



[Billing Code 8120-08-P]

TENNESSEE VALLEY AUTHORITY

18 CFR Part 1301

Freedom of Information Act Regulations

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Final rule.

SUMMARY: The Tennessee Valley Authority issues this final rule amending its Freedom of Information Act (FOIA) regulations to incorporate the statutory changes made to the FOIA by the FOIA Improvement Act of 2016 (Act). The TVA's FOIA regulations provide the procedures by which the public may request records from TVA, and the policies and procedures by which TVA provides such records to the public upon written request. TVA is updating its regulations to incorporate the procedural requirements of the Act.

DATES: This rule is effective [insert date of publication in the FEDERAL REGISTER].

ADDRESSES: Tennessee Valley Authority, Freedom of Information Act Office, 400 W. Summit Hill Drive (WT 7D), Knoxville, TN 37902-1401.

FOR FURTHER INFORMATION CONTACT: Ms. Denise Smith, FOIA Officer,
Tennessee Valley Authority, 400 W. Summit Hill Drive (WT 7D), Knoxville, TN 37902-
1401. *Telephone:* (865) 632-6945. *Email:* dsmith@tva.gov.

SUPPLEMENTARY INFORMATION: The FOIA Improvement Act of 2016 requires that Federal agencies review and update their FOIA regulations in accordance with its provisions. The provisions include a requirement that agencies make available for public inspection, in an electronic format records, that have become or are likely to become the subject of subsequent requests for substantially the same records, or records that have been requested under FOIA three or more times. The Act requires that agencies provide a minimum of 90 days for requesters to file an administrative appeal following an adverse determination, and that agencies provide dispute resolution services at various times throughout the FOIA process. The Act codifies the U.S. Department of Justice's "foreseeable harm" standard, specifying that an agency shall withhold information only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption under 5 USC 552(b) or if disclosure is prohibited by law. This provision also requires agencies to consider whether partial disclosure is possible if full disclosure is not possible, and to take reasonable steps to segregate and release nonexempt information. The Act amends FOIA exemption 5 to specify that the deliberative process privilege does not apply to records created 25 years or more before the date of the request and must be released if requested.

The Tennessee Valley Authority issues a final rule amending its Freedom of Information Act (FOIA) regulations to incorporate the statutory changes made to the FOIA by the Act. TVA exercises no discretion in implementing these statutory changes, therefore, public notice and comment is not required pursuant to 5 USC 553(b)(B). For

these same reasons, the 30-day delay in effective date provided for in 5 USC 553(d) is waived.

Lists of Subjects in 18 CFR Part 1301

Freedom of Information, Privacy, Government in the Sunshine.

For the reasons stated in the preamble, TVA amends 18 CFR part 1301 as follows:

PART 1301 - PROCEDURES

1. The authority citation for part 1301 Subpart A continues to read as follows:

Authority: 16 U.S.C. 831-831dd, 5 U.S.C. 552

2. Subpart A of part 1301 is revised as follows:

Subpart A -- Freedom of Information Act

Sec.

- §1301.1 General provisions.
- §1301.2 Proactive disclosures.
- §1301.3 Requirements for making requests.
- §1301.4 Responsibility for responding to requests.
- §1301.5 Timing of responses to requests.
- §1301.6 Responses to requests.
- §1301.7 Exempt records.
- §1301.8 Confidential commercial information.
- §1301.9 Appeals.
- §1301.10 Preservation of records.
- §1301.11 Fees.
- §1301.12 Other rights and services.

§1301.1 General provisions.

(a) This subpart contains the rules that the Tennessee Valley Authority (TVA) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with TVA’s Privacy Act regulations as well as under this subpart.

§1301.2 Proactive disclosures.

Records that the FOIA requires agencies to make available for public inspection in an electronic format may be accessed through the TVA website. Each TVA organization is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each TVA organization shall ensure that its posted records and indices are reviewed and updated on an ongoing basis. TVA has a FOIA Requester Service Center and a FOIA Public Liaison who can assist individuals in locating TVA records. Contact information for the FOIA Requester Service Center and Public Liaison is available at <https://www.tva.com/Information/Freedom-of-Information/FOIA-Contacts>.

§1301.3 Requirements for making requests.

(a) *General information.* (1) TVA has a centralized system for responding to FOIA requests. To make a request for records, a requester should write directly to the Tennessee Valley Authority, FOIA Officer, 400 W. Summit Hill Drive (WT 7D), Knoxville, TN 37902-1401. TVA's Guide to Information, which may be accessed on the TVA website at <https://www.tva.com/Information/Freedom-of-Information/A-Guide-to-Information-About-The-Tennessee-Valley-Authority> may be helpful in making your request.

(2) If you are making a request about yourself, see subpart B Privacy Act for additional requirements.

(3) 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, TVA may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable TVA personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help TVA 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 TVA's FOIA

Officer or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. If after receiving a request the agency determines that the request does not reasonably describe the records sought, the agency shall inform the requester of what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the agency's FOIA Officer or FOIA Public Liaison. If a request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(c) *Format of records sought.* Requests may specify the preferred form or format (including electronic formats) for the records you seek. TVA will accommodate your request if the record is readily reproducible in that form or format.

(d) *Requester contact information.* Requesters must provide contact information, such as their phone number, email address, and/or mailing address, to assist the agency in communicating with them and providing released records.

§1301.4 Responsibility for responding to requests.

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

(b) *Authority to grant or deny requests.* TVA's FOIA Officer or the FOIA Officer's designee is authorized to grant or to deny any requests for records that are maintained by TVA.

(c) *Consultation, referral and coordination.* When reviewing records located by TVA in response to a request, TVA 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, TVA shall proceed in one of the following ways:

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

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

(ii) Whenever an agency refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the

name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement 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 an agency locates within its files 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 agency that received the request should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the agency that originally received the request.

(d) *Classified information.* On receipt of any request involving classified information, the agency must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of

records, the receiving agency must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the agency must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

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

(f) *Agreements regarding consultations and referrals.* TVA may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§1301.5 Timing of responses to requests.

(a) *In general.* TVA ordinarily will respond to requests according to their order of receipt and placement in an appropriate processing track as follows.

(b) *Multitrack processing.* TVA has established three tracks for handling requests and the track to which a request is assigned will depend on the nature of the request and the estimated processing time. Among the factors TVA may consider are the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. TVA will also designate a specific track for requests

that are granted expedited processing, in accordance with the standards set forth in paragraph (e) of this section. TVA will advise requesters of the track into which their request falls and, when appropriate, will offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(1) *Track 1.* Requests that can be answered with readily available records or information. These are the fastest to process. These requests ordinarily will be responded to within 20 working days of receipt of a proper request by the FOIA Officer. The 20 working day time limit provided in this paragraph may be extended by TVA for unusual circumstances, as defined in paragraph (c) of this section, upon written notice to the person requesting the records.

(2) *Track 2.* Requests where we need records or information from other offices throughout TVA, where we must consult with other Government agencies, or when we must process a submitter notice as described in § 1301.8(d), but we do not expect that the decision on disclosure will be as time consuming as for requests in Track 3.

(3) *Track 3.* Requests which require a decision or input from another office or agency, extensive submitter notifications because of the presence of Business Information as defined in § 1301.8(b)(1), and a considerable amount of time will be needed for that, or the request is complicated or involves a large number of records. Usually, these requests will take the longest to process.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of “unusual circumstances,” and TVA extends the time limit on that basis, TVA 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 TVA estimates processing of the request will be completed. Where the extension exceeds 10 working days, TVA will, 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. TVA will make available its FOIA Officer or its FOIA Public Liaison for this purpose. A list of agency FOIA Public Liaisons is available at <https://www.foia.gov/report-makerequest.html>. TVA will also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services. As used in this paragraph, "unusual circumstances" means, but only to the extent reasonable necessary to the proper processing of the particular requests:

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

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

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

(d) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, TVA may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute

a single request that would otherwise involve unusual circumstances. TVA cannot aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) TVA will process requests and appeals on an expedited basis whenever it is determined 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;

(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;

(iii) The loss of substantial due process rights.

(2) A request for expedited processing may be made at any time. For a prompt determination, requests based on paragraphs (e)(1)(i) and (ii) of this section should be submitted to the TVA FOIA Officer. Requests based on paragraph (e)(1)(iii) of this section should be submitted in accordance with the agency's requirements as described in § 1301.3. When making a request for expedited processing of an administrative appeal, the request should be submitted to the TVA Chief FOIA Officer and Appeals Official.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person

whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. As a matter of administrative discretion, TVA may waive the formal certification requirement.

(4) TVA will notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, the agency must act on any appeal of that decision expeditiously.

§1301.6 Responses to requests.

(a) *In general.* TVA, to the extent practicable, will communicate with requesters having access to the Internet electronically, such as email.

(b) *Acknowledgments of requests.* TVA will acknowledge the request in writing and assign it an individualized tracking number if it will take longer than 10 working days to process. TVA will include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Estimated dates of completion and interim responses.* Upon request, TVA 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, TVA may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once TVA determines it will grant a request in full or in part, it will notify the requester in writing. TVA will also inform the requester of any fees charged under § 1301.11 of this subpart and will disclose the requested records to the requester promptly upon payment of any applicable fees.

(e) *Adverse determinations of requests.* If TVA makes an adverse determination denying a request in any respect, it will notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing. In the event of an adverse determination, TVA will inform the requester of the availability of its FOIA Public Liaison to offer assistance to requesters.

(f) *Content of denial.* The denial must be signed by the head of the agency or their designee and must include:

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

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

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under § 1301.9(a) of this subpart, and a description of the appeal requirements.

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

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted must also be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event that TVA identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), TVA will confer with the Department of Justice, Office of Information Policy, to obtain approval to apply the exclusion.

(2) If an exclusion is invoked, TVA will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§1301.7 Exempt records.

(a) TVA's records will be disclosed to any person upon request as provided in this section, except records that are exempt and are not made available if they are:

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and

(ii) Are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than section 552b of this title), if that statute--

(i)(A) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(B) Establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(ii) If enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings,

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or

prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) The availability of certain classes of nonexempt records is deferred for such time as TVA may determine is reasonable necessary to avoid interference with the accomplishment of its statutory responsibilities. Such records include bids and information concerning the identity and number of bids received prior to bid opening and award; and all negotiations in progress involving contracts or agreements for the acquisition or disposal of real or personal property by TVA prior to the conclusion of such negotiations. Any reasonably segregable portion of an available record shall be provided to any person requesting such record after deletion of the portions which are exempt under this paragraph.

§1301.8 Confidential commercial information.

(a) *Definitions*—(1) *Confidential commercial information* means commercial or financial information obtained by TVA 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. 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) TVA will promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if TVA 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) TVA 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 agency 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) TVA determines that the information is exempt under the FOIA, and therefore will not be disclosed;

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

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

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, TVA 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) TVA will specify a reasonable time period within which the submitter must respond to the notice referenced under paragraph (c)(1) of this section.

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

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. TVA 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.

(f) *Analysis of objections.* TVA 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 TVA decides to disclose information over the objection of a submitter, TVA will provide the submitter written notice, which will include:

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

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

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

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

(i) *Requester notification.* TVA 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.

§1301.9 Appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to TVA's office designated to receive FOIA appeals (FOIA Appeals Office). Examples of adverse determinations are provided in § 1301.6(e) of this subpart. Requesters can submit appeals by mail to TVA FOIA Appeals Official, Tennessee Valley Authority, 400 W. Summit Hill Drive (WT 7C), Knoxville, TN 37902-1401. The requester must make the appeal in writing and to be considered timely it must be postmarked within 90 calendar days after the date of the initial response. The appeal should clearly

identify the agency determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The TVA Chief FOIA Officer and FOIA Appeals Official or designee will act on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the Chief FOIA Officer and FOIA Appeals Official will take appropriate action to ensure compliance with applicable classification rules.

(c) *Decisions on appeals.* TVA will provide its decision on an appeal in writing. A decision that upholds TVA's determination in whole or in part must contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision must provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the dispute resolution services offered by the Office of Government Information Services (OGIS) of the National Archives and Records Administration as a non-exclusive alternative to litigation. If TVA's decision is remanded or modified on appeal, TVA will notify the requester of that determination in writing. TVA will then further process the request in accordance with that appeal determination and will respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If TVA agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(e) *When appeal is required.* Before seeking review by a court of TVA's adverse determination, a requester generally must first submit a timely administrative appeal.

§1301.10 Preservation of records.

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

§1301.11 Fees.

(a) *In general.* (1) TVA will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters:

(i) Commercial use requesters;

(ii) Non-commercial scientific or educational institutions or news media requesters;

and

(iii) All other requesters.

(2) Different fees are assessed depending on the category. Requesters may seek a fee waiver. TVA will consider requests for fee waivers in accordance with the requirements in paragraph (k) of this section. To resolve any fee issues that arise under this section, TVA may contact a requester for additional information. TVA will ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. TVA ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Tennessee Valley Authority, or by another method as determined by TVA.

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

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

(2) Direct costs are those expenses that TVA incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (i.e., the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

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

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

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

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

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

(5) Noncommercial scientific institution is an institution that is not operated on a “commercial” basis, as defined in paragraph (b)(1) 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. 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. TVA will advise requesters of their placement in this category.

(6) Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast “news” to the public at large and publishers of periodicals that disseminate “news” and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, agencies can also consider a requester’s past publication record in making this determination. TVA will advise requesters of their placement in this category.

(7) Search 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.

(8) Review is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 1301.7 of this subpart, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(c) *Charging fees.* In responding to FOIA requests, TVA will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, agencies should not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. TVA will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. TVA may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as

follows: for time spent by clerical employees, the charge is \$14.90 per hour. For time spent by supervisory and professional employees, the charge is \$34.30 per hour.

(iii) TVA will charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. TVA must notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by TVA at a Federal records center operated by the National Archives and Records Administration (NARA), TVA will charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* TVA will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. TVA must honor a requester's preference for receiving a record in a particular form or format where TVA can readily reproduce it in the form or format requested. Where photocopies are supplied, TVA will provide one copy per request at the cost of 10 cents per page for sheets no larger than 8 1/2 by 14 inches. For copies of records produced on tapes, disks, or other media, TVA will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, TVA will charge the direct costs.

(3) *Review.* TVA will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, i.e., the review conducted by TVA to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with an agency's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) When TVA determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2)(i) If TVA fails to comply with the FOIA's time limits in responding to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii) through (iv) of this section.

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

(iii) If TVA has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, TVA may

charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. TVA must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and TVA must have discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5. U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, TVA may charge all applicable fees incurred in the processing of the request.

(iv) 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.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, TVA must provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) 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.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When TVA determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, TVA will notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, TVA will advise the requester accordingly. If the request is not for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If TVA notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. TVA is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but TVA estimates that the total fee will exceed that amount, TVA will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. TVA will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or

modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) TVA will make available its FOIA Officer or FOIA Public Liaison to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if TVA chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* TVA 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 TVA. TVA must follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* When TVA 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, TVA may aggregate those requests and charge accordingly. TVA 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, TVA 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 cannot be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, TVA cannot require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(2) When TVA determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. TVA may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 calendar days of the billing date, TVA may require that the requester pay the full amount due, plus any applicable interest on that prior request, and TVA may require that the requester make an advance payment of the full amount of any anticipated fee before TVA begins to process a new request or continues to process a pending request or any pending appeal. Where TVA 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.

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

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

(k) *Requirements for waiver or reduction of fees.* (1) 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.

(2) TVA will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (iii) of this section are satisfied:

(i) 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.

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

(A) 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.

(B) 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. TVA will presume that a representative of the news media will satisfy this consideration.

(iii) 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, TVA will consider the following criteria:

(A) TVA must 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 will be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, TVA 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 (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. TVA ordinarily will presume that when a news media requester has satisfied factors paragraphs (k)(2)(i) and (ii), 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.

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

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to TVA 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 must pay any costs incurred up to the date the fee waiver request was received.

§1301.12 Other rights and services.

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

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