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MILLENNIUM CHALLENGE CORPORATION

22 CFR Part 1304

Freedom of Information Act Regulations

AGENCY: Millennium Challenge Corporation.

ACTION: Final rule.

SUMMARY: This rule amends the Agency's regulations under the Freedom of Information Act (FOIA). The regulation has been revised to update and implement the relevant provisions of the Freedom of Information Act as required under that statute. This document will assist interested parties in obtaining access to Millennium Challenge Corporation public records.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Tamiko N.W. Watkins, Chief FOIA Officer, 202.521.3730.

SUPPLEMENTARY INFORMATION: The Millennium Challenge Act (MCA) of 2003 established a new federal agency called the Millennium Challenge Corporation. Congress enacted the Freedom of Information Act (FOIA) in 1966 and last modified it with the FOIA Improvement Act of 2016. This rule addresses electronically available documents, procedures for making requests, agency handling of requests, records not disclosed, changes in fees, and public reading rooms, as well as, other related provisions.

Discussion of Final Rule and Response to Comments and Other Changes from Proposed

Rule:

MCC reviewed all public comments and made the necessary revisions in order to ensure that this

rule complies with the Freedom of Information Act and FOIA Improvement Act of 2016. These revisions include updating definitions to reflect the definitions identified in the Department of Justice Template for Agency FOIA Regulations.

Lists of Subjects in 22 CFR Part 1304

Freedom of Information Act procedures.

For the reasons set forth in the preamble, the Millennium Challenge Corporation amends chapter XIII of title 22 by revising part 1304 to read as follows:

PART 1304 – PRODUCTION OR DISCLOSURE OF INFORMATION

Subpart A--Procedures for Requests for Disclosure of Records under the Freedom of Information Act

Sec.

- 1304.1 General provisions.
- 1304.2 Definitions.
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- 1304.9 Administrative appeals.
- 1304.10 Preservation of records.
- 1304.11 Fees.
- 1304.12 Other rights and services.

Subpart B—[Reserved]

Authority: 5 U.S.C. 552, as amended.

§1304.1 General provisions.

This part contains the rules that the Millennium Challenge Corporation (“MCC”) follows in processing requests for records under the Freedom of Information Act (“FOIA”) (5 U.S.C.

552). The rules in this part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Fee Guidelines”). In addition, the MCC FOIA webpage contains information about the specific procedures particular to MCC with respect to making FOIA requests. This resource is available at www.mcc.gov/resources/foia.

§ 1304.2 Definitions.

Administrative appeal. An independent review of the initial determination made in response to a FOIA request.

Agency. Any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the Federal Government or any independent regulatory agency.

Business day or work day. A day of the week, excluding Saturday, Sunday, or legal public holidays.

Calendar days. Every day within a month, including Saturday, Sunday, and legal public holidays. Unless identified as a “business day” or “work day,” all timeframes and days noted in this part shall be calculated in calendar days.

Chief FOIA Officer. A designated MCC employee who is a senior official, at the Assistant Secretary or equivalent level who, subject to the authority of the head of the agency, shall have agency wide responsibility for efficient and appropriate compliance with the FOIA. In addition, the Chief FOIA Officer shall monitor implementation of the FOIA throughout MCC and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency’s performance in implementing the FOIA; recommend to the head of the agency such adjustments to MCC’s practices, policies,

personnel, and funding as may be necessary to improve its implementation of the FOIA; facilitate public understanding of the purposes of the statutory exemptions of the FOIA; offer training to MCC staff regarding their responsibilities under the FOIA, serve as the primary agency liaison with the Office of Government Information Services and the Office of Information policy; and designate one (1) or more FOIA Public Liaisons. The Chief FOIA Officer shall review, not less frequently than annually, all aspects of the administration of the FOIA by MCC to ensure compliance with the requirements of the FOIA, including – agency regulations; disclosure of records; assessment of fees and determination of eligibility for fee waivers; timely processing of requests for information; the use of exemptions; and dispute resolution services with the assistance of the Office of Government Information Services or the FOIA Public Liaison.

Commercial requester. Any person making a request for information for a use or purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation.

Complex request. A FOIA request that MCC anticipates will involve a voluminous amount of material to review or will be time-consuming to process.

Confidential commercial information. Records provided to the government that contain material exempt from disclosure under Exemption 4 of the FOIA and disclosure of such records could reasonably be expected to cause substantial competitive harm.

Consultation. When MCC locates a record that contains information of interest to another agency, MCC shall ask the interested agency for their views on disclosing the records before any final determination is made.

Direct costs. Expenditures actually incurred by MCC for searching, duplicating, and in the

case of commercial use requests, reviewing records in order to respond to a FOIA request.

Discretionary disclosure. The release of or portions of records to a FOIA requester that could be withheld by MCC under one or more of the FOIA exemptions.

Duplication. The process of making a copy of a record in order to respond to a FOIA request, including but not limited to paper copies, microfilm, audio-video materials, and computer diskettes or other electronic copies.

Duplication fees. The estimated direct costs of making a copy of a record in order to respond to a FOIA request.

Educational institution. Any school or institution that operates a program of scholarly research. A requester in this category must show that the request is made in connection with his or her role at the educational institution.

Educational requester. 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.

Exemptions. Certain categories of information that are not required to be released in response to a FOIA request because release would be harmful to governmental or private interests.

Fee waiver. The waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied including that the information is in the public interest and is not requested for a commercial interest.

FOIA Appeals Officer. The MCC employee who is responsible for conducting an independent review of the initial determination of the FOIA request after the requester has requested an administrative appeal.

FOIA Public Liaison. The MCC employee who is responsible for assisting in the resolution of disputes in response to FOIA requests.

FOIA Program Officer. The MCC employee who receives and processes requests within the MCC FOIA Office.

Non-commercial scientific institution. An institution that does not operate on a commercial basis, but operates solely for the purpose of conducting scientific research and the results of the scientific research are not intended to promote any particular product or industry.

Record. Any item, collection, or grouping of information maintained by MCC in any form or format, including an electronic copy. A “record” can potentially constitute an entire document, a single page of a multipage document, an individual paragraph of a document, or an email within an email chain.

Referral. When an agency locates a record that originated with, or is of otherwise primary interest to another agency, it will forward that record to the other agency to process the record and to provide the final determination directly to the requester.

Representative of the news media. 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.

Review. The process of examining a record to determine whether all or part of the record may be released or withheld, and includes redacting or otherwise processing the record for disclosure to a requester. The review process does not include time spent resolving legal or policy issues regarding the application of exemptions to a record. The review process also does not include time spent reviewing records at the administrative appeal level unless, MCC determines that the exemption under which it withheld records does not apply and the records are reviewed again to determine whether a different exemption may apply.

Requester category. One of the three categories that agencies place requesters in for the purpose of determining whether a requester will be charged fees for search, review and duplication, including commercial requesters; non-commercial scientific or educational institutions or news media requesters, and all other requesters.

Search. The time spent locating records that may be responsive to a request, manually or by electronic means, including page-by-page or line-by-line identification of responsive material within a record.

Search fees. Estimated direct costs of the time spent locating records by either manual or electronic means.

Submitter. Any person or entity who provides information directly or indirectly to MCC. The term includes, but is not limited to, corporations, state governments, and foreign governments.

§ 1304.3 Proactive disclosure of MCC records.

Records that are required by the FOIA to be made available for public inspection in an electronic format may be accessed through the MCC website. MCC is responsible for determining which of its records are required to be made publicly available, identifying additional records in the interest of the public that are appropriate for public disclosure, and posting such records. MCC shall ensure that its website of posted records is reviewed and updated on an ongoing basis. The FOIA Program Officer may assist individuals in locating records on the MCC website and FOIA reading room.

§ 1304.4 Requirements for making requests.

(a) Requests for access to, or copies of, MCC records other than those identified in § 1304.3, shall be in writing and addressed to the MCC Chief FOIA Officer at 1099 14th St NW, Washington, DC 20005 or FOIA@mcc.gov. All requests for records shall be deemed to have been made pursuant to the FOIA, regardless of whether the request specifically mentions the Freedom of Information Act. To facilitate processing, the requester should place the phrase “FOIA REQUEST” in capital letters on the front of the envelope or subject line of the email.

(b) Each request shall include the following:

(1) A description of the record(s) that provides sufficient detail to enable MCC to locate the record(s) with a reasonable amount of effort; 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 MCC FOIA Program Officer to discuss the records they are seeking and receive assistance in describing the records;

(2) The preferred format of the records;

(3) The requestor’s full name, mailing address or email address, and telephone

number where the requester can be reached during business hours; and

(4) If applicable, the maximum amount the requester is willing to pay or dollar limit on the fees MCC may incur to respond to the request for records. When this information is specified, MCC shall not exceed such limit.

(c) If a request does not meet all of the requirements of paragraph (b) of this section, the FOIA Program Officer may advise the requester that additional information is needed.

Requesters who are attempting to reformulate or modify a request may engage with the MCC Program Officer to clarify their request.

§ 1304.5 Responsibility for acknowledgment and initial determinations.

(a) Upon receipt of a request for records, the FOIA Program Officer will acknowledge receipt of the request in writing within ten (10) business days. In responding to a request for records, MCC shall make reasonable efforts to search for the records in electronic format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(b) The Chief FOIA Officer shall make an initial determination, within twenty (20) business days, to either grant or deny, in whole or in part, a request for records. If the Chief FOIA Officer shall notify the requester making such a request of the following information:

(1) The determination whether grant or deny the request and reasons for the determination;

(2) The right of the requester to seek assistance from the FOIA Public Liaison; and in the case of an adverse determination;

(3) The right of the requester to seek dispute resolution services via the Office of Government Information Services of the National Archives and Records Administration

(OGIS); and

(4) The right to file an administrative appeal to the FOIA Appeals Officer within 90 calendar days after the date of the adverse determination.

§ 1304.6 Timing of responses to requests.

(a) *General information.* The twenty (20) business day period identified in §1304.5(b) shall commence on the date that the request is first received by the MCC FOIA office and an acknowledgment of the request shall be sent no later than ten (10) business days after receipt of the request. The twenty (20) business day period shall not be tolled except that MCC may make one request to the requester for information and toll the twenty (20) business day period while it is awaiting receipt of the information, or the twenty (20) business day period may be tolled if it is necessary to clarify issues regarding fees with the requester.

(b) *Unusual circumstances.* If MCC cannot meet the statutory time limit for processing a request because of “unusual circumstances” as defined in the FOIA and MCC extends the time limit on that basis, MCC will, before expiration of the twenty (20) business day period, notify the requester in writing of the unusual circumstances involved and of the date by which MCC estimates processing of the request will be completed. Where the extension exceeds ten (10) business days, MCC will provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. MCC must make its designated FOIA Program Officer or FOIA Public Liaison available for this purpose. To aid the requester, the MCC FOIA Public Liaison shall assist in the resolution of any disputes between the requester and MCC, and notify the requester of the right to seek dispute resolution services from the Office of Government Information Services.

(c) *Aggregating requests.* MCC may aggregate requests 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. Requests that involve unrelated matters shall not be aggregated.

(d) *Multitrack processing.* MCC may use multitrack processing in responding to requests. This process entails separating simple requests that require rather limited review from more lengthy and complex requests. Requests in each track are then processed in their respective track. The FOIA Program Officer may provide requesters in the slower track an opportunity to limit the scope of their requests in order to decrease the processing time required. The FOIA Program Officer may provide the opportunity to limit the scope of the request by contacting the requester by letter, email, or telephone.

(e) *Expedited processing of requests.* The FOIA Program Officer must determine whether to grant a request for expedited processing within ten (10) calendar days of its receipt. Requests will receive expedited processing if one of the following criteria are met:

(1) The requester can establish that failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(2) The requester is primarily engaged in disseminating information and can demonstrate that an urgency to inform the public concerning actual or alleged Federal Government activity exists; or

(3) As determined by the Chief FOIA Officer.

(f) *Written expedited requests.* A requester who seeks expedited processing must submit a written statement explaining in detail the basis for making the request for expedited processing. This statement must be certified to be true and correct. The MCC Chief FOIA Officer may waive the formal certification requirement.

§ 1304.7 Responses to requests.

(a) *General information.* MCC, to the extent practicable, will communicate with requesters who have access to the internet via email or web portal.

(b) *Acknowledgment of requests.* MCC shall acknowledge the request in writing and assign a tracking number for processing purposes.

(c) *Estimated dates of completion and interim responses.* Upon request, MCC shall provide an estimated response date. If a request involves a voluminous amount of material or searches in multiple locations, MCC shall provide interim responses by releasing the records on a rolling basis.

(d) *Granting requests.* MCC will notify the requestor in writing if it determines that it will grant a request in full or in part. MCC shall inform the requester of any fees charged and shall disclose the requested records to the requester promptly upon payment of any applicable fees.

(e) *Partial grant of requests.* MCC shall consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible. MCC shall take reasonable steps necessary to segregate and release nonexempt information.

(f) *Denial or adverse determination of requests.* Except as otherwise provided in this part, MCC shall withhold information only if –

(1) It reasonably foresees that disclosure would harm an interest protected by an exemption under the FOIA or disclosure is prohibited by law;

(2) The request does not reasonably describe the records sought;

(3) The information sought is not a record subject to the FOIA;

(4) The information sought does not exist, cannot be located, or has been destroyed; or

(5) The records are not in the readily producible form or format sought by the requester.

(g) *Markings on released documents.* Records disclosed in part shall 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.

§ 1304.8 Confidential commercial information.

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

(b) *Required notice.* Written notice shall be provided to a submitter of confidential commercial information whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, it is determined that MCC may be required to disclose the records, provided:

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

(2) MCC has reason to believe that the requested information may be protected from disclosure under Exemption 4 of the FOIA, but has not yet determined whether the information is protected from disclosure under that exemption or any other applicable exemption.

(c) *Information.* The notices shall either describe the commercial information requested or include a copy of the requested records or portions of records containing information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish it.

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

(1) The Chief FOIA Officer determines that the information is exempt under the FOIA;

(2) The information has been lawfully published or has officially been 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 12600 of June 23, 1987; or

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

(e) *Opportunity to object to disclosure.* A submitter may provide the Chief FOIA Officer with a detailed written statement of any objection to disclosure within ten (10) days of notification. The statement shall specify all grounds for withholding any of the information under any exemption of the FOIA, and if Exemption 4 applies, shall demonstrate the reasons the submitter believes the information to be confidential commercial information that is exempt from disclosure. Whenever possible, the submitter's claim of confidentiality shall be supported by a

statement or certification by an officer or authorized representative of the submitter. In the event a submitter fails to respond to the notice in the time specified, the submitter will be considered to have no objection to the disclosure of the information. Information provided by the submitter that is received after the disclosure decision has been made will not be considered. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(f) *Notice of intent to disclose.* The Chief FOIA Officer shall consider a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose the information requested. Whenever the Chief FOIA Officer determines that disclosure is appropriate, the Chief FOIA Officer shall, within a reasonable number of days prior to disclosure, provide the submitter with written notice of the intent to disclose which shall include a statement of the reasons for which the submitter's objections were overruled, a description of the information to be disclosed, and a specific disclosure date. The Chief FOIA Officer shall also notify the requester that the requested records will be made available.

(g) *Notice of lawsuit.* If the requester files a lawsuit seeking to compel disclosure of confidential commercial information, MCC shall promptly notify the submitter of this action. If a submitter files a lawsuit seeking to prevent disclosure of confidential commercial information, MCC shall promptly notify the requester.

§ 1304.9 Administrative appeals.

(a) *Requirements for appealing an adverse determination.* A requester may appeal any adverse determination to MCC. The requester must submit a written notice of appeal and it must be postmarked or, in the case of electronic submissions, transmitted within ninety (90) calendar days after the date of the response. The appeal should clearly identify the determination that is

being appealed and the assigned tracking number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, “Freedom of Information Act Appeal.”

(b) *Appeals address.* Requesters can submit appeals by mail by addressing it to Millennium Challenge Corporation, Attn.: FOIA Appeals Officer, 1099 14th St NW, Washington, DC 20005 or online at FOIA@mcc.gov.

(c) *Adjudication of appeals.* The MCC FOIA Appeals Officer will adjudicate the appeal within twenty (20) business days after the receipt of such appeal. An appeal ordinarily will not be adjudicated if the request becomes a matter of the subject of litigation. On receipt of any appeal involving classified information, the MCC FOIA Appeals Officer must take appropriate action to ensure compliance with applicable classification rules.

(d) *Final agency determinations.* The FOIA Appeals Officer shall issue a final written determination, stating the basis for the decision, within twenty (20) business days after receipt of a notice of appeal. Any decision that upholds MCC’s determination in whole or in part must contain a statement that identifies the reason(s) for the decision, including any FOIA exemptions applied. The decision will 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 OGIS of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the Chief FOIA Officer’s decision is remanded or modified on appeal, the FOIA Appeals Officer will notify the requester of the determination in writing. MCC will then further process the request in accordance with the appeal determination and will respond directly to the requester.

(e) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If MCC agrees to participate in the dispute resolution services provided by

OGIS, MCC will actively engage as a partner to the process in an attempt to resolve the dispute.

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

§ 1304.10 Preservation of records.

MCC shall preserve all correspondence pertaining to the requests that it receives under this part, 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. MCC shall not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 1304.11 Fees.

(a) *General information.* (1) MCC's fee provisions are governed by the FOIA and by the Office of Management and Budget's Uniform FOIA Fee Schedule and Guidelines. For purposes of assessing fees, the FOIA establishes the following categories of requesters:

- (i) Commercial use;
- (ii) Non-commercial scientific or educational institutions;
- (iii) Representative of the news media; and
- (iv) All other requesters.

(2) Fees will be assessed pursuant to the category of requester and detailed in paragraph (b) of this section. Requesters may seek a fee waiver. To resolve any fee issues that arise under this section, MCC may contact a requester for additional information. MCC will ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. MCC ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees to the Treasury of the United States. All fee information is

available at www.mcc.gov/resources/foia.

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

(1) *Search time fees.* 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.

(i) Requests made by education institutions, non-commercial scientific institutions, or representatives of the news media are not subject to search time fees. Search time fees shall be charged for all other requesters, subject to the restrictions identified in this section. MCC may properly charge for time spent searching even if no responsive records are located if it is determined that the records are entirely exempt from disclosure.

(ii) Requesters shall be charged the direct costs associated with conducting any searches that require 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.

(iii) For requests that require the retrieval of records stored by an agency at the Federal Records Centers operated by the National Archives and Records Administration (NARA), additional costs shall be charged in accordance with the Transactional Billing Range Schedule established by NARA.

(2) *Duplication fees.* Duplication fees shall be charged to all requesters, subject to the restrictions in this section. MCC shall honor a requester's preference for receiving a record

in a particular form or format where it is readily reproducible by MCC in the form or format requested. Where photocopies are supplied, MCC shall provide one copy per request and charge fees calculated per page. For copies of records produced on tapes, disks, or other media, MCC shall 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 shall be charged direct costs associated with scanning those materials. For other forms of duplication, MCC shall charge the direct costs.

(3) *Review.* Review fees shall be charged to requesters who make commercial use requests. Review fees shall be assessed in connection with the initial review of the record. No charge will be made for review at the administrative appeal state of exemptions applied at the initial review stage. If a particular exemption is deemed to no longer apply, any costs associated with MCC's subsequent review following the administrative appeal of the records in order to consider the use of other exemptions may be assessed as review fees.

(c) *Restrictions on charging fees.* The following restrictions shall apply to MCC FOIA requests:

(1) If MCC fails to comply with the FOIA's time limits to respond to a request, MCC may not charge fees, except as described in paragraphs (c)(3) through (5) of this section;

(2) If MCC 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 ten (10) calendar days;

(3) If MCC has determined that unusual circumstances as defined by the FOIA apply, and more than five-thousand (5000) pages are necessary to respond to the request, MCC

may charge search time fees or duplication fees where applicable, if MCC has provided timely written notice of the unusual circumstances to the requester in accordance with the FOIA and has discussed with the requester via written mail, email, or telephone (or made a minimum of three (3) good-faith attempts to do so) how the requester could effectively limit the scope of the request;

(4) 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; and

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

(d) *Fee exceptions.* Except for requesters seeking records for commercial use, MCC shall provide without charge:

(1) The first one-hundred (100) pages of duplication (or the cost equivalent for other media); and

(2) The first two (2) hours of search time. When, after deducting the first one-hundred (100) free pages (or its cost equivalent) and the first two (2) hours of search time, a total fee calculated under this section is \$25.00 or less for any request, no fee will be charged.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When MCC determines that the fees to be assessed will exceed \$25.00, the requester shall be notified of the actual or estimated amount of the fees, including the breakdown of the fees for search time, 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, MCC shall advise the requester accordingly. If the requester is a not a commercial use requester, the notice shall specify that the

requester is entitled to the statutory requirements of one-hundred (100) pages of duplication at no charge and, if the requester is charged search time fees, two (2) hours of search time at no charge, and shall advise the requester whether those entitlements have been provided.

(2) In cases in which a requester has been notified that the actual or estimated fees are in excess of \$25.00, the request shall 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 requester who is not a commercial 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. MCC is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, and MCC estimates that the total fee will exceed that amount, MCC shall 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. MCC shall inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The FOIA Program Officer will assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Waiver or reduction of fees.* Documents shall be furnished without charge or at a charge below that listed in this section based upon information provided by a requester or

otherwise made known to the Chief FOIA Officer that disclosure of the requested information is in the public interest. Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations and is not primarily for commercial purposes.

Requests for a waiver or reduction of fees shall be considered on a case by case basis. Where only some of the records to be released satisfy the requirements for waiver of fees, a waiver shall be granted to those records. In order to determine whether the fee waiver requirement is met, the Chief FOIA Officer shall consider the following factors:

(1) The subject of the request. Whether the subject of the requested records concerns the operations or activities of the government;

(2) The informative value of the information to be disclosed; and

(3) The significance of the contribution to public understanding.

(g) *Fees pending a waiver request.* Requests for a waiver or reduction of fees should be made when the request is first submitted to the agency and should address the criteria referenced in this section. 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.

(h) *Types of requesters.* There are four categories of FOIA requesters: commercial use requesters, educational and non-commercial scientific institutional requesters; representatives of the news media; and all other requesters. The following specific levels of fees are prescribed for each of these categories:

(1) Commercial requesters shall be charged the full direct costs of searching for, reviewing, and duplicating requested records;

(2) Educational and non-commercial scientific institution requesters shall be charged for document duplication only and the first one-hundred (100) pages of paper copies shall be provided without charge;

(3) Representative of the news media requesters shall be charged for document duplication costs only, except that the first one-hundred (100) pages of paper copies shall be provided without charge; and

(4) All other requesters who do not fall into any of the categories in paragraphs (h)(1) through (3) of this section shall be charged fees which recover the full reasonable direct costs incurred for searching for and reproducing records if that total costs exceeds \$25.00, except that the first one-hundred (100) pages of duplication and the first two hours of manual search time shall not be charged.

(i) *Charges for unsuccessful searches.* If the requester has been notified of the estimated cost of the search time and has been advised specifically that the requested records may not exist or may be withheld as exempt, fees may be charged.

(j) *Charges for other services.* Although MCC is not required to provide special services, if it chooses to do so as a matter of administrative discretion, the direct costs of providing the service shall 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.

(k) *Charging interest.* MCC may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received. MCC shall follow the provisions of the Debt Collection Act of 1982, as amended, and its administrative

procedures, including the use consumer reporting agencies, collection agencies, and offset.

(l) *Aggregating requests.* The requester or a group of requesters may not submit multiple requests at the same time, each seeking portions of a document or documents solely in order to avoid payment of fees. When the FOIA Program Officer reasonably believes that a requester is attempting to divide a request into a series of requests to evade an assessment of fees, the FOIA Program Officer may aggregate such requests and charge accordingly. MCC may presume that multiple requests of this type made within a thirty (30) calendar day period have been made in order to avoid fees. For requests separated by a longer period, MCC 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.

(m) *Advance payment of fees.* (1) MCC may require an advanced payment of fees if the requestor previously failed to pay fees or if the FOIA Program Officer determines the total fee will exceed \$250.00. When payment is required in advance of the processing of a request, the time limits prescribed in § 1304.5 shall not be deemed to begin until the requester has paid the assessed fees.

(2) In cases in which MCC 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 thirty (30) calendar days after the date of the fee determination, the request will be closed. Where it is anticipated that the cost of providing the requested record will exceed \$25.00 but falls below \$250.00 after the free duplication and search time has been calculated, MCC may, in its discretion may require either an advance deposit of the entire estimated charges or written confirmation of the requester's

willingness to pay such charges.

(3) Where the requester has previously failed to pay a properly charged FOIA fee within thirty (30) calendar days of the billing date, MCC may require the requester to pay the full amount due plus any applicable interest on that prior request, and/or require that the requester make an advance payment of the full amount of the anticipated fee before MCC begins a new request or continues to process a pending request or any pending appeal. If MCC has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, MCC may require that the requester provide proof of identity.

§ 1304.12 Other rights and services.

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

Dated: July 17, 2018.

Tamiko N.W. Watkins,
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