NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE

1 CFR Part 426

RIN 3262–AA00

Freedom of Information Act Regulations

AGENCY: National Commission on Military, National, and Public Service.

ACTION: Interim final rule; request for comments.

SUMMARY: The National Commission on Military, National, and Public Service (the ''Commission'') is issuing an interim final rule, establishing procedure for the public to obtain information from the Commission under the Freedom of Information Act (FOIA).

DATES: This interim final rule is effective on May 2, 2018. Written comments on the interim final rule should be received on or before June 1, 2018.

ADDRESSES: You may send comments, identified by Regulatory Information Number (RIN), by any of the following methods:

- *Email:* Please send comments to *FOIA@inspire2serve.gov* and include the RIN in the subject line of the message.
- *Website: http://www.inspire2serve.gov/content/share-your-thoughts.* Follow the instructions on the page to submit a comment and include the RIN in the comment.
- *Mail:* National Commission on Military, National, and Public Service, Attn: Rulemaking—RIN 3262 AA00, 2530 Crystal Drive, Suite 1000, Box No. 63, Arlington, VA 22202.

All submissions received must include the RIN for this rulemaking. If the Commission cannot read your comment due to technical difficulties and cannot contact you for clarification, the Commission may not be able to consider your comment.

FOR FURTHER INFORMATION CONTACT: For general inquiries, submission process questions, or any additional information about this interim final regulation, please contact Rachel Rikleen, at (703) 571–3760 or by email at *rachel.l.rikleen@inspire2serve.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On December 23, 2016, the President signed into law the National Defense Authorization Act for Fiscal Year 2017, Public Law 114–328, 130 Stat. 2000 (2016), which created the National Commission on Military, National, and Public Service (the ''Commission''). Public Law 114–328, Subtitle F, 130 Stat. at 2130. To establish procedures to facilitate public interaction with the Commission, the agency is issuing interim final regulations under the Freedom of Information Act (FOIA).

II. Summary of Interim Final Rule

This interim final rule establishes procedures for the Commission necessary to implement the Freedom of Information Act (FOIA), which provides for the disclosure of agency records and information to the public, unless that information is exempted under statutory exemptions or exclusions. The procedures established herein are intended to ensure that the Commission fully satisfies its responsibility to the public. The authority for this rulemaking is 5 U.S.C. 552(a), which was amended by the FOIA Improvement Act of 2016, Public Law 114–185, 130 Stat. 538 (2016). It also complies with the policy directives set out in Presidential Memoranda dated January 21, 2009, entitled ''Freedom of Information Act'' (74 FR 4683, January 26, 2009) and ''Transparency and Openness'' (74 FR 4685, January 26, 2009), which encourage federal agencies to apply a presumption of disclosure in FOIA decision making.

III. Procedural Requirements

Administrative Procedure Act

This interim final rule parallels the procedures currently used by other agencies to implement FOIA. The Commission has determined that good cause exists under 5 U.S.C. 553(b) and 5 U.S.C. 553(d)(3) to waive the notice and comment and delayed effective requirements of the Administrative Procedure Act to publish this regulation as an interim final rule with a request for comments. The Commission is a temporary, independent establishment with statutorily-defined deadlines and a limited existence. It is the intent of the agency to be as transparent as practicable in making information available to the public. This regulation establishes procedures to facilitate the Commission's interactions with the public and the public's access to information about the Commission. In light of this agency's limited duration, as set forth in its enabling legislation, and the need for timely access, the Commission has decided that full notice and comment rulemaking is impracticable and contrary to public policy as the absence of FOIA regulations could impair the public's ability to access information. Additionally, the Commission has determined that full notice and comment rulemaking is not necessary as this regulation constitutes a rule of agency procedure under 5 U.S.C. 553(b). This is because the rule merely establishes procedural requirements for accessing information under FOIA from the Commission. In other words, it outlines *how* the public may access information available under FOIA. It does not change the substantive standards by which the agency evaluates applications under FOIA. Finally, the Commission has determined that this interim final rule should be issued without a delayed effective date pursuant to 5 U.S.C. 553(d)(3). The 30-day delay in effective date typically allows regulated entities time to revise their policies in light of a regulation that governs those entities' conduct. Here, such a delay is unnecessary because the regulation facilitates the accessibility of information under FOIA.

Executive Orders 12866 and 13771

This rulemaking is not a significant regulatory action for the purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required. It is also not subject to the requirements found in Executive Order 13771.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require State, local, or tribal governments to spend more than $100 million in one year. This rule will not mandate any requirements for State, local or tribal governments, nor will it affect private sector costs.

Regulatory Flexibility Act

The Commission certifies this interim rule is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* because it will not have a significant economic impact on a substantial number of small entities and it is not issuing a notice of proposed rulemaking.

Paperwork Reduction Act

It has been determined that this rule does not impose reporting or record keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

List of Subjects in 1 CFR Part 426

Administrative practice and procedure, Reporting and recordkeeping requirements.

Therefore, for reasons discussed in the preamble, the National Commission on Military, National, and Public

Service amends 1 CFR part 426 as follows:

PART 426—NATIONAL COMMISSION ON MILITARY, NATIONAL, AND PUBLIC SERVICE

■ 1. The authority citation for part 426 continues to read as follows:

Authority: 5 U.S.C. 552(a)

■ 2. Add subpart B, consisting of §§ 426.201 through 426.211, to read as follows:

Subpart B—Disclosure of Records and Information Under the Freedom of Information Act

Sec.

426.201 General.
426.202 Proactive disclosures.
426.203 Requirements for making requests.
426.204 Responsibility for responding to requests.
426.205 Timing of responses to requests.
426.206 Response to requests.
426.207 Confidential commercial information.
426.208 Appeals.
426.209 Preservation of records.
426.210 Fees.
426.211 Other rights and services.

Subpart B—Disclosure of Records and Information Under the Freedom of Information Act

§ 426.201 General.

This subpart contains the regulations of the National Commission on Military, National, and Public Service (the ''Commission'') implementing the Freedom of Information Act (''FOIA''), 5 U.S.C. 552, as amended. These regulations set forth procedures for requesting access to records maintained by the Commission. These regulations should be read together with the text of the FOIA, and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the Commission's Privacy Act regulations as well as under this subpart.

§ 426.202 Proactive disclosures.

(a) Records that FOIA requires agencies to make available for public inspection in an electronic format may be accessed through the Commission's website at *www.inspire2serve.gov.* The Commission will ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. The Commission has a FOIA Public Liaison who can assist individuals in locating records particular to the Commission. A list of agency FOIA Public Liaisons is available at *http://www.foia.gov/report-makerequest.html.*

(b) The following types of records shall be available routinely on the website, without resort to formal FOIA request procedures, unless such records fall within one of the exemptions listed at 5 U.S.C. 552(b) of the Act:

(1) Any formal report issued by the Commission;

(2) Testimonies and presentations submitted to the Commission;

(3) Schedules for public meetings and hearings of the Commission along with transcripts or notes of such public meetings and hearings;

(4) Press statements;

(5) Substantive rules of general applicability adopted by the Commission, procedural rules governing the Commission's general operations that may affect the public, and statements of general policy or interpretation of general applicability formulated and adopted by the Commission; and

(6) Copies of all records, regardless of form or format, that have been released previously to any person under 5 U.S.C. 552(a)(3), and that the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records. When the Commission receives three or more requests for substantially the same records, then the Commission shall make the released records available in the Commission's reading room and on the Commission's website.

(c) The Commission shall also maintain a public reading room, at the Commission's offices, containing records available for public inspection that cannot be produced in electronic form. The reading room shall be available for use on workdays during the hours of 9 a.m. to 4 p.m. Requests for appointments to review the materials in the public reading room should be directed to the FOIA Public Liaison.

(d) Based upon applicable exemptions in 5 U.S.C. 552(b), the Commission may redact certain information contained in any matter described in this section before making such information available for inspection or publishing it. The justification for the redaction shall be explained in writing, and the extent of such redaction shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemptions under which the redaction is made. The location of the information deleted must also be indicated on the record, if technically feasible.

§ 426.203 Requirements for making requests.

(a) *In general.* Many documents are available on the Commission's website and the Commission encourages requesters to visit the website before making a request for records pursuant to this subpart. Except for records already available on the website or subject to the FOIA exemptions and exclusions, the Commission shall promptly provide records to any person in response to a request that conforms to the rules and procedures of this section. Requesters may contact the agency's FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

(b) *Form of request.* For records not available on the website, requesters wishing to obtain information from the Commission should submit a written request to the Commission. It may be submitted by mail or via the internet (website or email). A request by mail must be addressed to: FOIA Request, National Commission on Military, National, and Public Service, 2530 Crystal Drive, Suite 1000, Box No. 63, Arlington, VA 22202. As there may be delays in mail delivery, it is advisable to send the request via email to *FOIA@inspire2serve.gov.* The Commission will communicate with the requester by email unless he or she specifies otherwise. Requesters may specify the preferred form or format for the records sought, and the Commission will accommodate the request if the record is readily reproducible in that form or format.

(c) *Contents of request.* Requests must include the following:

(1) The requester's full name, mailing address, a telephone number at which the requester can be reached during normal business hours, and an email address for the requester, if the requester has one;

(2) A description of the records sought in enough detail to allow the records to be located with a reasonable amount of effort. To the extent possible, requesters should include specific information, such as the date, title or name, author, recipient, and subject matter of the records sought. If known, the requester must include any file designations or descriptions for the records requested;

(3) If submitting the request as an educational institution, a non-commercial scientific institution, or a representative of the news media, information to support being placed in that category of requester as they are defined in § 426.210(b);

(4) A fee waiver request, if applicable (see § 426.210(f));

(5) A statement explaining why expedited processing is necessary, if it is being requested (see § 426.205(c)); and

(6) Where the request is making a request for records about himself or herself, verification of the individual's identity (please see the Commission's Privacy Act regulations at 1 CFR, chapter IV, part 426, subpart A).

(d) *Date received.* The Commission shall deem itself to have received a request on the date that it receives a request containing the information required by paragraph (c) of this section. If after receiving a request, the Commission determines that it does not reasonably describe the records sought, the agency must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Public Liaison.

§ 426.204 Responsibility for responding to requests.

(a) *In general.* In determining which records are responsive to a request, an agency ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the agency must inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The Chief FOIA Officer or designee is authorized to grant or to deny any requests for records.

(c) *Consultation, referral, and coordination.* When reviewing records in response to a request, the Commission will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the Commission will proceed in one of the following ways:

(1) *Consultation.* When records originated within the Commission, but contain within them information of interest to another agency or other Federal Government office, the Commission will typically consult with that other entity prior to making a release determination.

(2) *Referral.* When the Commission believes that a different agency is best able to determine whether to disclose the record, the Commission typically should refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. Whenever an agency refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, the name of the agency, and the FOIA agency contact.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the agency that received the request should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the agency that originally received the request.

(d) *Timing of response to consultations and referrals.* All consultations and referrals received by the Commission will be handled according to the date that the first agency received the perfected FOIA request.

§ 426.205 Timing of responses to requests.

(a) *In general.* The Commission ordinarily will respond to requests according to their order of receipt. The following timing and steps are the normal process:

(1) *Acknowledgment.* The Commission will provide an acknowledgment notice with an individualized tracking number, the date of receipt of the request, a confirmation of a waiver or reduction of fees (if requested), and a summary of the records requested to each requester within 10 working days after receiving a request that has all of the requisite information.

(2) *Response time.* Ordinarily, the Commission shall have 20 work days from when a request is received to determine whether to grant or deny a request for records. The 20-day time period shall not be tolled by the Commission except that the Commission may:

(i) Make one reasonable demand to the requester for clarifying information about the request and toll the 20-day time period while awaiting the clarifying information; or

(ii) Notify the requester of the fee assessment for the request and toll the 20-day time period while awaiting the requester's response.

(3) *Appeal.* The Commission will make a decision with respect to an appeal of a full or partial denial of a request for records within 20 work days after receipt of the appeal.

(b) *Multi-Track processing.* The Commission uses a multi-track system to process FOIA requests, so that a FOIA request is processed based on its complexity. Each request will be assigned to the Standard, Complex, or Expedited track.

(1) *Standard Track.* Requests that are routine and require little search time, review, or analysis are assigned to the Standard Track. The Commission will respond to these requests in the order in which they are received and make every effort to respond no later than 20 working days after receipt of the request.

(2) *Complex Track.* Requests that are non-routine are assigned to the Complex Track if the response may be voluminous; requires an unusually high level of effort for search, review, or duplication; or causes an undue disruption to the day-to-day activities of the Commission in carrying out its statutory responsibilities. The requester will be notified if the request is assigned to the Complex Track and will be given an estimate of the time for response. The Commission will respond to Complex Track requests as soon as practicable, and may discuss with the requester the possibility of reformulating the request to reduce processing time.

(3) *Expedited Track.* Requests for expedited processing that meet the standards set forth in paragraph (c) of this section, will be assigned to the Expedited track. In such cases, the process described in paragraph (c) will be followed.

(c) *Expedited processing.* A request for expedited processing must accompany the initial request for records, and the request should be clearly marked ''Expedited Processing Requested.'' It must be a certified, written statement of compelling need for expedited processing, stating that the facts are true and correct. The Commission shall decide whether to grant the request within 10 calendar days of its receipt, and shall notify the requester in writing. If the Commission grants this request, then the Commission will give the expedited request priority over non-expedited requests and shall process it as soon as practicable. Denials of expedited processing requests can be appealed using the same procedures as denials of other FOIA requests. In determining whether processing should be

expedited, the Chief FOIA Officer may consider whether:

(1) Failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to a person's life or physical safety;

(2) With respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public about actual or alleged Federal Government activity; or

(3) A reasonable expectation of an imminent loss of a substantial due process right.

(d) *Unusual circumstances.* If the Commission determines that ''unusual circumstances'' exist, as that term is defined in the FOIA, the time limits for responding to requests and appeals may be extended by no more than 10 work days by providing written notice of the extension to the requester. The requester will be given an opportunity to limit the scope of the request or to arrange with the Commission an alternative time frame for processing the request. A FOIA Officer shall include with the notice of extension a brief statement of the reason for the extension, the date the FOIA Officer expects to make a determination, and the availability of the FOIA Public Liaison to assist the requester, and the requester's right to seek dispute resolution services from the Office of Government Information Services (OGIS) of the National Archives and Records Administration.

§ 426.206 Response to requests.

(a) *Acknowledgements of requests.* The Commission will send an acknowledgement of the request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process. Upon request, the Commission will provide an estimated date by which the Commission expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the agency may provide interim responses, releasing the records on a rolling basis.

(b) *Grant of request.* If a FOIA Officer grants a request, in full or in part, the Commission shall promptly provide the requester written notice of the decision, what fees apply under section 10 of this subpart, and the availability of its FOIA Public Liaison to offer assistance. The requester will be notified whether the request has been assigned to the Standard, Complex, or Expedited track, pursuant to § 426.205(b).

(c) *Request denial.* If the Chief FOIA Officer denies a request in any respect, the Commission will notify the requester of that determination in writing. A denial of request includes decisions that: Fees will not be waived, no expedited processing will be done, there are no responsive records subject to FOIA, the requested record does not exist or has been destroyed, the requested record is exempt in whole or in part, or the request does not reasonably describe the records sought. The written notice will include:

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

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the agency in denying the request;

(3) A description of the material withheld, such as the approximate number of pages or some other reasonable form of estimation;

(4) A statement that the denial may be appealed under section 8(a) of this subpart, and a description of the appeal requirements; and

(5) A statement notifying the requester of the assistance available from the agency's FOIA Public Liaison and the dispute resolution services offered by OGIS.

(d) *Redactions.* When a portion of a record is withheld, the amount of information redacted and the claimed exemption will be noted at the place in the record where the redaction was made.

§ 426.207 Confidential commercial information.

(a) *Definitions.*

Confidential commercial information means commercial or financial information obtained by the Commission from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

Submitter means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The Commission must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the agency determines that it may be required to disclose the records, provided the requested information has been designated in good faith by the submitter or the Commission has a reason to believe that the requested information may be protected from disclosure under Exemption 4.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the Commission may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The Commission determines that the information is exempt under the FOIA, and therefore will not be disclosed;

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

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12,600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, the Commission must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) The Commission must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide the Commission a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the

notice will be considered to have no objection to disclosure of the information. The Commission is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(4) The Commission must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(f) *Notice of intent to disclose.* Whenever the Commission decides to disclose information over the objection of a submitter, the agency must provide the submitter written notice, which must include:

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

(2) A description of the information to be disclosed or copies of the records as the Commission intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(g) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the Commission must promptly notify the submitter.

(h) *Requester notification.* The Commission must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 426.208 Appeals.

(a) *Grounds for administrative appeals.* A requester may appeal an initial determination of the Commission, including but not limited to a determination:

(1) To deny access to records in whole or in part (as provided in § 426.206(c));

(2) To assign a particular fee category to the requester (as provided in § 426.209(d));

(3) To deny a request for a reduction or waiver of fees (as provided in § 426.209(f));

(4) That no records could be located that are responsive to the request (as provided in § 426.206(c)); or

(5) To deny a request for expedited processing (as provided in § 426.205(c)).

(b) *Initiating appeals.* Requesters not satisfied with the FOIA Officer's decision may make a written request appealing the decision within 90 days of the date of the FOIA Officer's decision. Any appeal requests should be clearly marked with the words ''Freedom of Information Act Appeal.'' Appeals may be made through the Commission's email, *FOIA@inspire2serve.gov;* website, *www.inspire2serve.gov,* or through the mail, and may be addressed to: FOIA Appeals, National Commission on Military, National, and Public Service, 2530 Crystal Drive, Suite 1000, Box No. 63, Arlington, VA 22202. As there may be delays in mail delivery, it is advisable to send the request via email. The request should set out the name and contact information of the requester, specify the date of the initial request and the initial determination, and set forth why the appeal should be granted.

(c) *Adjudication of appeals.* Appeals will be processed in the order of their receipt. An appeal ordinarily will not be adjudicated if the request become a matter of FOIA litigation. Before seeking review by a court of an agency's adverse determination, a requester generally must first submit a timely administrative appeal.

(d) *Appeal decisions.* The Commission's Chair or his designee shall decide whether to affirm or reverse the initial determination (in whole or in part), and shall notify the requester of this decision in writing within 20 work days, pursuant to § 426.205(c). If the appeal is denied (in whole or in part), the Commission will notify the requester in writing of the decision, the reasons for the denial (including the FOIA exemptions relied upon), the name and title of the official responsible for the determination on appeal, and the provisions for judicial review and dispute resolution services offered by the OGIS. If the appeal is granted in full or in part, the Chief FOIA Officer will notify the requester in writing and promptly process the request.

(e) *Dispute resolution.* Dispute resolution is a voluntary process. If the Commission agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute. Requesters may seek dispute resolution by contacting the FOIA Public Liaison or OGIS at: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, OGIS, College Park, MD 20740; email: *ogis@nara.gov;* telephone: (202) 741–5770; facsimile: (202) 741–5769; toll free telephone: (877) 684–6448.

§ 426.209 Preservation of records.

The Commission will preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration. The Commission will not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 426.210 Fees.

(a) *In general.* The Commission shall charge the requester for processing a request under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: Commercial use requesters, non-commercial scientific or educational institutions or news media requesters, and all other requesters. Different fees are assessed depending on the category. Requesters may seek a fee waiver, and the Commission will consider fee waiver requests in accordance with the requirements in paragraph (f) of this section. To resolve any fee issues that arise under this section, the Commission will contact a requester for additional information. No fees shall be charged if the amount of fees incurred in processing the request is below $25. The Commission ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or by another method as determined by the Commission.

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

Commercial use request means a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The Commission's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The Commission will notify requesters of their placement in this category.

Direct costs means those expenses that the Commission incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.,* the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as

photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

Duplication means reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

Educational institution means any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. The Commission may seek verification from the requester that the request is in furtherance of scholarly research and the Commission will advise requesters of their placement in this category.

Example 1. A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2. A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

Example 3. A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

Noncommercial scientific institution means an institution that is not operated on a ''commercial'' basis, as defined in this paragraph (b) and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. The Commission will advise requesters of their placement in this category.

Representative of the news media means 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 that broadcast news to the public at large and publishers of periodicals that disseminate news and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Commission can also consider a requester's past publication record in making this determination. The Commission will advise requesters of their placement in this category.

Review means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 426.207 of this subpart, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search means the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Fees chargeable for specific services.* In responding to FOIA requests, the Commission will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (f) of this section. No additional costs will be added to charges calculated under this section.

(1) *Duplicating records.* The Commission shall assess requester fees for the cost of copying records. The charge will be $0.12 per page, up to 8½ x 14, made by photocopy or similar process. The charge will be the actual cost for duplicating photographs, films, and other materials. Where paper documents must be scanned so they can be sent electronically, the requester must pay the direct costs associated with scanning those materials. The Commission will honor a requester's preference for receiving a record in a particular form or format where the agency can readily reproduce it in the form or format requested.

(2) *Search services.* The Commission shall charge a requester for all time spent by its employees searching for records that are responsive to a request, even if no responsive records are found or the records are exempt from disclosure. For non-electronic searches, the Commission shall charge for search time at the salary rate (basic pay plus 16 percent) of the employee who conducts the search. For electronic records, the Commission shall charge the requester for the actual direct cost of the search, including computer search time, runs, and the operator's salary.

(3) *Review of records.* The Commission shall only charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, but no charge will be made for review at the administrative appeal stage. However, if a particular exemption is deemed to no longer apply, any costs associated with an agency's re-review of the records in order to consider the use of other exemptions may be assess as review fees. The Commission shall charge a requester for time spent reviewing records at the salary rate(s) (*i.e.,* basic pay plus 16 percent) of the employees who conduct the review.

(4) *Inspection of records in the reading room.* Fees for all services provided shall be charged whether or not copies are made available to the requester for inspection. However, no fee shall be charged for monitoring a requester's inspection of records in the physical reading room.

(5) *Other services.* Although not required to provide special services, if the Commission chooses to do so as a matter of administrative discretion, the requested services are charged at the actual cost to the Commission. Examples of such services include certifying that records are true copies or sending records by express mail.

(d) *Fees applicable to each category of requester.* The Commission shall apply the fees set forth in this paragraph, for each category described in paragraph (c) of this section, to FOIA requests processed by the Commission.

(1) *Commercial use.* A requester seeking records for commercial use shall be charged the full direct cost of searching for, reviewing, and duplicating the records they request as set forth in paragraph (c) of this section. The Commission is not required to consider a waiver request based upon the assertion that disclosure would be in

the public interest from a commercial use requester.

(2) *Educational and non-commercial scientific uses.* A requester seeking records for educational or non-commercial scientific use shall be charged only for the cost of duplicating the records they request, except that the Commission shall provide the first 100 pages of duplication (or cost equivalent for other media) free of charge. To be eligible, the requester must show that the records are not sought for a commercial use, but rather in furtherance of scholarly or scientific research.

(3) *News media uses.* A requester seeking records under the news media use category shall be charged only the cost of duplicating the records they request, except that the Commission shall provide the requester with the first 100 pages of duplication (or cost equivalent for the other media) free of charge.

(4) *Other requests.* A requester seeking records for any other use shall be charged the full direct cost of searching for and duplicating records that are responsive to the request, as set out in paragraph (b) of this section, except that the Commission shall provide the first 100 pages of duplication and the first two hours of search time free of charge.

(e) *Other circumstances when fees are not charged.* Notwithstanding paragraphs (c) and (d) of this section, the Commission may not charge a requester a fee for processing a FOIA request if the total fee is equal to or less than $25. Additionally, the Commission may not charge a requester a search or duplication fee if the Commission fails to comply with any time limit under § 426.205 or § 426.208, unless:

(1) A court has determined that exceptional circumstances exist, as defined by the FOIA, then a failure to comply with such time limit shall be excused for the length of time provided by the court order;

(2) The Commission has determined that unusual circumstances, as defined by the FOIA, apply and the Commission provides timely written notice to the requester in accordance with § 426.205(d), then the time limit shall be excused for an additional 10 days; or

(3) The Commission has determined that unusual circumstances apply; more than 5,000 pages are necessary to respond to the request; the Commission has provided a timely written notice to the requester in accordance with § 426.205(d), and the Commission has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request. Then the Commission may charge a requester all applicable fees.

(f) *Waiver or reduction of fees.* (1) A requester may request a waiver or reduction of fees otherwise applicable to a FOIA request in writing during the initial FOIA request. The waiver must demonstrate that the fee reduction or waiver is in the public interest because it furnishes information that is likely to contribute significantly to public understanding of the operations or activities of the government, and the information is not primarily in the commercial interest of the requester.

(2) To determine whether the requester has satisfied the waiver request requirements, the Commission shall consider whether the subject of the requested records has a direct connection to government operations or activities; the disclosable portion of the requested records is meaningfully informative, and is not already in the public domain; the disclosure would contribute to the understanding of a reasonably broad audience, as opposed to the individual requester; and the public's understanding would be significantly enhanced by the disclosure. The Commission shall also consider whether the requester, or any person on whose behalf the requester may be acting, has a commercial interest that would be furthered by the disclosure, and whether the public interest is greater in magnitude than that of any identified commercial interest in disclosure.

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

(4) The Commission shall notify the requester in writing regarding its determination to reduce or waive fees.

(5) If the Commission denies a request to reduce or waive fees, then the Commission shall advise the requester, in the denial notification letter, that the requester may incur fees as a result of processing the request. In the denial notification letter, the Commission shall advise the requester that the Commission will not proceed to process the request further unless the requester, in writing, directs the Commission to do so and either agrees to pay any fees that may apply to processing the request or specifies an upper limit (of not less than $25) that the requester is willing to pay to process the request. If the Commission does not receive this written direction and agreement within 30 days of the date of the denial notification letter, then the Commission shall deem the FOIA request to be withdrawn.

(6) If the Commission denies a request to reduce or waive fees, then the requester shall have the right to submit an appeal in accordance with § 426.208. The Commission shall communicate this appeal right as part of its denial notification to the requester.

(g) *Notice of estimated fees.* (1) When an agency determines or estimates that the fees to be assessed in accordance with this section will exceed $25, the agency must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily the Commission will advise the requester accordingly. The notice will specify what duplication and search time the requester is entitled to and how they have been accounted for in the estimate.

(2) If the agency notifies the requester that the actual or estimated fees are in excess of $25, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable designate an exact dollar amount the requester is willing to pay. Agencies are not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Commission estimates that the total fee will exceed that amount, the Commission will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Commission will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The FOIA Public Liaison will be available to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(h) *Advance payment.* (1) For requests other than those described in

paragraphs (h)(2) and (3) of this section, the Commission will not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.,* payment before copies are sent to a requester) is not an advance payment.

(2) When the Commission determines or estimates that a total fee to be charged under this section will exceed $250, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. An agency may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) If a requester previously has failed to pay a fee within 30 calendar days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Commission begins to process a new request.

(4) In cases in which an agency requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the agency's fee determination, the request will be closed.

(i) *Charging interest.* The Commission may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the Commission. The Commission will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures.

(j) *Aggregating requests.* If the Commission reasonably determines that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Commission may aggregate those requests and charge accordingly. The Commission may presume that multiple requests involving related matters submitted within a 30 calendar day period have been made in order to avoid fees. For requests separated by a longer period, the Commission will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. The Commission shall not aggregate multiple requests involving unrelated matters.

(k) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Commission must inform the requester of the contact information for that program.

§ 426.211 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Dated: April 20, 2018.

Joseph Heck,

Chairman.

[FR Doc. 2018–09212 Filed 5–1–18; 8:45 am]

BILLING CODE 3610–YE–P