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## DEPARTMENT OF AGRICULTURE

### 7 CFR Part 1

RIN 0503-AA61

#### Departmental Freedom of Information Act Regulations

**AGENCY:** Office of the Chief Information Officer, USDA.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the U.S. Department of Agriculture (“USDA or the Department”) Freedom of Information Act (“FOIA”) regulations. The revisions clarify and update procedures for requesting information from USDA, as well as procedures that USDA follows in responding to requests from the public. The revisions also incorporate clarifications and updates resulting from changes to the FOIA and case law.

**DATES:** *Effective Date:* This final rule is effective October 21, 2019.

**FOR FURTHER INFORMATION CONTACT:** Alexis R. Graves, Departmental FOIA Officer, Office of the Chief Information Officer, United States Department of Agriculture, 1400 Independence Avenue SW, South Building, Room 4101, Washington, DC 20250. You may also contact the Departmental FOIA Officer by phone at 202-690-3318 or [USDAFOIA@usda.gov](mailto:USDAFOIA@usda.gov).

**SUPPLEMENTARY INFORMATION:** On June 11, 2018, USDA proposed to revise its regulations in order to incorporate changes of the FOIA Improvement Act of 2016 and the OPEN Government Act of 2007, to streamline processing procedures, and to incorporate the template published by the Department of Justice Office of Information Policy (“Template”). The proposed regulations were published in full and reflected these substantive changes as well as a renumbering and reorganization of USDA’s existing regulations. USDA also removed language it identified as obsolete, redundant, or inconsistent. In

keeping with the Department’s long-standing commitment to provide improved service by writing in plain language, USDA also revised some of the language to make it more clear, understandable, and useful to our requester community.

USDA invited public comment, and after carefully considering the submissions, has determined to incorporate additional revisions. USDA has also made minor clarifying and numbering corrections, made updates to reflect administrative and organizational changes, and removed duplicative language. USDA has also determined to revise the proposed language in § 1.7 to expand the component’s discretion to determine whether to voluntarily undertake the creation of new records. Accordingly, this preamble addresses significant changes to USDA’s existing regulations and, where relevant, addresses significant public comments.

In total, USDA received five public submissions to its proposed rule. One commenter expressed general support for the proposed rule. The remaining four submissions addressed a variety of issues to include public reading rooms, affirmative disclosures, fee provisions, treatment of confidential business information, and appeals. Collectively, these comments afforded USDA an opportunity to improve its final regulations and to reconsider the inclusion of language proposed for deletion.

#### 1. Comments on 1.2 (Public Reading Rooms)

Two commenters raised concerns with USDA’s proposed regulations concerning public reading rooms and the affirmative disclosure requirements of 5 U.S.C. 552(a)(2). Specifically, one commenter asserted that the proposed regulation fails to implement a process to manage proactive disclosures for records requested three or more times, because it fails to provide adequate guidance to components about when and how to determine when records are likely to become the subject of subsequent requests, because it removes existing guidance, and because it fails to establish procedures to identify records of public interest for disclosure in an electronic format.

Another commenter raised general concerns with USDA’s past and future handling of public reading rooms, including allegations that are the subject

of ongoing litigation. USDA declines to address comments that extend beyond the scope of the proposed regulations in this forum. With regard to comments about the proposed regulations, the commenter stated that (i) the proposed regulations should require all USDA components to post indices of frequently requested records with certain functions and information, pursuant to 552(a)(2)(D); (ii) USDA must promptly promulgate implementing regulations to provide “a rational approach to FOIA’s affirmative disclosure mandate”; (iii) the regulations provide no clear mechanism or guidance for submitting or processing requests under 552(a)(2)(D); (iv) the regulations eliminate existing guidance for components to determine whether records “are likely to become the subject of requests for substantially the same records” under 552(a)(2)(D)(ii)(I) and that such guidance should be expanded; (v) the regulations eliminate, without explanation, existing language that clarifies circumstances under which components will make frequently requested records available and what records are required to be posted online under 552(a)(2); (vi) USDA eliminates existing requirements concerning indices, handbooks, access to formal adjudication proceedings, and an index of information systems; (vii) USDA should adopt and expand factors from its existing regulations with regard to 552(a)(2)(D), *e.g.*, USDA regulations should require agencies to consider “whether records fall into frequently requested *categories* of information . . . without regard to whether any particular [ ] record has actually been requested under (a)(3) of the statute” and components should be required to make a determination each time it releases a record as to whether it is a “frequently requested record”; and (viii) USDA regulations should clarify the term “released” under 552(a)(2)(D)(i) to include “making the information available online or by responding to a FOIA request by referring the requester to the agency’s website.”

After consideration of the public comments, USDA has determined to include language to assist components in making online publication decisions pursuant to 552(a)(2). Specifically, USDA is keeping language from its existing regulation that identifies the types of records that are required to be

published under 552(a)(2) and that assists components in determining what 552(a)(3) FOIA-processed records are “likely to become the subject of subsequent requests for substantially the same records.” USDA declines proposals to expand certain language in contravention of the FOIA statute. Specifically, USDA disagrees with the proposed expansion of 552(a)(2)(D) to require components to consider *categories* of records without regard to whether any record has actually been requested and released under 552(a)(3). Such a suggestion is contrary to the plain language of the FOIA 552(a)(2)(D)(i) which is limited to records “that have been released to any person under paragraph (3).” Similarly, USDA disagrees with the comment that USDA regulations should clarify the term “released” to include “making the information available online.” Such a change would be contrary to the plain language of the statute, which is limited to certain FOIA-processed records that have previously been released to a person in response to a request under (a)(3). With regard to the comment concerning the indexing requirement of 552(a)(2), USDA notes that the requirement is generally satisfied by providing a distinct link to each document that is posted. More generally, beyond what is discussed above, USDA believes it is not currently necessary or appropriate to elaborate or expand upon the reading room requirements already set forth in the statute with sufficient clarity and precision.

## 2. Comments on 1.3 (Requirements for Making a Records Request)

One commenter asserted that USDA’s proposed regulations wrongfully delete information regarding the titles and addresses of relevant decision-making officials. This same commenter also contended that the proposed regulations failed to assist the public in identifying where records may be located. USDA disagrees with these comments. As explained in § 1.3(a) of the proposed regulations, USDA maintains a dedicated FOIA website containing contact information for component agencies and an online web portal for submitting requests. In addition, § 1.3(a) states that the public may submit requests to the Departmental FOIA Officer who will route them to the component(s) believed most likely to maintain the requested records. Additional guidance about submitting requests to USDA agencies is contained in § 1.3.

## 3. Comments on 1.8 (Requirements for Processing Records Requests Seeking Business Information)

On June 24, 2019, the Supreme Court issued an opinion in *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 915 (2019), concerning FOIA Exemption 4 and the definition of the term “confidential.” USDA has reviewed and updated the language of § 1.8 based on the *Argus Leader* opinion. The *Argus Leader* opinion renders moot the majority of comments received on § 1.8. For the reasons explained below, USDA has determined to adopt the language of the Template, subject to some customizations for USDA.

One commenter submitted several comments on § 1.8 and raised concerns with USDA’s proposed handling of information which may be determined to be confidential business information within the meaning of Exemption 4. The commenter objected to (i) USDA’s proposal to hold in abeyance a FOIA request until any “reverse FOIA” lawsuits are fully resolved. The commenter also argued that (ii) USDA omits the former requirement that business submitters explain item-by-item why disclosure would cause substantial harm to its competitive position; (iii) USDA has attempted to improperly codify a test established in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1982); and (iv) USDA fails to establish a strict timeline for submission of business submitter objections to disclosure.

The USDA’s decision to adopt the Template language and the *Argus Leader* decision render moot comments (i), (ii), (iii) and (iv).

## 4. Comments on 1.9 (Administrative Appeals)

One commenter suggested that USDA regulations improperly require that an appeal be received within 90 days. USDA accepts that comment and has revised the regulations to state that appeals must be postmarked or transmitted by email no later than 90 calendar days from the date of the adverse determination. This section is also revised to include language regarding engaging in dispute resolution services provided by the Office of Government Information Services (“OGIS”). These revisions also implement changes of the FOIA Improvement Act of 2016.

## 5. Comments on 1.12 (Fees and Fee Schedules)

Two commenters asserted that USDA should not cite to Uniform Freedom of

Information Act Fee Schedule and Guidelines (“OMB Fee Guidelines”) which are unreliable and no longer authoritative. USDA has determined to include references to the OMB Fee Guidelines, consistent with the Template. To the extent that the guidelines conflict with the FOIA statute, USDA acknowledges that the statute would control. For this reason, USDA declines to remove its citations.

One commenter objected to the removal of the provision which allowed the agency in its discretion to waive or reduce fees regardless of whether the requester had sought a waiver or reduction. The commenter was concerned about the potential negative effect on unsophisticated requesters or requesters who do not adequately understand the requirement. USDA has determined that it will help ensure the equal treatment of requesters by declining to include such language in the revised regulations. Further, USDA’s FOIA website provides guidance to all requesters about things to consider before submitting a FOIA request, including fee waiver requests.

One commenter asserted that USDA should eliminate the new provision under which the agency will close a request if advance payment is not received within 20 working days. USDA accepts this comment and has deleted this new provision.

One commenter asserted USDA’s proposed regulations improperly make the fee waiver standard more stringent by requiring an “identifiable” operation of the government “with a connection that is direct and clear, not remote or attenuated.” Also, the commenter stated that USDA’s proposed regulations improperly require that the information “must be meaningfully informative” and that “disclosure of information in the public domain in either the same or a substantially identical form would not contribute such understanding.” USDA declines to accept comments concerning the fee waiver provision because it is consistent with the FOIA statute and the language comes from the Template.

One commenter suggested that USDA has deviated from the six-factor test for determining whether disclosure is in the public interest for fee waiver purposes and places the burden on the requester exclusively to demonstrate there is no commercial interest. USDA disagrees with these comments. USDA’s updates do not substantively change the analysis but instead present the factors in a way that is clearer to both components and requesters. Rather than six factors, the revised section establishes three factors that address substantively the same issues formerly set forth in six factors.

Specifically, a requester should be granted a fee waiver if the requested information (1) sheds light on the activities and operations of the government; (2) is likely to contribute significantly to public understanding of those operations and activities; and (3) is not primarily in the commercial interest of the requester. This streamlined description facilitates easier understanding and application of the statutory standard.

#### **6. Comments on Appendix A (Fee Schedule)**

Two commenters asserted that the proposed regulations included language that was inconsistent with the OPEN Government Act of 2007 which amended the statutory definition of representative of the news media to eliminate the “organized and operated” factor. USDA agrees with this comment and revises App. A (2)(b)(4)(i) accordingly.

One commenter asserted that USDA should consider the nature of the requester, not the nature of the request, in determining eligibility for news media fee category status. The commenter further contended that, while case-by-case inquiry may be appropriate for new entities without a track record, the FOIA focuses on the requester not on the request for this purpose. USDA’s proposed language is consistent with the FOIA statute; therefore USDA declines to accept this comment.

One commenter suggested that USDA should use a broader standard for determining whether a product meets the “distinct work” standard, to include a “simple press release commenting on records” or “editorial comment.” USDA declines to accept this comment proposing to articulate a broader “distinct work” standard. USDA disagrees that the language of the proposed regulation is narrow and notes that it is consistent with the statutory definition and the Template.

One commenter suggested that USDA should indicate that any examples of news media entities in its regulations are non-exhaustive, in order to accommodate evolving news media formats. USDA agrees with this comment and added clarifying language to make clear that the list of examples is not exhaustive.

One commenter suggested that USDA should clarify its regulations to make clear that litigation itself is not strictly a commercial activity because the reference to litigation in the “commercial requesters” definition could adversely affect public interest groups and nonprofits that engage in

litigation. USDA declines to accept this comment. USDA considers fee determinations on a case-by-case basis.

USDA also received a few comments regarding the definition of an educational institution. USDA agrees with the comment that teachers and students may qualify for reduced fees and therefore has elected to revise its definition accordingly.

One commenter suggested that the proposed cost of authentication and certification of records is exorbitant. USDA accepts the comment regarding the potential for increased costs for authentication and certification of records. Accordingly, USDA has determined to use the language of the existing regulations. Another comment proposed that authentication and certification services should be eligible for fee waivers automatically if a fee waiver is otherwise granted to the FOIA requester or if the requester qualifies for a fee waiver under the same conditions as FOIA requests. USDA disagrees with this proposal because those services are outside of the FOIA and because of the potential impact on processing times and agency resources.

#### **7. Miscellaneous Comments**

One commenter asserted that the proposed regulations eliminate any discussion of the annual reports. USDA prepares and posts online its reports in accordance with the requirements of the FOIA.

One commenter objected to the elimination of language requiring USDA components to provide requesters a date by which the component expects to issue a determination in the event that the component misses a FOIA deadline. USDA accepts this comment and has added language from the Template.

One commenter suggested that USDA include the foreseeable harm standard in its regulations. USDA declines to accept this comment as the foreseeable harm standard is codified in the FOIA statute.

One commenter asserted that USDA’s proposed regulations eliminate a provision concerning routing misdirected requests outside of USDA. USDA has elected to omit this language because agency employees are not necessarily familiar with the missions of other federal agencies and such a provision risks further delay by misdirecting requests.

#### **Executive Orders 12866 and 13771**

This rule has been drafted and reviewed in accordance with Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), section 1(b), Principles of Regulation, and Executive Order 13563,

76 FR 3821 (January 18, 2011), Improving Regulation and Regulatory Review. The rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the rulemaking has not been reviewed by the Office of Management and Budget. This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

#### **Unfunded Mandates Reform Act of 1995**

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

#### **Regulatory Flexibility Act**

USDA, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this regulation will not have a significant economic impact on a substantial number of small entities. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters, and only for certain classes of requesters and when particular conditions are satisfied. Thus, fees assessed by the USDA are nominal.

#### **Small Business Regulatory Enforcement Fairness Act of 1995**

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996 (as amended), 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **List of Subjects in 7 CFR Part 1**

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

■ For the reasons stated in the preamble, USDA amends 7 CFR part 1 by revising subpart A to read as follows:

## PART 1—ADMINISTRATIVE REGULATIONS

### Subpart A—Official Records

Sec

- 1 General Provisions
  - 1.2 Public Reading Rooms
  - 1.3 Requirements for Making a Records Request
  - 1.4 Requirements for Responding to Records Requests
  - 1.5 Responses to Records Requests
  - 1.6 Timing of Responses to Perfected Records Requests
  - 1.7 Records Responsive to Records Requests
  - 1.8 Requirements for Processing Records Requests Seeking Business Information
  - 1.9 Administrative Appeals
  - 1.10 Authentication Under Departmental Seal and Certification of Records
  - 1.11 Preservation of Records
  - 1.12 Fees and Fee Schedule
- Appendix A to Subpart A of Part 1—Fee Schedule

**Authority:** 5 U.S.C. 301, 552; 31 U.S.C. 9701; and 7 CFR 2.28(a).

### Subpart A—Official Records

#### § 1.1 General provisions.

(a) This subpart contains the rules that the United States Department of Agriculture (USDA) and its components follow in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read together with the FOIA, which provides additional information about access to records maintained by the USDA. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, and 7 CFR Subpart G are also processed under this subpart.

(b) The terms “component” or “components” are used throughout this subpart and in appendix A of this subpart to include both USDA program agencies and staff offices.

(c) Unless otherwise stated, references to number of days indicates business days, excluding Saturdays, Sundays, and legal holidays.

(d) Supplemental regulations for FOIA requests and appeals relating to records of USDA’s Office of Inspector General are set forth in 7 CFR part 2620.

#### § 1.2 Public reading rooms.

(a) Components within the USDA maintain public reading rooms containing the records that the FOIA requires to be made regularly available for public inspection in an electronic format. Each component is responsible for determining which of its records are required to be made publicly available,

as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each component shall ensure that its reading room and indices are reviewed and updated on an ongoing basis.

(b) A link to USDA Electronic Reading Rooms can be found on the USDA public FOIA website.

(c) In accordance with 5 U.S.C. 552(a)(2), each component within the Department shall make the following materials available for public inspection and copying (unless they are promptly published and copies offered for sale):

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Those statements of policy and interpretation which have been adopted by the agency and are not published in the **Federal Register**;

(3) Administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records, regardless of form or format, which have been released to a person pursuant to a FOIA request under 5 U.S.C. 552(a)(3), and have been requested three or more times; and

(5) Copies of all records, regardless of form or format, which have been released to a person pursuant to a FOIA request under 5 U.S.C. 552(a)(3), and which because of the nature of their subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records. Components shall decide on a case by case basis whether records meet these requirements, based on the following factors:

(i) Previous experience with similar records;

(ii) The particular characteristics of the records involved, including their nature and the type of information contained in them; and

(iii) The identity and number of requesters and whether there is widespread media, historical, academic, or commercial interest in the records.

#### § 1.3 Requirements for making a records request.

(a) *Where and how to submit a request.* (1) A requester may submit a request in writing and address the request to the designated component within the USDA that maintains the records requested. The Departmental FOIA Officer will maintain a list of contact information for component FOIA offices and make this list available on the USDA public FOIA website. Filing a FOIA request directly with the

component that maintains the records will facilitate the processing of the request. If responsive records are likely to reside within more than one USDA component, the requester should submit the request to the USDA Departmental FOIA office.

(2) Alternatively, a requester may submit a request electronically via USDA’s online web portal or via the National FOIA portal. USDA components also accept requests submitted to the email addresses of component FOIA offices as listed on the USDA public FOIA website.

(3) If a requester cannot determine where within the USDA to send a request, he or she should consult the USDA public FOIA website to determine where the records might be maintained. Alternatively, he or she may send the request to the Departmental FOIA Officer, who will route the request to the component(s) believed most likely to maintain the records requested.

(4) To facilitate the processing of a request, a requester should place the phrase “FOIA REQUEST” in capital letters on the front of their envelope, the cover sheet of their facsimile transmittal, or the subject line of their email.

(b) *What to include in a request.* (1) A requester seeking access to USDA records should provide sufficient information about himself or herself to enable components to resolve, in a timely manner, any issues that might arise as to the subject and scope of the request, and to deliver the response and, if appropriate, any records released in response to the request. Generally, this includes the name of the requester, name of the institution on whose behalf the request is being made, a phone number at which the requester might be contacted, an email address and/or postal mailing address, and a statement indicating willingness to pay any applicable processing fees.

(2) A requester seeking access to USDA records must also provide a reasonable description of the records requested, as discussed in paragraph (c)(1) of this section.

(3) A requester who is making a request for records about himself or herself may receive greater access if the request is accompanied by a signed declaration of identity that is either notarized or includes a penalty of perjury statement pursuant to 28 U.S.C. 1746.

(4) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual

or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased. As an exercise of administrative discretion, the component can require a requester to supply additional information if necessary, in order to verify that a particular individual has consented to disclosure.

(c) *How to describe the requested records.* (1) A FOIA request must reasonably describe the requested records. This means a request must be described in such a way as to enable component personnel familiar with the subject of the request to locate them with reasonable effort. In general, requesters should include as much detail as possible about the specific records or types of records that they are seeking. To the extent possible, supply specific information regarding dates, titles, names of individuals, names of offices, locations, names of agencies or other organizations, and contract or grant numbers that may help in identifying the records requested. If the request relates to pending litigation, the requester should identify the court and its location in addition to a case number.

(2) If a component determines that a request is incomplete, or that it does not reasonably describe the records sought, the component will inform the requester of this fact and advise as to what additional information is needed or why the request is otherwise insufficient.

#### **§ 1.4 Requirements for responding to records requests.**

(a) *In general.* Except for the instances described in paragraphs (c) and (d) of this section, the component that first receives a request for a record is responsible for responding to or referring the request.

(b) *Authority to grant or deny requests.* The head of a component or his or her designee is authorized to grant or to deny any requests for records originating with or maintained by that component.

(c) *Handling of misdirected requests.* When a component's FOIA office receives and determines that a request was misdirected within the Department's components or should be directed to additional Department component(s), the receiving component's FOIA office will route the request to the FOIA office of the proper component(s).

(d) *Coordination of requests involving multiple components.* When a component becomes aware that a

requester has sent a request for records to multiple USDA components, the component will notify the Departmental FOIA Officer to determine if some form of coordination is warranted.

(e) *Consultations and referrals in the process of records review.* (1)

*Consultation.* When records originated with the component processing the request but contain within them information of interest to another USDA component or other Federal Government office, the component processing the request should consult with that other entity prior to making a release determination.

(2) *Referral.* When the component processing the request believes that another USDA component or Federal Government office is best able to determine whether to disclose the record, the component typically should refer the responsibility for responding to the request regarding that record to that USDA component or Federal Government office. Ordinarily, the component or agency that originated the record is presumed to be the best able to make the disclosure determination. However, if the component processing the request and the originating component or agency jointly agree that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the component or 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. For example, if a non-law enforcement component or agency responding to a request for records on a living third party locates within its files records originating with a law enforcement component or agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if a component or agency locates within its file's material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the component that received the request should coordinate with the

originating component or 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 component that originally received the request.

#### **§ 1.5 Responses to records requests.**

(a) *In general.* Components should, to the extent practicable, communicate with requesters having access to the internet by electronic means, such as email, in lieu of first-class U.S. mail.

(b) *Acknowledgements of requests.* On receipt of a request, the processing component will send an acknowledgement to the requester and provide an assigned request tracking number for further reference. Components should include in the acknowledgement a brief description of the records sought, or attach a copy of the request, to allow requesters to more easily keep track of their requests.

(c) *Grants of requests.* When a component makes a determination to grant a request in whole or in part, it will notify the requester in writing. The component will also inform the requester of any fees charged, pursuant to § 1.12, in the processing of the request. Except in instances where advance payment of fees is required, components may issue bills for fees charged at the same time that they issue a determination. The component will include a statement advising the requester that he or she has the right to seek dispute resolution services from the component's FOIA Public Liaison.

(d) *Specifying the format of records.* Generally, requesters may specify the preferred form or format (including electronic formats) for the records sought. Components will accommodate the request if the records are readily reproducible in that form or format.

(e) *Exemptions and discretionary release.* All component records, except those specifically exempted from mandatory disclosure by one or more provisions of 5 U.S.C. 552(a) and (b), will be made available to any person submitting a records request under this subpart. Components are authorized, in their sole discretion, to make discretionary releases of their records when such releases are not otherwise specifically prohibited by Executive Order, statute, or regulation.

(f) *Reasonable segregation of records.* If a requested record contains portions that are exempt from mandatory disclosure and other portions that are not exempt, the processing component will ensure that all reasonably segregable nonexempt portions are disclosed, and that all exempt portions

are identified according to the specific exemption(s) that are applicable.

(g) *Adverse determinations of requests.* A component making an adverse determination denying a request in any respect will notify the requester of that determination in writing. The written communication to the requester will include the name and title of the person responsible for the adverse determination, if other than the official signing the letter; a brief statement of the reason(s) for the determination, including any exemption(s) applied in denying the request; an estimate of the volume of records or information withheld, such as the number of pages or some other reasonable form of estimation; a statement that the determination may be appealed, followed by a description of the requirements to file an appeal; and a statement advising the requester that he or she has the right to seek dispute resolution services from the component's FOIA Public Liaison or the Office of Government Information Services ("OGIS"). An adverse determination includes:

(1) A determination to withhold any requested record in whole or in part;

(2) A determination that a requested record does not exist or cannot be found, when no responsive records are located and released;

(3) A determination that a record is not readily reproducible in the format sought by the requester;

(4) A determination on any disputed fee matter; or

(5) A denial of a request for expedited treatment.

(h) Upon request, the component will provide an estimated date by which the agency expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the component may provide interim responses, releasing the records on a rolling basis.

#### **§ 1.6 Timing of responses to perfected records requests.**

(a) *In general.* Components ordinarily will respond to requests according to their order of receipt. In instances involving misdirected requests that are re-routed pursuant to § 1.4(c), the response time will commence on the date that the request is received by the proper component's office that is designated to receive requests, but in any event not later than 10-working days after the request is first received by any component's office that is designated to receive requests.

(b) *Response time for responding to requests.* Components ordinarily will

inform requesters of their determination concerning requests within 20 working days of the date of receipt of the requests, plus any extension authorized by paragraph (d) of this section.

(c) *Multitrack processing and how it affects requests.* All components must designate a specific track for requests that are granted expedited processing in accordance with the standards set forth in paragraph (f) of this section. A component also may designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors a component may consider are the number of pages involved in processing the request and the need for consultations or referrals. Upon request, components will advise requesters of the track into which their request falls and, when appropriate, will offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track in order to decrease the processing time.

(d) *Circumstances for extending the response time.* Whenever the component cannot meet the statutory time limit for processing a request because of "unusual circumstances," as defined in the FOIA, and the component extends the time limit on that basis, the component must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the component estimates processing of the request will be completed. Where the extension exceeds 10 working days, the component must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The component must make available its designated FOIA contact or its FOIA Public Liaison for this purpose. The component also must alert requesters to the availability of the OGIS to provide dispute resolution services.

(e) *Procedures for requesting expedited processing.* A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing.

(1) Requests and appeals will be processed on an expedited basis whenever it is determined by the component that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat

to the life or physical safety of an individual; or

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

(2) Requests for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) or (ii) of this section must be submitted to the component that maintains the records requested. Components receiving requests for expedited processing will decide whether to grant them within 10 calendar days of their receipt of these requests and will notify the requesters accordingly. If a request for expedited treatment is granted, the request or appeal will be given priority, placed in the processing track for expedited requests or appeals, and will be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

#### **§ 1.7 Records responsive to records requests.**

(a) In determining which records are responsive to a request, a component ordinarily will include only records in its possession as of the date that the component begins its search.

(b) A component is not required to create a new record in order to fulfill a request for records. The FOIA does not require agencies to do research, to analyze data, or to answer written questions in response to a request.

(c) Creation of records may be undertaken voluntarily.

(d) A component will provide a record in the format specified by a requester, if the record is readily reproducible by the component in the format requested.

#### **§ 1.8 Requirements for processing records requests seeking business information.**

(a) *In general.* Each component is responsible for making the final determination with regard to the disclosure or nondisclosure of business information in records submitted by an outside entity.

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

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

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, or Tribe, but not including another Federal Government

entity, that provides confidential commercial information, either directly or indirectly, to the Federal Government.

(c) *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.

(d) *When notice to the submitter is required.* (1) The component must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the component determines that it may be required to disclose the records, provided:

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

(ii) The component has a reason to believe that the requested information may be protected from disclosure under Exemption 4 but has not yet determined whether the information is protected from disclosure.

(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 component 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.

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

(1) The component 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 statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12,600.

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such case, the component 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.

(f) *Submitter's opportunity to object to disclosure.* (1) The component must specify a reasonable time period within which the submitter must respond to the notice referenced in paragraph (d) of this section.

(2) If a submitter objects to disclosure of any portion of the records, the submitter must provide the component with a detailed written statement that specifies all grounds for withholding the particular information. The submitter must show why the information is a trade secret or commercial or financial information that is privileged or 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 component 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.

(g) *Notice of intent to disclose over submitter's objection.* If a component decides to disclose confidential commercial information over the objection of a submitter, the component will give the submitter written notice, which will include:

(1) A statement of the reason(s) 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 component intends to release them; and

(3) A disclosure date subsequent to the notice.

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

(i) *Corresponding notice to requester.* The component 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.

### **§ 1.9 Administrative appeals.**

(a) *Appeals of adverse determinations.* If a requester is dissatisfied with a component's response to his or her request, the requester may submit a written appeal of that component's adverse

determination denying the request in any respect.

(b) *Deadline for submitting an appeal.* Requesters must make the appeal in writing. To be considered timely, the appeal must be postmarked, or in the case of electronic submissions transmitted, within 90 calendar days of the date of the adverse determination. Components adjudicating appeals will issue a decision on an appeal, within 20-working days of its date of receipt, plus any extension authorized by § 1.6(d).

(c) *Appeals officials.* Each component will provide for review of appeals by an official different from the official who made the initial determination(s).

(d) *Components' responses to appeals.* The decision on an appeal will be made in writing.

(1) If the component grants the appeal in part or in whole, it will inform the requester of any conditions surrounding the granting of the request (*e.g.*, payment of fees). If the component grants only a portion of the appeal, it will treat the portion not granted as a denial.

(2) If the component denies the appeal, either in part or in whole, it will inform the requester of that decision and of the following:

(i) The reasons for denial, including any FOIA exemptions asserted;

(ii) The name and title or position of each official responsible for denial of the appeal;

(iii) The availability of mediation services offered by the OGIS of the National Archives and Records Administration as a non-exclusive alternative to litigation; and

(iv) The right to judicial review of the denial in accordance with 5 U.S.C. 552(a)(4)(B).

(e) *Legal sufficiency review of an appeal.* If a component makes the determination to deny an appeal in part or whole, that component will send a copy of all records to the Assistant General Counsel, General Law and Research Division, that the Office of the General Counsel ("OGC") would need to examine to provide a legal sufficiency review of the component's decision.

(1) Frequently, these records will include a copy of the unredacted records requested, a copy of the records marked to indicate information the component proposes to withhold, all correspondence relating to the request, and a proposed determination letter. When the volume of records is so large as to make sending a copy impracticable, the component will enclose an informative summary and representative sample of those records. The component will not deny an appeal

until it receives concurrence from the Assistant General Counsel.

(2) With regard to appeals involving records of OIG, the records in question will be referred to the OIG Office of Counsel, which will coordinate all necessary reviews.

(f) *Submission of an appeal before judicial review.* Before seeking review by a court of a component's adverse determination, a requester generally must first submit a timely administrative appeal.

#### **§ 1.10 Authentication under Departmental Seal and certification of records.**

(a) *In general.* Requests seeking either authenticated or certified copies of records will generally be processed under the FOIA. FOIA search, review, and duplication fees, where applicable, may also apply. However, because the costs for authenticated and certified copies are outside of the FOIA, the provisions of § 1.12 that call for the automatic waiver of FOIA fees under \$25.00 do not apply.

(b) *Authentication of records.* (1) Authentication provides confirmation by a USDA officer that a certified copy of a record is what it purports to be, an accurate duplicate of the original record.

(2) When a request is received for an authenticated copy of a record that the component determines may be made available, under the FOIA, each component will send an authentic (*i.e.*, correct) copy of the record to the Assistant General Counsel in the OGC Division responsible for the applicable component program or other designee of the Secretary of Agriculture. The Assistant General Counsel for the applicable component program or other designee of the Secretary of Agriculture will confirm the authenticity of the record and affix the seal of the USDA to it.

(3) The Hearing Clerk in the Office of Administrative Law Judges may authenticate copies of records for the Hearing Clerk. The Director of the National Appeals Division may authenticate copies of records for the National Appeals Division. The Inspector General is the official who authenticates copies of records for OIG.

(4) When any component determines that a record for which authentication is requested may be made available only in part, because certain portions of it are exempt from release under the FOIA, the component will process the record under the FOIA and make any needed redactions, including notations on the record as to the FOIA exemption(s) which require(s) the removal of the information redacted. In such an instance, the component will supply a

copy of the record both in its unredacted state and in its redacted state to the party authorized to perform authentication, along with a copy of the proposed determination letter regarding the withholding of the information redacted.

(5) The cost for authentication of records is \$10.00 each.

(c) *Certification of records.* (1) Certification is the procedure by which a USDA official confirms that a copy of a record is a true reproduction of the original.

(2) When a request is received for a certified copy of a record that the component determines may be made available under the FOIA, each component will prepare a correct copy and a statement attesting that the copy is a true and correct copy.

(3) When any component determines that a record for which a certified copy is requested may be made available only in part, because certain portions of it are exempt from release under the FOIA, the component will process the record under the FOIA and make any needed redactions, including notations on the record as to the FOIA exemption(s) which require(s) the removal of the information redacted.

(4) The cost for certification of records is \$5.00 each.

#### **§ 1.11 Preservation of records.**

Components will preserve all correspondence and records relating to requests and appeals received under this subpart, as well as copies of all requested records, until disposition or destruction of such correspondence and records is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the NARA. Agency records will not be disposed of, or destroyed, while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

#### **§ 1.12 Fees and fee schedule.**

(a) *Authorization to set FOIA fees.* The Chief Financial Officer is delegated authority to promulgate regulations providing for a uniform fee schedule applicable to all components of the USDA regarding requests for records under this subpart. The regulations providing for a uniform fee schedule are found in appendix A of this subpart.

(b) *In general.* Components will charge for processing requests under the FOIA in accordance with the provisions of appendix A of this subpart and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget ("OMB Fee Guidelines").

(c) *Guidance for lowering FOIA fees.* Components will ensure that searches, review, and duplication are conducted in the most efficient and least expensive manner practicable.

(d) *Communicating with requesters on fee issues.* In order to resolve any fee issues that arise under this subpart, a component may contact a requester for additional information.

(e) *Notifying requesters of estimated fees.* When a component determines or estimates that the processing of a FOIA request will incur chargeable FOIA fees, in accordance with appendix A of this subpart and the OMB Fee Guidelines, the component will notify the requester in writing 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.

(f) *Requester commitment to pay estimated fees.* In cases in which a requester has been notified that the processing of his or her request will incur chargeable FOIA fees, the component providing such notification will not begin processing the request until the requester commits in writing to pay the actual or estimated total fee, or designates the amount of fees that he or she is willing to pay, or in the case of a requester who has not yet been provided with his or her statutory entitlements, designates that he or she seeks only that which can be provided by these statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount he or she is willing to pay.

(g) *Tolling of request for fee issues.* If the requester has indicated a willingness to pay some designated amount of fees, but the component estimates that the total fee will exceed that amount, the component will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester is willing to pay. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(h) *Assisting requesters wishing to lower fees.* Components will make available their FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(i) *Timing of Bills for Collection.* Except in instances where advance payment is required, or where requesters have previously failed to pay a properly charged FOIA fee within 30

calendar days of the billing date, components may issue Bills for Collection for FOIA fees owed at the same time that they issue their responses to FOIA requests.

(j) *Advance payment of FOIA fees when estimated fees exceed \$250.00.* When a component determines or estimates that a total fee to be charged for the processing of a FOIA request is likely to exceed \$250.00, it may require the requester to make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. However, a component may elect to process a request prior to collecting fees exceeding \$250.00 when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(k) *Special services.* For services not covered by the FOIA or by appendix A of this subpart, as described in § 1.10, components may set their own fees in accordance with applicable law. Although components are not required to provide special services, such as providing multiple copies of the same record, or sending records by means other than first class mail, if a component chooses to do so as a matter of administrative discretion, the direct costs of these services will be charged.

(l) *Aggregating requests.* When a component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the component may aggregate those requests and charge accordingly. Components may presume that multiple requests of this type made within a 30 calendar day period have been made in order to avoid fees. For requests separated by a longer period, components will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involves. Multiple requests involving unrelated matters will not be aggregated for fee purposes.

(m) *Payment of FOIA fees.* Requesters must pay FOIA fees by check or money order made payable to the Treasury of the United States. Components are not required to accept payments in installments.

(n) *Failure to pay properly charged fees.* When a requester has previously failed to pay a properly charged FOIA fee to any component within 30 calendar days of the billing date, a component may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the component may require that the requester make an advance

payment of the full amount of any anticipated fee before the component begins to process a new request or continues to process a pending request or any pending appeal. Where a component has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(o) *Restrictions on charging fees.* (1) If a component fails to comply with the statutory time limits in which to respond to a request, as provided in § 1.6(b), and if unusual circumstances, as that term is defined by the FOIA, apply to the processing of the request, as discussed in § 1.6(d), it may not charge search fees for the processing of the request, or duplication fees for the processing of the request if the requester is classified as an educational institution requester, a noncommercial scientific institution requester, or a representative of the news media, as defined in appendix A of this subpart, unless:

(i) The component notifies the requester, in writing, within the statutory 20-working day time period, that unusual circumstances, as that term is defined by the FOIA, apply to the processing of the request;

(ii) More than 5,000 pages are necessary to respond to the request; and

(iii) The component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request.

(2) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(p) *Waivers of chargeable fees.* (1) *In general.* Records responsive to a request will be furnished without charge or at a reduced rate below that established in Table 1 of appendix A of this subpart, where a component determines, based on available evidence, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest as defined in paragraph (p)(3) of this section, because it is likely to contribute significantly to public understanding of the operations or activities of the government, and;

(ii) Disclosure of the information is not primarily in the commercial interest of the requester as defined in paragraph (p)(4) of this section.

(2) *Adjudication of fee waivers.* Each fee waiver request is judged on its own merit.

(3) *Factors for consideration of public interest.* In deciding whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, components will consider all four of the following factors:

(i) The subject of the request must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested records must be meaningfully informative about government operations or activities 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 the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the requester's individual understanding. A requester's expertise in the subject area as well as his or her ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media, as defined in appendix A of this subpart, will satisfy this consideration.

(iv) The public's understanding of the subject in question must be enhanced by the disclosure to a significant degree. However, components will not make value judgments about whether the information at issue is "important" enough to be made public.

(4) *Factors for consideration of commercial interest.* In deciding whether disclosure of the requested information is in the requester's commercial interest, components will consider the following two factors:

(i) Components will identify any commercial interest of the requester, as defined in appendix A of this subpart. Requesters may be given an opportunity to provide explanatory information regarding this consideration.

(ii) A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure. Components ordinarily will 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 will not be presumed to primarily serve the public interest.

(5) *Partial fee waivers.* Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver will be granted for those records only.

(6) *Timing of requests for fee waivers.* Requests for a waiver or reduction of fees should be made when the request is first submitted to the component and should address the criteria referenced in paragraph (p)(3) of this section. A requester may submit a fee waiver request later so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester will be required to pay any costs incurred up to the date the fee waiver request was received.

## Appendix A to Subpart A—Fee Schedule

*Section 1. In General.* This schedule sets forth fees to be charged for providing copies of records—including photographic reproductions, microfilm, maps and mosaics, and related services—requested under the Freedom of Information Act (“FOIA”). The fees set forth in this schedule are applicable to all components of the USDA. Further information about fees and fee waivers is provided in 7 CFR 1.12 Fees and Fee Waivers.

### *Section 2. Definitions.*

(a) *Types of FOIA fees.* The FOIA defines the following types of FOIA fees that may be charged for responding to FOIA requests.

#### (1) *Search fees.*

(i) *Searching* is 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.

(ii) Search time is charged in quarter-hour increments within the USDA, and includes the *direct costs* incurred by a component in searching for records responsive to a request. It does not include overhead expenses such as the costs of space and heating or lighting of the facility in which the records are maintained.

(iii) Components may charge for time spent searching for requested records even if they do not locate any responsive records or if they determine that the records that they locate are entirely exempt from disclosure.

(iv) USDA components will charge for search time at the actual salary rate of the individual who conducts the search, plus 16 percent of the salary rate (to cover benefits). This rate was adopted for consistency with the Uniform Freedom of Information Act Fee

Schedule and Guidelines (“OMB Fee Guidelines”) that state that agencies should charge fees that recoup the full allowable direct costs that they incur in searching for responsive records.

(v) Search time also includes the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Components will notify requesters of the costs of creating such a program, and requesters must agree to pay the associated costs before these costs may be incurred.

#### (2) *Review fees.*

(i) *Reviewing* is the process of examining records located in response to a request in order to determine whether any portion of the records is exempt from disclosure. The process of review also includes the process of preparing records for disclosure, for example, doing all that is necessary to redact them and prepare them for release. Review time also includes time spent considering any formal objection to disclosure of responsive records made by a business submitter as discussed in 7 CFR 1.8 Requirements for processing requests seeking business information. However, it does not include time spent resolving general legal or policy issues regarding the application of the nine FOIA exemptions.

(ii) Review time is charged in quarter-hour increments within the USDA, and includes the *direct costs* incurred by a component in preparing records responsive to a request for disclosure. It does not include overhead expenses such as the costs of space and heating or lighting of the facility in which the records are maintained.

(iii) USDA components may charge for time spent reviewing requested records even if they determine that the records reviewed are entirely exempt from disclosure.

(iv) USDA components will charge for review time at the actual salary rate of the individual who conducts the review, plus 16 percent of the salary rate (to cover benefits). This rate was adopted for consistency with the OMB Fee Guidelines that state that agencies should charge fees that recoup the full allowable direct costs that they incur in reviewing records for disclosure.

(v) Review time also includes the direct costs associated with the cost of computer programming designed to facilitate a manual review of the records, or to perform electronic redaction of responsive records, particularly when records are maintained in electronic form. Components will notify requesters of the costs performing such programming, and requesters must agree to pay the associated costs before these costs may be incurred.

#### (3) *Duplication fees.*

(i) *Duplicating* is the process of producing copies of records or information contained in records requested under the FOIA. Copies can take the form of paper, audiovisual materials, or electronic records, among other forms.

(ii) Duplication is generally charged on a per-unit basis. The duplication of paper records will be charged at a rate of \$.05 per page within the USDA. The duplication of records maintained in other formats will include all *direct costs* incurred by a

component in performing the duplication, including any costs associated in acquiring special media, such as CDs, disk drives, special mailers, and so forth, for transmitting the requested records or information. It does not include overhead expenses such as the costs of space and heating or lighting of the facility in which the records are maintained.

(iii) Duplication generally does not include the cost of the time of the individual making the copy. This time is generally factored into the per page cost of duplication. However, when duplication requires the handling of fragile records, or paper records that cannot be safely duplicated in high-speed copiers, components may also charge for the time spent duplicating these records. In such an instance, the cost of this time will be added to the per-page charge, and an explanation provided to the requester in the component’s itemization of FOIA fees charges.

Components may describe this time as time spent in duplicating fragile records.

(iv) USDA components will charge for time spent in duplicating fragile records at the actual salary rate of the individual who performs the duplication, plus 16 percent of the salary rate (to cover benefits). This rate was adopted for consistency with the OMB Fee Guidelines that state that agencies should charge fees that recoup the full allowable direct costs that they incur in duplicating requested records.

(v) Where paper records must be scanned in order to comply with a requester’s preference to receive the records in an electronic format, duplication costs will also include the direct costs associated with scanning those materials, including the time spent by the individual performing the scanning. Components may describe this time as time spent in scanning paper records.

(vi) However, when components ordinarily scan paper records in order to review and/or redact them, the time required for scanning records will not be included in duplication fees, but in review fees, when these are applicable. When components that ordinarily scan paper records in order to review and/or redact them release records in an electronic format to requesters who are not to be charged review fees, duplication fees will not include the time spent in scanning paper records. In such instances, duplication fees may only include the direct costs of reproducing the scanned records. In such instances, components may not charge duplication fees on a per-page basis.

(b) *Categories of FOIA requesters for fee purposes.* The FOIA defines the following types of requests and requesters for the charging of FOIA fees.

#### (1) *Commercial use requests.*

(i) *Commercial use requests* are requests for information for a use or a purpose that furthers commercial, trade or profit interests, which can include furthering those interests through litigation. Components will determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because a component has reasonable cause to doubt a requester’s stated use, the component may provide the

requester a reasonable opportunity to submit further clarification. A component's decision to place a request in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(ii) Commercial requests will be charged applicable search fees, review, and duplication fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to a commercial request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge search fees for the processing of the request. It may, however, still charge applicable review and duplication fees.

(iv) If a component fails to comply with the statutory time limits in which to respond to a commercial request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge any search fees for the processing of the request, as well as any applicable review and duplication fees. Otherwise, it may only charge applicable review and duplication fees.

(2) *Educational institution requesters.*

(i) *Educational institution requesters* are requesters who are affiliated with a school that operates a program of scholarly research, such as a preschool, a public or private elementary or secondary school, an institution of undergraduate education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education. To be in this category, a requester must show that the request is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research. Records sought by students at an educational institution for use in fulfilling their degree requirements may qualify if the requester articulates a clear relationship to his or her coursework. Students must document how the records they are requesting will further the scholarly research aims of the institution in question.

(ii) Educational institution requesters are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplicating of any additional pages of responsive records released. They may not be charged search or review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to an educational use request, as provided in

7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge duplication fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to an educational use request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge duplication for the processing of the request. Otherwise, it may not charge duplication fees.

(3) *Noncommercial scientific institution requesters.*

(i) *Noncommercial scientific institution requesters* are requesters who are affiliated with an institution that is not operated on a "commercial" basis, as that term is defined in paragraph (b)(1)(i) of this section, 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. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(ii) Noncommercial scientific institution requesters are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplicating of any additional pages of responsive records released. They may not be charged search or review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to a noncommercial scientific institution request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge duplication fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to a noncommercial scientific institution request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are

necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge duplication for the processing of the request. Otherwise, it may not charge duplication fees.

(4) *Representatives of the news media.*

(i) *Representative of the news media* is any person or entity that actively 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, but are not limited to, television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public, including news organizations that disseminate solely on the internet. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but components will also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting the news-dissemination function of the requester will not be considered of commercial use.

(ii) Representatives of the news media are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplication of any additional pages of responsive records released. They may not be charged search or review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to a news-media use request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge duplication fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to a news-media request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could

effectively limit the scope of the request, the component may charge duplication for the processing of the request. Otherwise, it may not charge duplication fees.

(5) *All other requesters.*

(i) *All other requesters* are individuals and entities who do not fall into any of the four categories described in Section 2(b) paragraphs (1), (2), (3) and (4) of this appendix. Requesters seeking information for personal use, public interest groups, and nonprofit organizations are examples of requesters who might fall into this group.

(ii) All other requesters are entitled to receive 100 pages of duplication without charge. Following the exhaustion of this entitlement, they will be charged fees for the duplicating of any additional pages of responsive records released. All other requesters are also entitled to receive 2 hours of search time without charge. Following the exhaustion of this entitlement, they may be charged search fees for any remaining search time required to locate the records requested. They may not be charged review fees.

(iii) If a component fails to comply with the statutory time limits in which to respond to an all-other request, as provided in 7 CFR 1.6(b), and if no unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, as discussed in 7 CFR 1.6(d), it may not charge search fees for the processing of the request.

(iv) If a component fails to comply with the statutory time limits in which to respond to an all-other request, as provided in 7 CFR 1.6(b), when unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the

request, as discussed in 7 CFR 1.6(d), and the component notifies the requester, in writing, within the statutory 20-working day time period, that unusual or exceptional circumstances, as those terms are defined by the FOIA, apply to the processing of the request, more than 5,000 pages are necessary to respond to the request, and the component has discussed with the requester by means of written mail, electronic mail, or by telephone (or has made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request, the component may charge search fees for the processing of the request as well as any applicable duplication fees. Otherwise, it may only charge applicable duplication fees.

*Section 3. Charging fees.*

(a) *In general.* When responding to FOIA requests, components will charge all applicable FOIA fees that exceed the USDA charging threshold, as provided in paragraph (b) of this section, unless a waiver or reduction of fees has been granted under 7 CFR 1.12(p), or statutory time limits on processing are not met, and when unusual or exceptional circumstances apply, components do not meet all of the three conditions for charging as set forth in 7 CFR 1.12(o).

(b) *USDA fee charging threshold.* The OMB Fee Guidelines state that agencies will not charge FOIA fees if the cost of collecting the fee would be equal to or greater than the fee itself. This limitation applies to all requests, including those seeking records for commercial use. At the USDA, the cost of collecting a FOIA fee is currently established as \$25.00. Therefore, when calculating FOIA fees, components will charge requesters all

applicable FOIA fees when these fees equal or exceed \$25.01.

(c) *Charging interest.* Components 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 component. Components will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(d) *NARA retrieval fees.* For requests that require the retrieval of records stored by a component at a Federal records center operated by the National Archives and Records Administration (“NARA”), additional costs will be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(e) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires a component 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 component will inform the requester of the contact information for that program.

(f) *Social Security Numbers and Tax Identification Numbers.* Components may not require requesters to provide Social Security Numbers or Tax Identification Numbers in order to pay FOIA fees due.

TABLE 1 TO APPENDIX A TO SUBPART A—FOIA FEE SCHEDULE

Type of request	Type of charge	Price
Commercial Requesters ....	Duplication charges .....	\$0.05 per page. When the component has to copy fragile records, the charge is \$0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges .....	Actual hourly salary rate of employee involved, plus 16% of the hourly salary rate.
	Review charges .....	Actual hourly salary rate of employee involved, plus 16% of the hourly salary rate.
Educational or Non-Commercial Scientific Requesters.	Duplication charges .....	No charge for first 100 pages, then \$0.05 per page. When the component has to copy fragile records, the charge is \$0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges .....	Free.
	Review charges .....	Free.
Representatives of the News Media.	Duplication charges .....	No charge for first 100 pages, then \$0.05 per page When the component has to copy fragile records, the charge is \$0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges .....	Free.
	Review charges .....	Free.
All Other Requesters .....	Duplication charges .....	No charge for first 100 pages, then \$0.05 per page. When the component has to copy fragile records, the charge is \$0.05 per page plus the copying time involved, which includes the actual hourly salary rate of the employee involved, plus 16% of the hourly salary rate.
	Search charges .....	No charge for first two (2) hours of search time, then actual hourly salary rate of employee involved, plus 16% of the hourly salary rate.
	Review charges .....	Free.

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