe search time not printing).	The direct cost of conducting the search.	Applies	Does not apply	Applies.
(7) Duplication costs	\$0.18 per page	Applies	Applies. No charge for first 100 pages.	Applies. No charge for first 100 pages.
(8) Duplication costs—tape, CD ROM or diskette.	Actual cost	Applies	Applies	Applies.

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(h) *Waiver or reduction of fees in the public interest.* If HUD determines that disclosure of the information you seek 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 that you are not seeking the information primarily for your own commercial interests, HUD may waive or reduce the fee.

(1) In order to qualify for a waiver or a reduction of fees, a requester must make the following demonstrations in the FOIA request:

(i) 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.

(A) *The subject of the request pertains to the operations or activities of the Federal Government.* Requesters must be seeking documents and records that contain information regarding identifiable operations or activities of the Federal Government. The connection between the content of the records and Federal governmental operations or activities must be direct and clear.

(B) *The informative value of the information to be disclosed is consequential.* The disclosable portions of the requested records must be meaningfully informative about Federal Governmental operations or activities in order to be “likely to contribute” to an

increased public understanding of those operations or activities. The disclosure of information that is already in the public domain, in either a duplicative or substantially identical form, would not be as likely to contribute to the public’s understanding of Federal governmental operations or activities.

(C) *The disclosure is likely to contribute to an understanding of the subject by the public.* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester, in order to provide a great benefit to the public at large. A requester’s expertise in the subject area and ability and intention to effectively convey the information will be considered.

(D) *The contribution to public understanding is significant.* The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a substantial degree. HUD will not make value judgments about whether the information to be disclosed is worthy or important enough to be made public, but rather whether it would contribute substantially to public understanding of the operations or activities of the government.

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(A) *The existence and magnitude of a commercial interest.* The requester must

describe and explain any commercial interest that would be furthered by the requested disclosure, whether personally benefiting the requester or any person on whose behalf the requester may be acting. See the definition of a “commercial use requester” in paragraph (b)(1) of this section for further explanation.

(B) *Primary interest in disclosure.* A fee waiver or reduction in fees is justified where the requester has demonstrated that the public interest in disclosure is greater in magnitude than that of any identified commercial interest in disclosure. However, disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(2) Requests for waivers must address the elements listed in paragraph (h)(1) of this section, insofar as they apply to each request. HUD will exercise its discretion in considering the cost-effectiveness of its investment of administrative resources in deciding whether to grant waivers or reductions of fees, in consultation with appropriate offices as needed. Requests for the waiver or reduction of fees must be submitted with the request.

(3) When only some of the requested records satisfy the requirements for a waiver of fees, a waiver will be granted for only those records.

(4) When a fee waiver request is denied, HUD will do no further work on the request until it receives an assurance

of payment, or an appeal of the fee waiver adverse determination is filed and HUD has made a final appeal determination pursuant to § 15.112.

(i) *When do I pay the fee?* HUD will bill you when it responds to your request. You must pay within 31 calendar days. If the estimated fee is more than \$250.00 or you have a history of failing to pay FOIA fees to HUD in

a timely manner, HUD will ask you to remit the estimated amount and any past due charges before processing and sending you the records.

* * * * *

(k) *Contract services.* HUD will contract with private sector sources to locate, reproduce, and disseminate records in response to FOIA requests when that is the most efficient and least

costly method. HUD will ensure that the ultimate cost to the requester is no greater than it would be if the agency itself had performed these tasks.

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Dated: March 7, 2007.

Roy A. Bernardi,
Deputy Secretary.

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