

# Rules and Regulations

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## FEDERAL LABOR RELATIONS AUTHORITY

### 5 CFR Part 2411

#### Availability of Official Information

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Federal Labor Relations Authority's (Authority) regulations implementing the Freedom of Information Act, as amended. The final rule adds provisions to the regulations for compliance with the OPEN Government Act of 2007, and the Electronic Freedom of Information Act Amendments of 1996. The final rule amends the regulations to reflect changes required by Executive Order 12600 and Executive Order 13392. The final rules also update the regulations to reflect changes in the Authority's policies and procedures. As a result of these amendments to the regulations, the public will have a clearer understanding of the Authority's policies and procedures implementing the FOIA.

**DATES:** This final rule is effective October 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** Rosa M. Koppel, Solicitor, via telephone: (202) 218-7999, or via e-mail: [rkoppel@flra.gov](mailto:rkoppel@flra.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The comprehensive revisions that the Authority is making to part 2411 include changes to the language and structure of the regulations. Provisions have been revised, added, and/or in some cases, reorganized in order to clarify how the Authority implements the procedural requirements of the FOIA. The revisions are not intended to change any rights under the FOIA.

The revisions are intended to achieve compliance with the OPEN Government Act of 2007, Public Law 110-175, 121 Stat. 2524, and Executive Order 13392, 70 FR 75371-75371 (Dec. 9, 2005). Provisions which relate to implementation of the OPEN Government Act are as follows—(1) § 2411.4(b)(1) (identification of deleted information); (2) § 2411.8(a) (setting forth criteria for when the time period for processing requests begins to run and when that time period may be suspended or tolled); (3) §§ 2411.8(c)(5) and 2411.13(b)(3) (address waiver of fees when time limits for complying with FOIA requests are not met); and (4) § 2411.8(d) (assigns individual tracking numbers to requests requiring more than ten days to process and provides phone number/Web site address to inquire about status).

The OPEN Government Act and EO 13392 establish and set forth duties and responsibilities for the Chief FOIA Officer and the FOIA Public Liaison(s). The provisions of the regulations pertaining to these duties and responsibilities are found at: (1) § 2411.3(a) and (c) (delegation of FOIA-related duties to Chief FOIA Officer and designation of FOIA Public Liaison(s)); (2) § 2411.4(b)(1) (identification of deleted information); (3) §§ 2411.8(c)(5) and 2411.13(b)(3) (waives certain processing fees when time limits are not met for processing FOIA requests); (4) § 2411.11(a) (to aid in meeting time limits the FOIA Public Liaison(s) are given responsibility to resolve disputes between requesters and the agency as to the scope of requests or modification of time limits); and (5) § 2411.13(a)(8) (adds definition of "representative of the news media").

The regulations also contain new provisions to explicitly implement Executive Order 12600, 52 FR 23781 (June 23, 1987), 3 CFR 235 (1987 Comp.) and the Electronic Freedom of Information Act Amendments of 1996, Public Law 104-231, 110 Stat. 3048 (E-FOIA). The Authority has been operating in compliance with these provisions of law, and based on its experience is now updating its regulations to reflect this compliance. A new section implementing Executive Order 12600's procedural structure for notifying those who submit business information to the government when that information becomes the subject of

a FOIA request can be found at § 2411.9. New provisions implementing the E-FOIA can be found at: (1) § 2411.2(a) (includes electronic formats within the meaning of the term "record"); (2) § 2411.4(a)(iv) (requires that records that "have become or are likely to become the subject of subsequent requests for substantially the same records" be included in FOIA reading room); (3) § 2411.4(a)(v) (requires general index of records be included in FOIA reading room); (4) § 2411.4(b)(2) (establishment of electronic reading room); (5) § 2411.7 (format of disclosure); (6) § 2411.13(a)(2) (searches for records in electronic form or format); and (7) § 2411.15 (modification of deadline for submission of Annual Report and requirement that it shall be available in electronic format).

Further, the revisions are intended as a routine updating of the Authority's procedures—to streamline the existing procedures based on experience, to reflect certain changes in the procedural requirements of the FOIA since the previous regulations issued, and to make the Authority's procedures easier for the public to understand. Provisions that implement these goals can be found at: (1) § 2411.2 (adds a new section clarifying that the regulations' scope includes information in electronic formats and the relation of the regulations to the Privacy Act regulations in part 2412); (2) § 2411.4 (a) and (b) (merging paragraph (b) of § 2411.4 into paragraph (a) of § 2411.4 so that the policies of all three FLRA components are addressed in one paragraph); (3) § 2411.4(d) (eliminating explanatory discussion of specific FOIA exemptions from mandatory disclosures); (4) § 2411.4(f)(1) and (2) (providing Web site addresses to obtain copies of agency forms); (5) § 2411.5(b) (request is considered an agreement to pay all applicable fees, up to \$25.00, unless a waiver is sought); (6) § 2411.6(b) (adding language to give requester the opportunity to discuss/clarify request so that it may be modified, if necessary, to meet regulatory requirements); (7) § 2411.8(b) (moving language from § 2411.13(c)(4) to set forth earlier the objective that requesters reasonably describe records sought); (8) § 2411.10(a)(2) (adding language to explain how to calculate the twenty-day period for responding to appeal); (9) § 2411.10(a)(2)(i) and

(b)(2)(i) (providing consistency with other sections regarding the cut-off amount at which fees (\$250 and above) will be requested in advance of information production); (10) § 2411.10(a)(2)(ii) and (b)(2)(ii) (providing for information production before payment of fees below \$250 if no history of failure to pay fees on time); (11) § 2411.13(a)(2) (adding language to inform requesters that searches will be conducted in the most efficient and least expensive manner reasonably possible); (12) § 2411.13(b)(4)(ii)(A) thru (D) (adding language to set forth more clearly the factors to be considered in determining when fees should be waived because a disclosure is in the “public interest”); (13) § 2411.13(b)(4)(iii)(A) and (B) (adding language clarifying when a requester’s interest is “primarily commercial”); (14) § 2411.13(b)(4)(v) (adding language to clarify when partial fees will be assessed); (15) § 2411.13(h) (adding language related to handling requests by other than a party to a proceeding before the agency for a copy of a transcript, diskette, or other recordation of the proceeding); and (16) § 2411.14 (providing information on record retention and preservation).

The Authority has added language relating to the role of the Inspector General throughout the regulation (*i.e.*, purpose (§ 2411.1), scope (§ 2411.2), information policy (§ 2411.4), procedures for obtaining information (§ 2411.5)), when requests for information relate to records, documents, or other information of the Inspector General for the Authority.

Finally, the Authority has deleted former § 2411.11 and replaced it with a new part 2417. *See* 74 FR 11634 (March 14, 2009).

## II. Response to Comment and Revisions Included in Final Rule

On July 22, 2009, the Authority published a proposed rule with request for comments that proposed to amend 5 CFR, chapter XIV, part 2411 (74 FR 36121). The FLRA received no comments during the 30 days allowed for public comment, but received one set of comments after the close of the comment period on August 21, 2009. This set of comments, from the National Security Archive, is discussed below.

*Comment 1:* Amend proposed § 2411.5(a) to clarify that agency subcomponents will accept facsimiled requests as well as written and e-mail requests.

The Authority agrees with this comment and amends proposed § 2411.5(a) to provide for the acceptance of facsimiled requests.

*Comment 2:* Amend proposed § 2411.5(b) to eliminate the requirement that requests include an explicit statement accepting financial liability for the direct costs of processing the request, and encourage requesters to state their fee category.

The Authority agrees with this comment in part and amends proposed § 2411.5(b) to provide that each request will be considered an agreement to pay all applicable fees charged under § 2411.13, up to \$25.00, unless a requester seeks a waiver of fees. However, the Authority sees no need to add a statement encouraging requesters to state their fee category inasmuch as the relevance of fee categories is adequately addressed in § 2411.13.

*Comment 3:* Amend proposed § 2411.6 to clarify that Authority personnel are required to provide requesters with assistance in reformulating requests that insufficiently describe the record sought. The commenter explains that, as drafted, § 2411.6(b) requires that a requester be given an opportunity to modify a request that does not “reasonably describe” the records sought whereas § 2411.6(a) could be read to state that this opportunity may, or may not, be granted.

The Authority agrees with the comment and modifies paragraphs (a) and (b) of § 2411.6 to clarify that a requester will be given an opportunity to modify a request that does not “reasonably describe” the records sought.

*Comment 4:* Amend proposed § 2411.8(c)(5) to clarify that applicable fees will not be charged for partial determinations when the remainder of the request is pending beyond FOIA’s 20 day statutory time limit, unless “unusual or exceptional circumstances” exist, as defined in § 2411.11(b).

The Authority agrees with this comment and modifies proposed § 2411.8(c)(5) to clarify that the Authority, absent unusual or exceptional circumstances, will not assess search fees if an agency component fails to make a final determination with respect to disclosure of all of the records requested within the 20-day period set out in § 2411.8(a).

### List of Subjects in 5 CFR Part 2411

Freedom of Information Act.

■ For the reasons stated in the preamble, the Authority revises 5 CFR part 2411 to read as follows:

## PART 2411—AVAILABILITY OF OFFICIAL INFORMATION

Sec.

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**Authority:** 5 U.S.C. 552, as amended and OPEN Government Act of 2007, Pub. L. 110–175, 121 Stat. 2524; E.O. 13392 (Dec. 14, 2005); and E.O. 12600 (June 23, 1987).

### § 2411 Purpose.

This part contains the regulations of the Federal Labor Relations Authority (Authority), the General Counsel of the Federal Labor Relations Authority (General Counsel), the Federal Service Impasses Panel (Panel) and the Inspector General of the Federal Labor Relations Authority (IG) providing for public access to information from the Authority, the General Counsel, the Panel or the IG. These regulations implement the Freedom of Information Act, as amended, 5 U.S.C. 552, and the policy of the Authority, the General Counsel, the Panel and the IG to disseminate information on matters of interest to the public and to disclose to members of the public on request such information contained in records insofar as is compatible with the discharge of their responsibilities, consistent with applicable law.

### § 2411.2 Scope.

(a) For the purpose of this part, the term record and any other term used in reference to information includes any information that would be subject to the requirements of 5 U.S.C. 552 when maintained by the Authority, the General Counsel, the Panel or the IG in any format including an electronic format. All written requests for information from the public that are not processed under part 2412 of this chapter will be processed under this part. The Authority, the General Counsel, the Panel and the IG may continue, regardless of this part, to furnish the public with the information it has furnished in the regular course of performing its official duties, unless furnishing the information would violate the Privacy Act of 1974, 5 U.S.C. 552a, or another law.

(b) When the subject of a record, or the subject's representative, requests the record from a Privacy Act system of records, as that term is defined by 5 U.S.C. 552a(a)(5), and the Authority retrieves the record by the subject's name or other personal identifier, the Authority will handle the request under the procedures and subject to the fees set out in part 2412. When a third party requests access to those records, without the written consent of the subject of the record, the Authority will process the request under this part.

(c) Nothing in 5 U.S.C. 552 or this part requires that the Authority, the General Counsel, the Panel or the IG, as appropriate, create a new record in order to respond to a request for the records.

#### **§ 2411.3 Delegation of authority.**

(a) *Chief FOIA Officer.* The Chairman of the Federal Labor Relations Authority designates the Chief FOIA Officer who has agency-wide responsibility for the efficient and appropriate compliance with the FOIA. The Chief FOIA Officer monitors the implementation of the FOIA throughout the agency.

(b) *Authority/General Counsel/Panel/IG.* Regional Directors of the Authority, the Freedom of Information Officer of the Office of the General Counsel, Washington, DC, the Solicitor of the Authority, the Executive Director of the Panel and the IG are delegated the exclusive authority to act upon all requests for information, documents and records which are received from any person or organization under § 2411.5(a) and (b).

(c) *FOIA Public Liaison(s).* The Chief FOIA Officer shall designate the FOIA Public Liaison(s), who shall serve as the supervisory official(s) to whom a FOIA requester can raise concerns about the service the FOIA requester has received following an initial response.

#### **§ 2411.4 Information policy.**

(a) *Authority/General Counsel/Panel/IG.* (1) It is the policy of the Authority, the General Counsel, the Panel and IG to make available for public inspection and copying (unless they are published and copies are offered for sale):

(i) Final decisions and orders of the Authority and administrative rulings of the General Counsel; and procedural determinations, final decisions and orders of the Panel; and factfinding and arbitration reports; and reports and executive summaries of the IG;

(ii) Statements of policy and interpretations which have been adopted by the Authority, the General Counsel, the Panel or the IG and are not published in the **Federal Register**;

(iii) Administrative staff manuals and instructions to staff that affect a member of the public (except those establishing internal operating rules, guidelines, and procedures for the investigation, trial, and settlement of cases);

(iv) Copies of all records, regardless of form or format, which have been released to any person under 5 U.S.C. 552(a)(3) and which, because of the nature of their subject matter, the Authority, the General Counsel, the Panel or the IG determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(v) A general index of the records referred to in paragraphs (a)(1)(i) through (iv) of this section.

(2) It is the policy of the Authority, the General Counsel, the Panel and the IG to make promptly available for public inspection and copying, upon request by any person, other records where the request reasonably describes such records and otherwise conforms to the procedures of this part.

(b) *Records Availability.* (1) Any person may examine and copy items in paragraphs (a)(1)(i) through (iv) of this section, at each regional office of the Authority and at the offices of the Authority, the General Counsel, the Panel and the IG, respectively, in Washington, DC, under conditions prescribed by the Authority, the General Counsel, the Panel and the IG, respectively, and at reasonable times during normal working hours so long as it does not interfere with the efficient operations of the Authority, the General Counsel, the Panel and the IG. To the extent required to prevent a clearly unwarranted invasion of personal privacy, identifying details may be deleted and, in each case, the justification for the deletion shall be fully explained in writing. On the released portion of the record, the amount of information deleted, and the exemption under which the deletion is made, shall be indicated unless an interest protected by the exemption would be harmed.

(2) All records covered by this section are available through the Internet/World Wide-Web site ([http://www.flra.gov/foia/reading\\_room.html](http://www.flra.gov/foia/reading_room.html)). The Web site containing these records may also be accessed from a computer terminal located in the library at FLRA headquarters at 1400 K Street, NW., Washington, DC. Requests to use this terminal to access the FLRA's electronic Reading Room should be submitted to the FLRA's Office of the Solicitor (mail: Office of the Solicitor, FLRA, 1400 K Street, NW., Washington, DC 20424; telephone: 202-218-7770; e-mail:

[solmail@flra.gov](mailto:solmail@flra.gov)); or from computer terminals located in the FLRA regional offices. A listing of these offices, including appropriate information for requesting the use of the terminal, is provided at <http://www.flra.gov/foia/contacts.html>.

(c) The Authority, the General Counsel, the Panel and the IG shall maintain and make available for public inspection and copying the current indexes and supplements to the records which are required by 5 U.S.C. 552(a)(2) and, as appropriate, a record of the final votes of each member of the Authority and of the Panel in every agency proceeding. Any person may examine and copy such document or record of the Authority, the General Counsel, the Panel or the IG at the offices of either the Authority, the General Counsel, the Panel or the IG, as appropriate, in Washington, DC, under conditions prescribed by the Authority, the General Counsel, the Panel or the IG at reasonable times during normal working hours so long as it does not interfere with the efficient operations of either the Authority, the General Counsel, the Panel or the IG.

(d) All agency records, except those exempt from mandatory disclosure by one or more provisions of 5 U.S.C. 552(b), will be made promptly available to any person submitting a written request in accordance with the procedures of this part.

(e)(1) The formal documents constituting the record in a case or proceeding are matters of official record and, until destroyed pursuant to applicable statutory authority, are available to the public for inspection and copying at the appropriate regional office of the Authority, or the offices of the Authority, the General Counsel, the Panel or the IG in Washington, DC, as appropriate, under conditions prescribed by the Authority, the General Counsel or the Panel at reasonable times during normal working hours so long as it does not interfere with the efficient operations of the Authority, the General Counsel, the Panel, or the IG.

(2) The Authority, the General Counsel, the Panel or the IG, as appropriate, shall certify copies of the formal documents upon request made a reasonable time in advance of need and payment of lawfully prescribed costs.

(f)(1) Copies of forms prescribed by the General Counsel for the filing of charges and petitions may be obtained without charge from any regional office of the Authority or on the Authority's Web site at: <http://www.flra.gov/forms/forms.html#gc>.

(2) Copies of forms prescribed by the Panel for the filing of requests may be

obtained without charge from the Panel's offices in Washington, DC or on the Authority's Web site at: [http://www.flra.gov/forms/flra\\_14.pdf](http://www.flra.gov/forms/flra_14.pdf).

**§ 2411.5 Procedure for obtaining information.**

(a) *Authority/General Counsel/Panel/IG.* Any person who desires to inspect or copy any records, documents or other information of the Authority, the General Counsel, the Panel or the IG, covered by this part, other than those specified in paragraphs (a)(1) and (c) of § 2411.4, shall submit a written, facsimiled, or e-mail request (*see* office and e-mail addresses listed at <http://www.flra.gov/foia/contacts.html>) to that effect as follows:

(1) If the request is for records, documents or other information in a regional office of the Authority, it should be made to the appropriate Regional Director;

(2) If the request is for records, documents or other information in the Office of the General Counsel and located in Washington, DC, it should be made to the Freedom of Information Officer, Office of the General Counsel, Washington, DC;

(3) If the request is for records, documents or other information in the offices of the Authority in Washington, DC, it should be made to the Solicitor of the Authority, Washington, DC;

(4) If the request is for records, documents or other information in the offices of the Panel in Washington, DC, it should be made to the Executive Director, Federal Service Impasses Panel, Washington, DC; and

(5) If the request is for records, documents or other information in the offices of the IG in Washington, DC, it should be made to the Inspector General, Washington, DC.

(b) Each request under this part 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 identified as such on the envelope or other cover. A request shall be considered an agreement by the requester to pay all applicable fees charged under § 2411.13, up to \$25.00, unless the requester seeks a waiver of fees. The component responsible for responding to the request ordinarily will confirm this agreement in an acknowledgment letter. When making a request, the requester may specify a willingness to pay a greater or lesser amount. Fee charges will be assessed for the full allowable direct costs of document search, review, and duplicating, as appropriate, in

accordance with § 2411.13. If a request does not comply with the provisions of this paragraph, it shall not be deemed received by the appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate. A list of the office and e-mail addresses is in Appendix A to 5 CFR Chapter XIV and on the Federal Labor Relations Authority's World Wide Web site at <http://www.flra.gov/foia/contacts.html>.

**§ 2411.6 Identification of information requested.**

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

(b) If the description does not meet the requirements of paragraph (a) of this section, the officer processing the request shall 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 record sought.

(c) Upon receipt of a request for records, the appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, shall enter it in a public log. The log shall state the date and time received, the name and address of the 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 paragraphs (b) and (c) of § 2411.8, 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.

**§ 2411.7 Format of disclosure.**

(a) After a determination has been made to grant a request in whole or in part, the appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel or the IG, as appropriate, will notify the requester in writing. The notice will describe the manner in which the record will be disclosed. The appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel or the IG, as appropriate, will

provide the record in the form or format requested if the record is readily reproducible in that form or format, provided the requester has agreed to pay and/or has paid any fees required by § 2411.13 of this part. The appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, will determine on a case-by-case basis what constitutes a readily reproducible format. These offices will make a reasonable effort to maintain their records in commonly reproducible forms or formats.

(b) Alternatively, the appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, may make a copy of the releasable portions of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection will not unreasonably disrupt the operations of the office.

**§ 2411.8 Time limits for processing requests.**

(a) The 20-day period (excepting Saturdays, Sundays, and legal public holidays), established in this section, shall commence on the date on which the request is first received by the appropriate component of the agency (Regional Director, the Freedom of Information Officer of the Office of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG of the Authority), but in any event not later than ten days after the request is first received by any Authority component responsible for receiving FOIA requests under part 2411. The 20-day period does not run when—

(1) The agency component makes one request to the requester for information and is awaiting such information that it has reasonably requested from the requester; or

(2) It is necessary to clarify with the requester issues regarding fee assessment.

(3) The agency component's receipt of the requested information or clarification triggers the commencement of the 20-day period.

(b) A request for records shall be logged in by the appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel or the IG, as appropriate, pursuant to § 2411.6(c). All requesters must reasonably describe the records sought. An oral request for

records shall not begin any time requirement. A written request for records sent to other than the appropriate officer will be forwarded to that officer by the receiving officer, but in that event the applicable time limit for response shall begin as set forth in paragraph (a) of this section.

(c) Except as provided in § 2411.11, the appropriate Regional Director, the Freedom of Information Officer of the General Counsel, the Solicitor of the Authority, the Executive Director of the Panel, or the IG, as appropriate, shall, within twenty (20) working days following receipt of the request, as provided by paragraph (a) of this section, respond in writing to the requester, determining whether, or the extent to which, the request shall be complied with.

(1) If all the records requested have been located and a final determination has been made with respect to disclosure of all of 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 the records requested, the response shall state the extent to which the records involved shall be disclosed pursuant to the rules established in this part.

(3) If the request is expected to involve allowed charges in excess of \$250.00, the response shall specify or estimate the fee involved and shall require prepayment of any charges in accordance with the provisions of paragraph (g) of § 2411.13 before the request is processed further.

(4) Whenever possible, subject to the provisions of paragraph (g) of § 2411.13, the response relating to a request for records that involves a fee of less than \$250.00 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 Authority, the General Counsel, the Panel, or the IG.

(5) Search fees shall not be assessed requesters (or duplication fees in the case of an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media requester, as defined by § 2411.13(a)(8)), under this subparagraph if an agency component fails to make a final determination with respect to disclosure of all records requested as described under subparagraph (c)(1) of this section within any time limit under paragraph (a) of this section, if no unusual or exceptional circumstances (as those

terms are defined for purposes of § 2411.11(a)) apply to the processing of the request.

(d) If a request will take longer than ten days to process:

(1) An individualized tracking number will be assigned to the request and provided to the requester; and

(2) Using the tracking number, the requester can find, by calling (202) 218-7770 or linking to [http://www.flra.gov/foia/foia\\_main.html](http://www.flra.gov/foia/foia_main.html), status information about the request including:

(i) The date on which the agency originally received the request; and

(ii) An estimated date on which the agency will complete action on the request.

(e) If any request for records is denied in whole or in part, the response required by paragraph (c) of this section shall notify the requester of the denial. Such denial shall specify the reason therefore, set forth the name and title or position of the person responsible for the denial, and notify the person making the request of the right to appeal the denial under the provisions of § 2411.10.

#### § 2411.9 Business information.

(a) *In general.* Business information obtained by the Authority from a submitter will be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) Business information means commercial or financial information obtained by the Authority from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter means any person or entity from whom the Authority obtains business information, directly or indirectly. The term includes corporations; State, local, and Tribal governments; and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* The Authority shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (e) of this section, except as provided in paragraph (h) of

this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (f) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *Where notice is required.* Notice shall be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) The Authority has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) *Opportunity to object to disclosure.* The Authority will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that is not received by the Authority until after its disclosure decision has been made shall not be considered by the Authority. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* The Authority shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information.

Whenever the Authority decides to disclose business information over the objection of a submitter, the Authority shall give the submitter written notice, which shall include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) The Authority 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 statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, the Authority shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the Authority shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever the Authority provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, the Authority shall also notify the requester(s). Whenever the Authority notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, the Authority shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the Authority shall notify the requester(s).

#### **§ 2411.10 Appeal from denial of request.**

(a) *Authority/General Counsel/Panel/IG.* (1) Whenever any request for records is denied, a written appeal may be filed within thirty (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.

(i) If the denial was made by a Regional Director or by the Freedom of Information Officer of the General Counsel, the appeal shall be filed with the General Counsel in Washington, DC.

(ii) If the denial was made by the Executive Director of the Panel, the appeal shall be filed with the Chairman of the Panel.

(iii) If the denial was made by the Solicitor or the IG, the appeal shall be

filed with the Chairman of the Authority in Washington, DC.

(2) The Chairman of the Authority, the Chairman of the Panel or the General Counsel, as appropriate, shall, within twenty (20) working days (excepting Saturdays, Sundays, and legal public holidays) from the time of receipt of the appeal, except as provided in § 2411.11, make a determination on the appeal and respond in writing to the requester, determining whether, or the extent to which, the request shall be granted.

(i) If the determination is to grant the request and the request is expected to involve an assessed fee in excess of \$250.00, the determination shall specify or estimate the fee involved and shall require prepayment of any charges due in accordance with the provisions of paragraph (a) of § 2411.13 before the records are made available.

(ii) Whenever possible, the determination relating to a request for records that involves a fee of less than \$250.00 shall be accompanied by the requested records when there is no history of the requester having previously failed to pay fees in a timely manner. Where this is not possible, the records shall be forwarded as soon as possible thereafter, consistent with other obligations of the Authority, the Panel, the General Counsel or IG.

(b) If on appeal the denial of the request for records is upheld in whole or in part by the Chairman of the Authority, the General Counsel, or the Chairman of the Panel, as appropriate, the person making the request shall be notified of the reasons for the determination, the name and title or position of the person responsible for the denial, and the provisions for judicial review of that determination under 5 U.S.C. 552(a)(4). Even though no appeal is filed from a denial in whole or in part of a request for records by the person making the request, the Chairman of the Authority, the General Counsel or the Chairman of the Panel, as appropriate, may, without regard to the time limit for filing of an appeal, sua sponte initiate consideration of a denial under this appeal procedure by written notification to the person making the request. In such event the time limit for making the determination shall commence with the issuance of such notification.

#### **§ 2411.11 Modification of time limits.**

(a) In unusual circumstances as specified in this section, the time limits prescribed with respect to initial determinations or determinations on appeal may be extended by written notice from the agency component

handling the request (either initial or on appeal) to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. As appropriate, the notice shall provide the requester with an opportunity to limit the scope of the request so that it may be processed within the time limit or an opportunity to arrange with the agency component an alternative time frame for processing the request or a modified request. To aid the requester, the FOIA Public Liaison shall assist in the resolution of any disputes between the requester and the processing agency component. No such notice shall specify a date that would result in a total extension of more than ten (10) working days.

(b) As used in this section, “unusual or exceptional circumstances” means, but only to the extent reasonably necessary to the proper processing of the particular request:

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

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

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

(c) Expedited processing of a request for records, or an appeal of a denial of a request for expedited processing, shall be provided when the requester demonstrates a compelling need for the information and in other cases as determined by the officer processing the request. A requester seeking expedited processing can demonstrate a compelling need by submitting a statement certified by the requester to be true and correct to the best of such person’s knowledge and belief and that satisfies the statutory and regulatory definitions of compelling need. Requesters shall be notified within ten (10) calendar days after receipt of such a request whether expedited processing, or an appeal of a denial of a request for expedited processing, was granted. As used in this section, “compelling need” means:

(1) That a failure to obtain 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

(2) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

#### § 2411.12 Effect of failure to meet time limits.

Failure by the Authority, the General Counsel, the Panel, or the IG either to deny or grant any request under this part within the time limits prescribed by the Freedom of Information Act, as amended, 5 U.S.C. 552, and these regulations shall be deemed to be an exhaustion of the administrative remedies available to the person making this request.

#### § 2411.13 Fees.

(a) *Definitions.* For the purpose of this section:

(1) The term *direct costs* means those expenditures which the Authority, the General Counsel, the Panel, or the IG actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of the rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(2) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents as well as all reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Searches may be done manually or by computer using existing programming. The Authority, the General Counsel, the Panel or the IG shall ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, if duplicating an entire document would be quicker and less expensive, a line-by-line search should not be done.

(3) The term *duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microfilm, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others.

(4) The term *review* refers to the process of examining documents located

in response to a commercial use request (see paragraph (a)(5) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term "*commercial use*" request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Authority, the General Counsel, the Panel, or the IG will look first to the use to which a requester will put the document requested. Where the Authority, the General Counsel, the Panel, or the IG has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the Authority, the General Counsel, the Panel, or the IG may seek additional clarification before assigning the request to a specific category.

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

(7) The term *non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as that term is referenced 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.

(8) The term *representative of the news media* refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as

disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not intended to be all-inclusive.

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

(b) *Exceptions to fee charges.*

(1) With the exception of requesters seeking documents for a commercial use, the Authority, the General Counsel, the Panel or the IG will provide the first 100 pages of duplication and the first two hours of search time without charge. The word "pages" in this paragraph refers to paper copies of standard size, usually 8½ by 11, or their equivalent in microfiche or computer disks. The term "search time" in this paragraph is based on a manual search for records. In applying this term to searches made by computer, when the cost of the search as set forth in paragraph (d)(2) of this section equals the equivalent dollar amount of two hours of the salary of the person performing the search, the Authority, the General Counsel, the Panel or the IG will begin assessing charges for computer search.

(2) The Authority, the General Counsel, the Panel or the IG will not charge fees to any requester, including commercial use requesters, if the cost of collecting the fee would be equal to or greater than the fee itself.

(3) As provided in § 2411.8(c)(5), the Authority, the General Counsel, the Panel or the IG will not charge search fees (or duplication fees if the requester is an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media, as described in this section), when the time limits are not met.

(4)(i) The Authority, the General Counsel, the Panel or the IG will provide documents without charge or at reduced charges if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the

government; and is not primarily in the commercial interest of the requester.

(ii) In determining whether disclosure is in the "public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" under paragraph (b)(4)(i) of this section, the Authority, the General Counsel, the Panel, and the IG will consider the following factors:

(A) *The subject of the request.* Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated;

(B) *The informative value of the information to be disclosed.* Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government 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 already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding;

(C) *The contribution to an understanding of the subject by the general public likely to result from disclosure.* Whether disclosure of the requested information will contribute to "public understanding." 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. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration; and

(D) *The significance of the contribution to the public understanding.* Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. 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 significant extent. The Authority, the General Counsel, the Panel and the IG shall not make value judgments about whether information

that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(iii) In determining whether disclosure "is not primarily in the commercial interest of the requester" under paragraph (b)(4)(i) of this section, the Authority, the General Counsel, the Panel and the IG will consider the following factors:

(A) *The existence and magnitude of a commercial interest.* Whether the requester has a commercial interest that would be furthered by the requested disclosure. Commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (a)(5) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration; and

(B) *The primary interest in disclosure.* Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure "is primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Authority, the General Counsel, the Panel, and the IG ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(iv) A request for a fee waiver based on the public interest under paragraph (b)(4)(i) of this section must address these factors as they apply to the request for records in order to be considered by the Authority, the General Counsel, the Panel, or the IG.

(v) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(c) *Level of fees to be charged.* The level of fees to be charged by the Authority, the General Counsel, the Panel, or the IG, in accordance with the schedule set forth in paragraph (d) of this section, depends on the category of

the requester. The fee levels to be charged are as follows:

(1) A request for documents appearing to be for commercial use will be charged to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.

(2) A request for documents from an educational or non-commercial scientific institution will be charged for the cost of reproduction 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 and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(3) The Authority, the General Counsel, the Panel or the IG shall provide documents to requesters who are representatives of the news media for the cost of reproduction alone, excluding charges for the first 100 pages.

(4) The Authority, the General Counsel, the Panel or the IG shall charge requesters who do not fit into any of the categories of this section fees which recover the full direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Requests from record subjects for records about themselves filed in Authority, General Counsel, Panel, or IG systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974, which permits fees only for reproduction.

(d) The following fees shall be charged in accordance with paragraph (c) of this section:

(1) *Manual searches for records.* The salary rate (*i.e.*, basic pay plus 16 percent) of the employee(s) making the search. Search time under this paragraph and paragraph (d)(2) of this section may be charged for even if the Authority, the General Counsel, the Panel or the IG fails to locate records or if records located are determined to be exempt from disclosure.

(2) *Computer searches for records.* The actual direct cost of providing the service, including computer search time directly attributable to searching for records responsive to a FOIA request, runs, and operator salary apportionable to the search.

(3) *Review of records.* The salary rate (*i.e.*, basic pay plus 16 percent) of the

employee(s) conducting the review. This charge applies only to requesters who are seeking documents for commercial use, and only to the review necessary at the initial administrative level to determine the applicability of any relevant FOIA exemptions, and not at the administrative appeal level of an exemption already applied.

(4) *Duplication of records.* Twenty-five cents per page for paper copy reproduction of documents, which the Authority, the General Counsel, the Panel and the IG determined is the reasonable direct cost of making such copies, taking into account the average salary of the operator and the cost of the reproduction machinery. For copies of records prepared by computer, such as tapes or printouts, the Authority, the General Counsel, the Panel or the IG shall charge the actual cost, including operator time, of production of the tape or printout.

(5) *Forwarding material to destination.* Postage, insurance and special fees will be charged on an actual cost basis.

(e) *Aggregating requests.* When the Authority, the General Counsel, the Panel or the IG reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Authority, the General Counsel, the Panel or the IG will aggregate any such requests and charge accordingly.

(f) *Charging interest.* Interest at the rate prescribed in 31 U.S.C. 3717 may be charged those requesters who fail to pay fees charged, beginning on the 30th day following the billing date. Receipt of a fee by the Authority, the General Counsel, the Panel or the IG, whether processed or not, will stay the accrual of interest.

(g) *Advanced payments.* The Authority, the General Counsel, the Panel or the IG will not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The Authority, the General Counsel, the Panel or the IG estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then the Authority, the General Counsel, the Panel or the IG 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, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), in which case the Authority, the General Counsel, the Panel or the IG requires the requester to pay the full amount owed plus any applicable interest as provided in this section or demonstrate that the requester has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester. When the Authority, the General Counsel, the Panel or the IG acts under paragraph (g)(1) or (2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 20 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extension of these time limits) will begin only after the Authority, the General Counsel, the Panel or the IG has received fee payments described in this section.

(h) When a person other than a party to a proceeding before the agency makes a request for a copy of a transcript, diskette, or other recordation of the proceeding, the Authority, the General Counsel, the Panel or the IG, as appropriate, will handle the request under this part.

(i) Payment of fees shall be made by check or money order payable to the U.S. Treasury.

#### **§ 2411.14 Record retention and preservation.**

The Authority, the General Counsel, the Panel, and the IG shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until such time as disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

#### **§ 2411.15 Annual report.**

On or before February 1 annually, the Chief FOIA Officer of the Authority shall submit a report of the activities of the Authority, the General Counsel, the Panel, and the IG with regard to public information requests during the preceding fiscal year to the Attorney General of the United States. The report shall include those matters required by 5 U.S.C. 552(e), and shall be made available electronically.

Dated: September 25, 2009.

**Carol Waller Pope,**  
Chairman.

[FR Doc. E9-23553 Filed 9-30-09; 8:45 am]

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## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 981**

[Doc. No. AMS-FV-08-0045; FV08-981-2 FIR]

### **Almonds Grown in California; Revision of Outgoing Quality Control Requirements**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Affirmation of interim final rule as final rule.

**SUMMARY:** The Department of Agriculture (USDA) is adopting as a final rule, without change, an interim final rule that revised the outgoing quality control regulations issued under the California almond marketing order (order). The interim final rule revised the term "validation" under the *Salmonella* bacteria (*Salmonella*) treatment program by specifying that validation data must be both submitted to and accepted by the Almond Board of California's (Board) Technical Expert Review Panel (TERP) for all treatment equipment prior to its use under this program. The interim final rule was necessary to ensure that all treatment equipment meets a 4-log reduction of *Salmonella* in almonds.

**DATES:** *Effective Date:* Effective October 2, 2009.

#### **FOR FURTHER INFORMATION CONTACT:**

Terry Vawter, Senior Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487-5901, Fax: (559) 487-5906, or E-mail: [Terry.Vawter@ams.usda.gov](mailto:Terry.Vawter@ams.usda.gov), or [Kurt.Kimmel@ams.usda.gov](mailto:Kurt.Kimmel@ams.usda.gov).

Small businesses may obtain information on complying with this and other marketing order regulations by viewing a guide at the following Web site: <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&page=MarketingOrdersSmallBusinessGuide>; or by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250-0237;