

the agency has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request.

* * * * *

■ 19. Amend § 1184.8 by revising the second sentence of paragraph (b) to read as follows:

§ 1184.8 How can I address concerns regarding my request?

* * * * *

(b) * * * If you seek information regarding OGIS and/or the services it offers, please contact OGIS directly at Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001, Email: ogis@nara.gov, Phone: (202) 741-5770 or toll free (877) 684-6448, Fax: (202) 741-5769. * * *

§ 1184.9 [Amended]

■ 20. Amend § 1184.9(b)(2) by adding a comma after “local”.

Dated: May 13, 2019.

Kim Miller,

Grants Management Specialist, Institute of Museum and Library Services.

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OFFICE OF MANAGEMENT AND BUDGET

5 CFR Part 1303

RIN 0348-AB42

Freedom of Information Act

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Final rule.

SUMMARY: OMB is issuing a final rule revising its regulations implementing the Freedom of Information Act (FOIA). These regulations are being revised to implement the FOIA and incorporate the provisions of the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016 as well as streamline OMB’s FOIA regulations by structuring the text of the regulation in an order more similar to that of the Department of Justice’s (DOJ) FOIA regulation and the DOJ Office of Information Policy’s (OIP) *Guidance for Agency FOIA Regulations*, thus promoting uniformity of FOIA regulations across agencies. Additionally, the regulations are being updated to reflect developments in case law regarding the FOIA.

DATES: The final rule is effective June 20, 2019.

FOR FURTHER INFORMATION CONTACT:

Dionne Hardy, Office of Management and Budget, Office of General Counsel, at OMBFOIA@omb.eop.gov, 202-395-FOIA.

SUPPLEMENTARY INFORMATION:

Background: On August 23, 2018, OMB proposed revisions (43 FR 42610-42618) to its existing regulations under the CFR at part 1303 governing requests and responses for agency records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These revisions are now being finalized to implement the FOIA and incorporate the provisions of the OPEN Government Act of 2007 (Pub. L. 110-81) and the FOIA Improvement Act of 2016 (Pub. L. 114-185) as well as streamline OMB’s FOIA regulations by structuring the text of the regulation in an order more similar to that of DOJ’s FOIA regulation and the DOJ Office of Information Policy’s (OIP) *Guidance for Agency FOIA Regulations* (“the DOJ FOIA Regulation Guidance”), thus promoting uniformity of FOIA regulations across agencies. Additionally, the regulations are updated to reflect developments in the case law. OMB proposed these revisions after conducting the review made in accordance with section 3(a) of the FOIA Improvement Act of 2016, which provides that each agency “shall review the regulations of such agency and shall issue regulations on procedures for the disclosure of records under [the FOIA].” With this final rule OMB is adopting the revision to its FOIA regulation as previously proposed, with amendments included in response to public comments regarding OMB’s proposal.

Public Comments

Interested persons were afforded the opportunity to participate in the rulemaking process through submission of written comments to the proposed rule during the 30-day public comment period. OMB received twelve public submissions in response to the proposed rulemaking. Due consideration was given to each submission received and a determination was made that four of the submissions were relevant comments to the proposed rule and that the remaining eight submissions were unrelated to the subject matter of the proposal. Overall, OMB adopted all four of these relevant comments in part. Three of these four comments contained discussion of multiple sections of the proposed revised rule. Discussion of each of the comments and OMB’s responses follows in order of the relevant section of the revised regulation.

1. Section 1303.21

One commenter suggested a change to this section’s provision stating how a requester can access certain information about a person other than the requester which would otherwise be withheld. OMB’s proposal provided that if the requester includes authorization for full disclosure given by the individual whom the information is about, or a death certificate or other proof that that person is deceased, the requester can receive “greater access” to the information about that individual. The commenter suggested that the rule should limit the people for whom “greater access” can be withheld by OMB in the first place, without such proof or authorization, to only people who are not “government officials.” The commenter suggested that this change would facilitate “open access to government records about government officials.”

For this section, OMB used the text found in the DOJ OIP’s *Guidance for Agency FOIA Regulations* without modification except to insert the name of the agency. OMB’s purpose for including this provision was to facilitate greater access to information which is permitted to be withheld by an agency under exemptions b(6) and b(7)(C) in the FOIA statute which protect against unwarranted invasions of personal privacy.

There is no basis in the FOIA statute allowing or directing agencies to make a distinction between “government officials” and other people who are the subject of requested information when it comes to what information will be released. Indeed, the FOIA’s exemptions from release for personal privacy interests (5 U.S.C. 552(b)(6), (7)(C)) are often invoked to withhold sensitive personal information of government employees. OMB’s rule directs requesters to provide specified documentation showing that no invasion of personal privacy would result from the release of the requested records (*i.e.*, because the subject of the personal information has authorized the release or is deceased). Personal information is protected by exemption b(6) regardless of whether the subject of the information is a government official. For these reasons, OMB declines to make the change requested to distinguish government officials.

2. Section 1303.22

The same commenter suggested that OMB remove this section’s proposed statement of the requirement that “requesters must describe the records sought in sufficient detail to enable

OMB personnel to locate them with a reasonable amount of effort.” The commenter stated that a requirement that requesters provide “sufficient detail” in their requests is not required by the FOIA statute and removing this requirement “avoids the unnecessary delays introduced by” such a requirement. The commenter linked the proposed rule’s requirement for sufficient detail in FOIA requests with language in OMB’s regulation guiding OMB to conduct searches efficiently and without unnecessary expense.

For this section, OMB used the text found in the DOJ OIP’s *Guidance for Agency FOIA Regulations* without modification except to insert the name of the agency. OMB’s purpose for including this language was to reflect prevailing case law that has consistently held that a request failing to provide sufficient detail or particular specificity may be a basis for an agency to validly reject the request. See *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 27–28 (D.D.C. 2000) (agency motion for summary judgment based on requester’s failure to exhaust administrative remedies was granted because requester “fail[ed] to state its request with sufficient particularity.”). Failing to provide sufficient detail in a request is one of several ways a plaintiff may fail to “reasonably describe” the records sought. See *James Madison Project v. CIA*, No. 08–1323, 2009 U.S. Dist. LEXIS 78671, *8 (E.D. Va., August 31, 2009).

OMB’s revision provides ways for requesters to prevent a FOIA request from being deficient for failure to reasonably describe the records sought, both before and after the request is submitted. Moreover, OMB’s revision provides requesters an additional accommodation not required by the FOIA statute, namely that OMB will contact requesters for clarification in cases where the request fails to reasonably describe the records sought.

Finally, OMB does not intend for this provision to change OMB’s procedures for searching for records in response to FOIA requests. The text of § 1303.91 of OMB’s revised regulation includes text that is unchanged from OMB’s previous rule (formerly in § 1303.40) that states that OMB will use the “most efficient and least costly methods” in complying with requests for responsive documents. For these reasons, OMB declines to make the suggested change to this section.

3. Section 1303.30

The same commenter opposed the inclusion of parts (a) and (b) of this new section stating that they would curtail

the processing of valid FOIA requests. Specifically, the commenter stated that the provisions for when searches are cut off from including later, newly created records, and for exclusion of records from searches when those records have been transferred to the control of the National Archives and Records Administration (NARA) may make the request process more difficult. The comment notes that the proposed regulation’s provision in part (a) of a search cutoff date “does not delineate the search cutoff in its text.”

For part (a) of this section, OMB used text found in the DOJ OIP’s *Guidance for Agency FOIA Regulations* without modification except to insert the name of the agency. This section is intended to provide notice to requesters that OMB uses the date the search is begun by agency staff as the search cutoff date, designating records created after that date as not responsive to the request. This procedure is favored by courts over the use of a date-of-receipt search cutoff policy. See, e.g., *McGehee v. CIA*, 697 F.2d 1095, 1104 (D.C. Cir. 1983) (holding that a date-of-search cutoff is more reasonable because it “results in a much fuller search and disclosure” than does a date-of-request cut-off). Using the date that the search begins is more reasonable than a later date because one of the first steps in the search is often a request for collection of documents currently in possession of agency staff or in file systems. A later cutoff would potentially require multiple successive requests for additional documents in response to the same FOIA request.

Additionally, this comment opposed inclusion of part (b) of this section, which provides notice that records that have been transferred to the control of NARA are not accessible by submitting a FOIA request to OMB. The commenter requested that this provision be removed because “it does not make explicit that recent records created under the Obama Administration are no longer within the OMB’s control for FOIA request purposes.”

OMB chose to add both paragraph (a) and paragraph (b) to the regulation in order to provide requesters some notice where there previously was none, of the possible limits of the scope of searches conducted by OMB in response to FOIA requests. In the case of paragraph (b), OMB intends this provision to notify requesters of a limitation of the FOIA which commonly affects the scope of searches conducted by OMB. A listing of particular instances of the transfer of records to NARA such as happened with emails at the end of the Obama Administration, as requested by this comment, was not included in the rule

because such changes to OMB’s records holdings typically happen too frequently to include an up-to-date listing of OMB’s records retention schedules in OMB’s regulation. OMB’s records holdings, including documentation of the Obama Administration email accession to NARA are publicly listed on NARA’s website for Records Control Schedules of agencies here: <https://www.archives.gov/records-mgmt/rcs/schedules/index.html?dir=/executive-office-of-the-president/rg-0051>. For these reasons, OMB declines to make the change requested.

4. Section 1303.40(a)

One commenter pointed out that this section’s statement of when the FOIA Officer is to determine whether it is appropriate to grant requests and what the notification of that determination back to the requester must include does not list the same items that were listed in the D.C. Circuit’s opinion in *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180 (D.C. Cir. 2013), including, among other items, the right of the requester to appeal the agency’s determination. In that case, the D.C. Circuit gave a description of the minimum requirements for an agency’s determination regarding a FOIA request in order for that communication to be effective to require a requester to exhaust their administrative remedies prior to filing suit over that FOIA request pursuant to the FOIA’s provisions at 5 U.S.C. 552(a)(6)(C).

OMB does not intend for this provision in its regulation to change the statutory requirements for OMB to provide notification of the agency’s determination of whether to comply with a request in the FOIA at 5 U.S.C. 552(a)(6)(A). Nor does OMB intend for this section to reflect a comprehensive description of the information that the FOIA requires to be included in a notification of a determination of a request, which can be found by examining the FOIA itself. This section only intends to briefly describe the timing of responses to a request, including the basic 20-day time period and the requirement of immediate notification to the requester of a determination regarding the request. For these reasons, OMB declines to make the requested change.

The same commenter stated that this section includes an erroneous method for calculating the date of receipt of a FOIA request. Specifically, the commenter stated that the proposed rule’s provision that “the 20-day period, as used herein, shall commence on the

date on which the FOIA Officer or the FOIA Public Liaison first receives the request” conflicts with the FOIA’s requirement that the 20-day period commences no later than ten days after the request is first received by any component of the agency designated to receive FOIA requests.

OMB does not intend for this provision to modify the statutory requirement that the 20-day period should commence no less than ten days after the request is first received by the agency. OMB agrees with the commenter that this section will more accurately reflect OMB’s duties under the FOIA by including an additional clause which is included in the DOJ OIP’s *Guidance for Agency FOIA Regulations*. Specifically, OMB has added to this subsection the following text: “but in any event not later than 10 working days after the request is first received by any component’s office that is designated by these regulations to receive requests.”

5. Section 1303.40(d)

Four commenters raised concerns that this section of the proposal’s provision regarding the aggregating of requests for the purposes of triggering the FOIA’s provision for extending the time period for the agency to respond to FOIA requests in cases of unusual circumstances stated in the FOIA at 5 U.S.C. 552(a)(6)(B), are overly broad. Each of the comments opposed OMB’s proposal of a 45-day period within which OMB would presume requests can be aggregated if other circumstances listed in the regulation and statute apply. One commenter stated that this provision would extend OMB’s response time for requests “from 20 days to 40 days, or longer.”

Another commenter disagreed with OMB’s explanation for the proposed time period in the proposal’s summary of changes, that the 45-day period accounts for the FOIA statute’s provision of ten working days for routing of FOIA requests, 20 days for an initial response, and 20 days for an appeal response, and suggested that the time period for appeal responses should be ignored because appeals are relatively rare. This comment also noted that most agencies have a 30-day aggregation period included in the fee-calculation portion of their regulations in accordance with the DOJ OIP’s *Guidance for Agency FOIA Regulations*. Another commenter stated that this section would have set an overly broad standard for aggregating requests by omitting the requirement of the FOIA’s aggregation provision (5 U.S.C. 552(a)(6)(B)(iv)) that aggregated requests

involve “clearly related matters.” Another commenter stated more generally that this provision was overly broad because it did not stipulate that the requests must “otherwise satisfy the unusual circumstances” standard in the FOIA in order to be eligible for aggregation.

After careful consideration of these comments, OMB agrees that including the proposed 45-day period for aggregating requests could lead to confusion and potentially overly broad application of the FOIA’s aggregation provision for the agency to claim “unusual circumstances” regarding a request. As proposed, the regulation would not have affected the 20-day time limit for requests, and therefore would only be applied to claim the “unusual circumstances” timing provision of the FOIA on the later of multiple aggregated requests when the earlier request’s 20-day time period had expired. However, OMB agrees with commenter’s arguments that the proposed provision could have been misinterpreted, leading to unnecessary confusion. Further, OMB agrees with commenters who suggested that OMB should revise this section to align with the corresponding provision of the DOJ OIP’s *Guidance for Agency FOIA Regulations*. Doing so will add to uniformity across regulations and reduce the potential for confusion and delays in processing FOIA requests.

For these reasons, OMB is adopting changes to this section suggested by the comments. Specifically, OMB has amended this section to align with the DOJ OIP’s *Guidance for Agency FOIA Regulations*.

6. Section 1303.70

One commenter suggested that a provision of this section could be confusing to requesters who wish to seek review by a court of an agency’s adverse determination. Specifically, the comment highlighted the final sentence of this section in the proposal, which states, “[b]efore seeking review by a court of an agency’s adverse determination, a requester generally must first submit a timely administrative appeal.” The commenter noted that the FOIA statute at 5 U.S.C. 552(a)(6)(C)(i) provides that a requester “shall be deemed to have exhausted [her or his] administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions. . . .” The comment concluded that the regulation’s statement of the requirement that that requester to appeal an adverse ruling before seeking review by a court conflicts with the FOIA’s provision granting requesters leave to seek court

review when the 20-day time limit for agency responses expires, regardless of whether the requester has appealed their case.

For the provision of the rule highlighted by this comment, OMB used the text found in the DOJ OIP’s *Guidance for Agency FOIA Regulations* without modification. This provision was included in OMB’s rule to give notice to requesters of the uniform treatment by courts of the FOIA as requiring plaintiffs who are challenging an agency’s adverse determinations in court to first exhaust their administrative remedies by appealing to the agency for administrative review. See, e.g., *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004). OMB agrees with the commenter that in those cases where an agency has not issued a determination when the 20-day time limit has passed, the FOIA’s constructive exhaustion provision, cited by this comment, applies unless and until the agency does issue a determination. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (“A requester is considered to have constructively exhausted administrative remedies and may seek judicial review immediately if . . . the agency fails to answer the request within twenty days. If the agency responds to the request after the twenty-day statutory window, but before the requester files suit, the administrative exhaustion requirement still applies.”). This provision of the proposed rule does not concern situations where an agency has not issued an adverse determination and therefore does not conflict with the provision of the FOIA statute highlighted in the comment. For these reasons, OMB declines to make the change requested by this comment.

7. Section 1303.80

One commenter advised that this section’s reference to NARA’s General Records Schedule (GRS) 14 should be changed to “GRS 4.2.” The commenter noted that NARA’s GRS 14 was updated to “GRS 4.2” in January 2017. OMB agrees with this comment and has made the requested change in the rule.

8. Section 1303.90(j)

One commenter requested a change to OMB’s definition of “news” for purposes of applying the FOIA’s reduced fees for news media requesters. Specifically, the requester asked that OMB amend the part of the definition of “news” that provides examples of news-media entities by amending the parenthetical phrase referring to periodicals which says “(but only in those instances when they can qualify

as disseminators of ‘news’).” The commenter stated that this text improperly limits the definition of “news” and therefore the definition of “representative of the news media” in contradiction with the FOIA. Specifically, the commenter expressed concerns that the use of the phrase “in those instances” suggests that OMB will determine on a case-by-case basis, whether a requester qualifies for this provision. Furthermore, the commenter noted that the FOIA statute includes a definition of “news” that differs from the one in OMB’s prior rule and proposed revision.

OMB did not propose changes to this provision in the regulation in its rule proposal but it did generally propose to make changes to comply with updates to the FOIA statute. Definitions of “representative of the news media” and “news” were added to the FOIA statute as part of the OPEN Government Act amendments made to the law in 2007. The definition in OMB’s prior regulation predated the 2007 FOIA amendments and closely adhered to the definition originally created by OMB and included in OMB’s “Uniform Freedom of Information Fee Schedule and Guidelines” in 1987. OMB agrees with the requester that OMB must comply with the definitions of “news” and “news media requester” set out in the FOIA, and further agrees that continued textual deviations from the statutory definition in OMB’s regulation may add confusion and uncertainty for requesters who may seek reduced fees for this category of requests. Therefore, OMB has revised the text of this section by aligning the definition “news” with the statutory definition in the FOIA. OMB intends that this change will relieve requesters of any uncertainty that OMB will adhere to the FOIA’s statutory definition of “news” when assessing fees.

9. Section 1303.91(b)

One commenter expressed confusion with a sentence in this subsection which included “i.e.” but the phrase following it did not appear to be connected with the phrase preceding it. OMB had inadvertently omitted language from this sentence which would have illustrated the concept of an “initial review” of a record which is drawn from the DOJ OIP’s *Guidance for Agency FOIA Regulations* without modification. Including this text will correct a typographical error and will also provide information to requesters about the record review process, while promoting uniformity of FOIA regulations across agencies. For these reasons, OMB has added the illustrative

phrase found in that guidance to this subsection of the regulation.

10. Section 1303.91(g)

One commenter advised that this section as proposed did not appear to distinguish between “all other” requesters and the educational institutions, noncommercial scientific institutions, and representatives of the news media with regard to charges for search time. The commenter noted that the FOIA states at 5 U.S.C. 552(a)(4)(A)(ii) that educational, non-commercial scientific institution, and news media requesters should not be charged search fees, and should only be charged duplication fees.

OMB does not intend to omit this overall distinction in the FOIA regarding search fees in its rule revision and both OMB’s proposal and final rule include the general distinction for fees to be charged to these groups in § 1303.91(a) and (b), as well as 1303.92(a) through (c). Section 1303.91(g) of OMB’s rule states that the first 100 pages of duplication and the first two hours of search time will be provided without charge to non-commercial requests.

For this subsection OMB used text similar to that found in the DOJ OIP’s *Guidance for Agency FOIA Regulations*, which also does not make its distinction regarding these restrictions on assessing fees with regard explicitly to educational, non-commercial scientific institution, and news media requesters. Instead, the rule provides the benefit of this restriction on the charging of fees to a category of requests that includes “all requests other than those seeking documents for a commercial use.”

Because requests for “commercial use” are explicitly excluded from each of the above-listed special requester categories, the category “non-commercial requests” necessarily includes all requests that would be in any of the above listed requester categories. Therefore, it would be redundant and potentially confusing to further stipulate in the regulation that the above listed categories of requesters should also receive the benefit of this subsection. For this reason, OMB declines to make the requested change to this section.

11. Section 1303.92

One commenter noted incorrect cross references included in this section intended to point to definitions in § 1303.90. Those references have been corrected in this rule.

12. Section 1303.93

One commenter that also commented on the proposal’s aggregation provision for purposes of timing of responses to requests (see discussion of comments to § 1303.40 above) stated that its comments equally apply to the rule’s provision for aggregating requests for purposes of calculating fees. This commenter stated that the proposed 45-day period for presumption that requests can be aggregated should be reduced to 30 days in order to align with the DOJ OIP’s *Guidance for Agency FOIA Regulations*. Additionally this commenter suggested that the rule does not provide guidelines for overcoming a presumption that multiple requests can be aggregated, and also suggested that the regulation could allow the charging of one requester fees incurred in replying to another requester. Finally, this commenter stated that the proposed regulation conflicts with the FOIA’s requirement that agencies only charge “direct costs of search, duplication, or review,” 5 U.S.C. 552(a)(4)(A)(iv).

OMB agrees with the commenter that using the 30-day period suggested by DOJ OIP will better promote uniformity of FOIA regulations across agencies. OMB disagrees that a version of this section that uses a 30-day time period will allow charging of one requester for work done for another requester. Under this rule, any fee charged will still be a direct cost of the search, processing, and duplication done for that requester’s request. OMB also disagrees that more specificity is required regarding how OMB will determine that the presumption that requests can be aggregated has been overcome. OMB will administer this provision within the bounds of the FOIA, while addressing the circumstances of each case to promote the purposes of the statute. This provision has been included in the rule in order to prevent abuse of the FOIA’s provision of the first 100 pages of duplication and the first two hours of search time to non-commercial requesters.

For these reasons as well as the same reasons stated in the discussion of the comments to § 1303.40, OMB has revised this section to align with the corresponding provision of DOJ OIP’s *Guidance for Agency FOIA Regulations*, including by changing the proposed 45-day period for presumption that requests can be aggregated to a 30-day period. OMB declines to make any of the other changes sought by the commenter.

13. Foreseeable Harm Standard

One commenter suggested that the FOIA's standard for withholding documents based on foreseeable harm should be addressed in OMB's FOIA rule. OMB recognizes that the FOIA Improvement Act of 2016 requires that an agency may withhold information "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law." 5 U.S.C. 552(a)(8)(A)(i). However, OMB does not agree that it is necessary to include language confirming OMB's compliance with this standard or a provision requiring adverse agency determinations to include an explanation of foreseeable harms in its rule. For these reasons, OMB declines to make the changes requested in the comment.

14. Final Amendments

OMB has made the following clarifying amendments to the rule in response to comments and on its own.

- Section 1303.1
 - This section was revised to add that this regulation should be read in conjunction with the text of the FOIA.
- Section 1303.40
 - As discussed above, in response to a comment this section was revised to comply with the FOIA by adding the stipulation that the 20-day period for making determinations regarding requests will begin within 10 working days after the request is first received by any component's office that is designated to receive requests.
 - As discussed above, in response to a comment paragraph (d) was revised to remove the proposed 45-day period for presumption that multiple requests can be aggregated and otherwise to align with the DOJ regulation template.
- Section 1303.80
 - As discussed above, in response to a comment this section was revised to update a reference to NARA's General Records Schedule 4.2.
- Section 1303.90(j)
 - As discussed above, in response to a comment this section was revised to align the definition of "news" with the definition now included in the FOIA statute.
- Section 1303.91
 - As discussed above, in response to a comment this section is revised with added text to illustrate the concept of an "initial review" of a record which is drawn from the DOJ OIP's *Guidance for*

Agency FOIA Regulations without modification.

- Paragraph (b) of this section was amended to clarify that review fees will be charged at the same rate as search fees.

- Section 1303.93(c)

- This subsection was revised to change the proposed 45-day period for presumption that multiple requests can be aggregated to 30 days and otherwise to align with the DOJ regulation template.

Classification of This Rule Under Relevant Statutes

Regulatory Flexibility Act

OMB, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this rule and certifies that this rule 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 OMB are nominal.

Executive Orders 12866 and 13771

For purposes of Executive Order (E.O.) 13771 on *Reducing Regulation and Controlling Regulatory Costs*, this rule is not an E.O. 13771 regulatory action because this rule is not a significant regulatory action under section 3(f) of E.O. 12866.

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 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 5 CFR Part 1303

Administrative practice and procedure, Archives and records, Freedom of information.

For the reasons stated in the preamble, OMB revises 5 CFR part 1303 to read as follows:

PART 1303—PUBLIC INFORMATION PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

Sec.

General

- 1303.1 Purpose.
- 1303.2 Authority and functions.
- 1303.3 Organization.

Proactive Disclosures

- 1303.10 Availability of proactive disclosures.

Requirements for Making Requests

- 1303.20 Where to send requests.
- 1303.21 Requesters making requests about themselves or others.
- 1303.22 Requirement for providing description of the records sought.

Responsibility for Responding to Requests

- 1303.30 Responsibility for responding to requests.

Timing of Responses to Requests

- 1303.40 Timing of responses to requests.

Responses to Requests

- 1303.50 Responses to requests.

Confidential Commercial Information

- 1303.60 Notification procedures for confidential commercial information.

Appeals

- 1303.70 Appeals.

Preservation of Records

- 1303.80 Preservation of records.

Fees

- 1303.90 Definitions.
- 1303.91 Fees to be charged—general.
- 1303.92 Fees to be charged—categories of requesters.
- 1303.93 Miscellaneous fee provisions.
- 1303.94 Waiver or reduction of charges.

Authority: 5 U.S.C. 301 and 5 U.S.C. 552, unless otherwise noted.

General

§ 1303.1 Purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, and prescribes the rules governing the public availability of Office of Management and Budget (OMB) records. The rules in this subpart should be read in conjunction with the text of the FOIA.

§ 1303.2 Authority and functions.

The general functions of OMB, as provided by statute and by executive

order, are to develop and to execute the budget, oversee implementation of Administration policies and programs, advise and assist the President, and develop and implement management policies for the government.

§ 1303.3 Organization.

(a) The central organization of OMB is as follows:

(1) The Director's Office includes the Director, the Deputy Director, the Deputy Director for Management, and the Executive Associate Director.

(2) Staff Offices include General Counsel, Legislative Affairs, Communications, Management and Operations, and Economic Policy.

(3) Offices that provide OMB-wide support include the Legislative Reference Division and the Budget Review Division.

(4) Resource Management Offices, which develop and support the President's management and budget agenda in the areas of Natural Resources, Energy and Science; National Security; Health; Education, Income Maintenance and Labor; and General Government Programs.

(5) Statutory offices include the Offices of Federal Financial Management, Federal Procurement Policy, Intellectual Property Enforcement Coordinator; E-government and Information Technology; and Information and Regulatory Affairs.

(b) OMB is located in the Eisenhower Executive Office Building, 17th Street and Pennsylvania Avenue NW, and the New Executive Office Building, 725 17th Street NW, Washington, DC 20503. OMB has no field offices. Security in both buildings prevents visitors from entering the building without an appointment.

Proactive Disclosures

§ 1303.10 Availability of proactive disclosures.

OMB makes available records that are required by the FOIA to be made available for public inspection in an electronic format. OMB information pertaining to matters issued, adopted, or promulgated by OMB that is within the scope of 5 U.S.C. 552(a)(2) is available electronically on OMB's website at www.whitehouse.gov/omb/. Additionally, for help accessing these materials, you may contact OMB's FOIA Officer at (202) 395-3642.

Requirements for Making Requests

§ 1303.20 Where to send requests.

The FOIA Officer is responsible for acting on all initial requests. Individuals wishing to file a request under the FOIA

should address their request in writing to FOIA Officer, Office of Management and Budget, 725 17th Street NW, Room 9204, Washington, DC 20503, via fax to (202) 395-3504, or by email at OMBFOIA@omb.eop.gov. Additionally, OMB's FOIA Public Liaison is available to assist requesters who have questions and can be reached at (202) 395-7545 or in writing at the address provided in this section.

§ 1303.21 Requesters making requests about themselves or others.

A requester who is making a request for records about himself or herself pursuant to 5 U.S.C. 552a must comply with the verification of identity requirements as determined by OMB pursuant to OMB's Rules For Determining if an Individual Is the Subject of a Record in 5 CFR 1302.1. 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 (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, OMB may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

§ 1303.22 Requirement for providing description of the records sought.

(a) Requesters must describe the records sought in sufficient detail to enable OMB personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help the agency identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the FOIA Officer or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records.

(b) If, after receiving a request, OMB determines that the request does not reasonably describe the records sought, OMB will inform the requester what additional information is needed and why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Officer or the FOIA Public Liaison. If a request does not

reasonably describe the records sought, OMB's response to the request may be delayed.

Responsibility for Responding to Requests

§ 1303.30 Responsibility for responding to requests.

(a) *Search cutoff date.* In determining which records are responsive to a request, OMB ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, OMB will inform the requester of that date.

(b) *Transfer of records to the National Archives and Records Administration (NARA).* Permanent records of OMB which have been transferred to the control of NARA under the Federal Records Act are not in the control of OMB and are therefore not accessible by a FOIA request to OMB. Requests for such records should be directed to NARA.

(c) *Consultation and referral.* When reviewing records, OMB 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, OMB will proceed in one of the following ways:

(1) *Consultation.* When records contain information of interest to another agency, OMB typically will consult with that agency prior to making a release determination.

(2) *Referral.* (i) When OMB believes that a different agency is best able to determine whether to disclose the record, OMB will refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is best situated to make the disclosure determination. However, if OMB and the originating agency jointly agree that OMB is in the best position to respond regarding the record, then OMB may provide it.

(ii) If OMB determines that another agency is best situated to consider a request, OMB promptly will notify the requestor and inform him of the agency which will be processing his request, except when disclosure of the identity of the agency could harm an interest protected by an applicable FOIA exemption. In those instances, in order to avoid harm to an interest protected by an applicable exemption, OMB will coordinate with the originating agency to seek its views on the disclosability of the record and convey the release determination for the record that is the subject of the coordination to the requester.

Timing of Responses to Requests

§ 1303.40 Timing of responses to requests.

(a) *In general.* Upon receipt of any request for information or records, the FOIA Officer will determine within 20 working days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such request whether it is appropriate to grant the request and will immediately notify the requester of such determination and the reasons therefore and the right of such person to seek assistance from the FOIA Public Liaison. The 20-day period, as used herein, shall commence on the date on which the FOIA Officer or the FOIA Public Liaison first receives the request but in any event not later than 10 working days after the request is first received by any component's office that is designated by these regulations to receive requests. OMB may toll this 20-day period either one time while OMB is awaiting information that it has reasonably requested from the requester or any time when necessary to clarify with the requester issues regarding fee assessment. OMB's receipt of the requester's response to OMB's request for information ends the tolling period.

(b) *Multitrack processing.* (1) FOIA requests are placed on one of three tracks:

- (i) Track one covers those requests that seek and receive expedited processing pursuant to subsection (a)(6)(E) of the FOIA and in accordance with paragraph (e) of this section;
- (ii) Track two covers simple requests;
- (iii) Track three covers complex requests.

(2) Whether a request is simple or complex is based on the amount of work or time needed to process the request. OMB considers various factors, including the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. OMB will advise the requester of the processing track in which their request has been placed and provide an opportunity to narrow or modify their request so that the request can be placed in a different processing track.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of "unusual circumstances," as defined in the FOIA, and OMB extends the time limit on that basis, OMB will, 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 processing of the request can be expected to be completed. Where the extension

exceeds 10 working days, OMB will, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing. OMB will alert requesters to the availability of its FOIA Public Liaison, who will assist in the resolution of any disputes between the requester and OMB, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services (OGIS).

(d) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, OMB may aggregate those requests for the purposes of this section when OMB reasonably believes that a requester, or a group of requesters acting in concert, has submitted requests that constitute a single request, that would otherwise satisfy the unusual circumstances specified in this section. Multiple requests involving unrelated matters will not be aggregated.

(e) *Expedited processing.* (1) Requests and appeals will be given expedited treatment in cases where OMB determines:

- (i) The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) There is an urgency to inform the public about an actual or alleged Federal Government activity;
- (iii) Failure to respond to the request expeditiously would result in the loss of due process rights in other proceedings; or
- (iv) There are possible questions, in a matter of widespread and exceptional public interest, about the government's integrity which effect public confidence.

(2) A request for expedited processing may be made at the time of the initial request for records or at any later time.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for requesting expedited processing. OMB may waive this certification requirement at its discretion.

(4) OMB will decide whether to grant expedited processing and will notify the requester within 10 days after the date of the request. If a request for expedited treatment is granted, OMB will prioritize the request and process the request as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

Responses to Requests

§ 1303.50 Responses to requests.

(a) *Acknowledgements of requests.* OMB will assign an individualized tracking number to each request received that will take longer than ten days to process; and acknowledge each request, informing the requester of their tracking number if applicable; and, upon request, make available information about the status of a request to the requester using the assigned tracking number, including—

(1) The date on which OMB originally received the request; and

(2) An estimated date on which OMB will complete action on the request.

(b) *Grants of requests.* Once OMB makes a determination to grant a request in full or in part, it will notify the requester in writing. OMB also will inform the requester of any fees charged under § 1303.9 and shall provide the requested records to the requester promptly upon payment of any applicable fees. OMB will inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(c) *Adverse determinations of requests.* In the case of an adverse determination, the FOIA Officer will immediately notify the requester of—

(1) The right of the requester to appeal to the head of OMB within 90 calendar days after the date of such adverse determination in accordance with § 1303.70;

(2) The right of such person to seek dispute resolution services from the FOIA Public Liaison or the OGIS at NARA;

(3) The names and titles or positions of each person responsible for the denial of such request; and

(4) OMB's estimate of the volume of any requested records OMB is withholding, unless providing such estimate would harm an interest protected by the exemption in 5 U.S.C. 552(b).

Confidential Commercial Information

§ 1303.60 Notification procedures for confidential commercial information.

(a) *Definitions.* (1) "Confidential commercial information" means commercial or financial information obtained by OMB 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, 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 of the FOIA. 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) OMB will promptly notify a submitter when OMB determines that a pending FOIA lawsuit seeks to compel the disclosure of records containing the submitter's confidential information, or if OMB determines that it may be required to disclose such records, provided:

(i) The requested information has been designated by the submitter as information considered protected from disclosure under Exemption 4 in accordance with paragraph (b) of this section; or

(ii) OMB 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 will 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, OMB 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) OMB 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 law, including 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, OMB will 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) Unless OMB specifies a different period, submitters who fail to respond to OMB's notice within 30 days of OMB's notice will be deemed to have consented to disclosure.

(2) If a submitter has any objections to disclosure, it should provide OMB 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. OMB is not required to consider any information received after the date of any disclosure decision.

(3) Any information provided by a submitter under this section may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* OMB will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever OMB decides to disclose information over the objection of a submitter, OMB will provide the submitter written notice, which will include:

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

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

(3) A specified disclosure date, at least 30 days after OMB transmits its notice of intent to disclose, except for good cause.

(h) *Requester notification.* OMB will 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.

Appeals

§ 1303.70 Appeals.

(a) A requester must appeal to the head of OMB in writing within 90 calendar days after the date of such adverse determination addressed to the FOIA Officer at the address specified in § 1303.20. The appeal must include a statement explaining the basis for the appeal. Determinations of appeals will be set forth in writing and signed by the Deputy Director, or his designee, within 20 working days. If on appeal the denial is upheld in whole or in part, the

written determination will also contain a notification of the provisions for judicial review, the names of the persons who participated in the determination, and notice of the services offered by the OGIS as a non-exclusive alternative to litigation.

(b) OGIS's dispute resolution services is a voluntary process. If OMB agrees to participate in the mediation services provided by OGIS, OMB will actively engage as a partner to the process in an attempt to resolve the dispute. An appeal ordinarily will not be adjudicated if the request becomes 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.

Preservation of Records

§ 1303.80 Preservation of records.

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

Fees

§ 1303.90 Definitions.

For the purpose of this part, all definitions set forth in the FOIA apply.

(a) The term "direct costs" means those expenditures that OMB actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Not included in direct costs are overhead expenses such as costs of space, heating, or lighting the facility in which the records are stored.

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

(c) The term "duplication" means the making of a copy of a document, or of the information contained in it, that is necessary to respond to a FOIA request. Such copies can be in the form of paper, microform, audio-visual materials, or electronic records (e.g., magnetic tape or disk), among others.

(d) The term "review" refers to the process of examining documents located

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

(e) The term “commercial use request” is a request that asks for information for a use or purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation.

(f) The term “educational institution” is any school that operates a program of teaching or scholarly research. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and in connection with the requester’s role at a qualifying institution and that the records are not sought for commercial use, but are sought in furtherance of teaching or scholarly research. OMB may seek assurance from the requester that the request is in furtherance of teaching or scholarly research and will advise requesters of their placement in this category.

(g) The term “non-commercial scientific institution” refers to an institution that is not operated on a commercial basis (as that term is referenced in paragraph (e) of this section) and that is operated solely for the purpose of conducting scientific research where the results of the research 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.

(h) The term “representative of the news media” refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

(i) 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, OMB can also consider a requester’s past publication record in making this determination. OMB will advise requesters of their placement in this category.

§ 1303.91 Fees to be charged—general.

OMB will charge fees that recoup the full allowable direct costs it incurs. Moreover, it will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure. When documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (*see* definition in § 1303.30(b)), such as the NTIS, OMB will inform requesters of the steps necessary to obtain records from those sources.

(a) *Search.* Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. OMB will charge search fees for all other requesters, subject to the restrictions of paragraph (h) of this section.

(1) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: Professional—\$10.00; and clerical/administrative—\$4.75.

(2) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(b) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be

assessed only for the initial review; *i.e.*, the review conducted by an agency to determine whether an exemption applies to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The direct costs for such a subsequent review are assessable. However, review costs will not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. Review fees will be charged at the same rates as those charged for a search under paragraph (a)(1) of this section.

(c) *Duplication of records.* The requester’s specified preference of form or format of disclosure will be honored if the record is readily reproducible in that format. Where photocopies are supplied, OMB will provide one copy per request at a cost of five cents per page. For copies prepared by computer, such as tapes or printouts, OMB will charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, OMB will charge the actual direct costs of producing the document(s).

(d) *Other charges.* OMB will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies; or

(2) Sending records by special methods, such as express mail.

(e) *Remittances.* Remittances shall be in the form of either a personal check, a bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the FOIA Officer at the address found in § 1303.10(b).

(f) *Receipts and refunds.* A receipt for fees paid will be provided upon request. Refund of fees paid for services actually rendered will not be made.

(g) *First 100 pages and two hours of search time.* With the exception of requesters seeking documents for a commercial use, OMB will provide the first 100 pages of duplication (or the cost equivalent for other media) and the first two hours of search time without charge.

(h) *Restrictions on assessing fees.* If OMB fails to comply with the FOIA’s time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in § 1303.90(g)

through (i), may not charge duplication fees, except as described in the following circumstances:

(1) If OMB has determined that unusual circumstances, as defined by the FOIA, apply, and OMB provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit will be excused for an additional 10 days.

(2) If OMB has determined that unusual circumstances, as defined by the FOIA, apply, and more than 5,000 pages are necessary to respond to the request, OMB may charge search fees, or, in the case of requesters described in § 1303.90(g) through (i), may charge duplication fees, if OMB has provided timely written notice to the requester in accordance with the FOIA and OMB has discussed with the requester via written mail, email, 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 in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(3) If a court determines 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.

(i) *No Fees under \$25.* No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25. If OMB estimates that the charges are likely to exceed \$25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel to meet the requester's needs at a lower cost.

§ 1303.92 Fees to be charged—categories of requesters.

There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The specific levels of fees for each of these categories are:

(a) *Commercial use requesters.* When OMB receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. OMB may recover the cost of searching for and reviewing records

even if there is ultimately no disclosure of records (*see* § 1303.93(b)).

(b) *Educational and non-commercial scientific institution requesters.* OMB will provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 1303.90(g) or (h). OMB may seek evidence from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

(c) *Requesters who are representatives of the news media.* OMB will provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 1303.90(i) and (j) and not make the request for commercial use. A request for records supporting the news dissemination function of the requester is not a commercial use for this category.

(d) *All other requesters.* OMB will charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. Moreover, requests for records about the requesters filed in OMB's systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for reproduction.

§ 1303.93 Miscellaneous fee provisions.

(a) *Charging interest—notice and rate.* OMB may begin assessing interest charges on an unpaid bill starting on the 31st day after OMB sends the bill. If OMB receives the fee within the thirty-day grace period, interest will not accrue on the paid portion of the bill, even if the payment is unprocessed. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the billing.

(b) *Charges for unsuccessful search.* OMB may properly charge for time spent searching even if it does not locate any responsive records or if OMB determines that the records are entirely exempt from disclosure.

(c) *Aggregating requests.* When OMB reasonably believes that a requester, or a group of requestors acting in concert, is attempting to divide a single request into a series of requests for the purpose of avoiding fees, OMB may aggregate those requests and charge fees

accordingly. OMB may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, OMB will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(d) *Advance payments.* (1) OMB will not require a requester to make an advance payment, *i.e.*, payment before work is commenced or continued on a request, unless OMB estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250 or the requester has previously failed to make payments due within 30 days of billing.

(2) In cases in which OMB 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 OMB's fee determination, the request will be closed.

(e) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).* OMB will comply with applicable provisions of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

§ 1303.94 Waiver or reduction of charges.

(a) *How to apply for a fee waiver.* Requesters may seek a waiver of fees by submitting a written application demonstrating how 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 and is not primarily in the commercial interest of the requester.

(b) *Factors for approving fee waivers.* OMB will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the following factors are satisfied:

(1) Disclosure of the requested information would shed light on the operations or activities of the government. 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.

(2) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when both of the following criteria are met:

(i) Disclosure of the requested records must be meaningfully informative about government 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 be meaningfully informative if nothing new would be added to the public's understanding.

(ii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. OMB will presume that a representative of the news media will satisfy this consideration.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, OMB will consider the following criteria:

(i) OMB will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is an identified commercial interest, OMB must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (b)(1) and (2) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. OMB ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (b)(1) and (2) of this section, the request is not primarily in the commercial interest of the 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.

(c) *Timing of requests for fee waivers.* Requests for a waiver or reduction of fees should be made when the request is first submitted to OMB and should address the criteria referenced above. A requester may submit a fee waiver request at a later time 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 shall be required to pay any costs incurred up to the date the fee waiver request was received.

Mark R. Paoletta,

General Counsel and Chief FOIA Officer.

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 948

[Doc. No. AMS-SC-18-0067; SC18-948-2 FR]

Irish Potatoes Grown in Colorado; Modification of the Handling Regulations for Area No. 2

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule revises the size requirements currently prescribed under the federal marketing order for Irish potatoes grown in Colorado. This action revises the minimum size requirement for U.S. No. 2 or better grade round potatoes to align with the current size requirements for all other types of U.S. No. 2 or better grade potatoes. In addition, this rule revises the size requirements for smaller size profile U.S. Commercial grade or better potatoes.

DATES: Effective June 20, 2019.

FOR FURTHER INFORMATION CONTACT:

Barry Broadbent, Senior Marketing Specialist, or Gary D. Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326-2724, Fax: (503) 326-7440, or Email: Barry.Broadbent@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This rule is issued under Marketing Agreement No. 97 and Order No. 948, as amended (7 CFR part 948), regulating the handling of Irish potatoes

grown in Colorado. Part 948, (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Colorado Potato Administrative Committee, Area 2 (Committee) locally administers the Order and is comprised of potato producers and handlers operating within the area of production.

This rule is also issued pursuant to section 8e of the Act (7 U.S.C. 608e-1), which provides that whenever certain specified commodities, including potatoes, are regulated under a Federal marketing order, imports of these commodities into the United States are prohibited unless they meet the same or comparable grade, size, quality, or maturity requirements as those in effect for the domestically produced commodities.

The Department of Agriculture (USDA) is issuing this final rule in conformance with Executive Orders 13563 and 13175. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this final rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

There are no administrative procedures which must be exhausted