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6353-01-P

## **COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED**

### **41 CFR Parts 51-8**

**RIN 3037-AA10**

#### **Proposed Public Availability of Agency Materials**

**AGENCY:** Committee for Purchase From People Who Are Blind or Severely Disabled.

**ACTION:** Proposed rule with request for comments.

**SUMMARY:** This document amends the Committee for Purchase From People Who Are Blind or Severely Disabled's (Committee) regulations in their entirety under the Freedom of Information Act (FOIA) to incorporate changes made to the FOIA by the FOIA Improvement Act of 2016. In addition, this document amends provisions in the fee section to reflect developments in the case law and to streamline the description of the factors to be considered when making fee waiver determinations.

**DATES:** Comment Date: Comments should be submitted on or before June 10, 2019 to be considered in the formulation of the final rule.

**ADDRESSES:** You may submit your comments, identified by "RIN 3037-AA10" by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Comments received will be posted without change to [www.regulations.gov](http://www.regulations.gov) including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov) approximately two to three days after submission to verify posting (except allow for 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Timi Nickerson Kenealy, 703-603-2121.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Committee's last rule amending its FOIA policies was published in the Federal Register on April 3, 1998, Volume 63, No. 64, pages 16439-16440.

The Freedom of Information Act (FOIA) at 5 U.S.C. 552, requires agencies to “promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests [the FOIA] and establishing procedures and guidelines for determining when such fees should be waived or reduced.” Additionally, an agency may, in its regulation, designate those components that can receive FOIA requests, provide for the aggregation of certain requests, and provide for multitrack processing of requests. Finally, the FOIA requires agencies to “promulgate regulations . . . providing for expedited processing of requests for records.”

On June 30, 2016, the FOIA Improvement Act of 2016 (Act) was signed. The Act requires agencies to notify requesters for engaging in dispute resolution through the FOIA Public Liaison and the Office of Government Information Services. It also requires that agencies

- (i) make records that have been both released previously and requested three or more times available to the public in electronic format,

- (ii) establish a minimum of ninety days for requesters to appeal an adverse determination, and
- (iii) provide, or direct requesters to, dispute resolution services at various times throughout the FOIA process.

The FOIA Improvement Act also adds restrictions to when agencies can charge certain fees if they are not able to meet FOIA's time limits.

This document replaces and renumbers in its entirety the Committee's regulations in 41 CFR part 51-8 to reflect those statutory changes.

## **II. Changes Proposed By the Committee in this Rulemaking**

This rule amends the Committee's regulations under the FOIA consistent with Department of Justice's Guidance for Agency FOIA Regulations issued September 8, 2016, and adopts both the format and suggested language of the accompanying Template for Agency FOIA Regulations.

Revised provisions include the following:

§ 51-8.1 (General) that replaces 51-8.1 Purpose and 8.2 Scope,

§ 51-8.2 (Proactive disclosure of Committee records) (new), replaces 51-8.4 Availability of materials requiring agencies to make records available in electronic format rather than making them available for public inspection and copying,

§ 51-8.3 (Requirements for making requests, replaces old 51-8.5 Requests for records (old 8.3 Definitions is repealed (definitions are incorporated in each section where included)),

§ 51-8.4 (Responsibility for responding to requests), replaces old 51-8.4 Availability of materials (allowing for review of records at the agency's physical location - repealed) and 51-8.9 Records of other agencies now at 51-8.4(c)(2)

§ 51-8.5 (Timing of responses to requests), replaces old 51-8-7 Committee response to requests for records and 51-8.11 Extensions of time,

§ 51-8.6 (Response to requests), replaces old 51-8.6 Aggregating requests and 8.7 Committee response to requests for records,

§ 51-8.7 (Confidential commercial information), replaces old 51-8.8 Business information,

§ 51-8.8 (Administrative appeals) replaces 51-8.10 Appeals,

§ 51-8.9 (Preservation of records), replaces 51-8.16 Preservation of records,

§ 51-8.10 (Fees) replaces 51-8.7(f) notice of fees or to modify request and (g) notice requirements for fees, 8.12 Fee schedule, 8.13 Fees charged by category of requester, 8.14 Fee waivers and reductions, and 8.15 Collection of fees and charges, and

§ 51-8.11 (Other rights and services) (new).

Section 51-8.1 (General) is revised to delete the reference to the Department's policy regarding discretionary release of information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, because that foreseeable harm standard is now part of the FOIA statute itself as a result of the FOIA Improvement Act of 2016.

Section 51-8.2 (Proactive disclosure of Department records) is revised to more clearly reflect the FOIA Improvement Act of 2016's requirement that records the FOIA requires agencies to make available for public inspection must be in an electronic format, rather than simply made available for public inspection and copying.

As explained below, this document amends the provisions in 51-8.12 through 51-8.15 by incorporating all fee-related provisions provisions in § 51-8.10 (Fees) to incorporate the new

statutory restrictions on charging fees in certain circumstances, to reflect developments in the case law, and to streamline the description of the factors to be considered when making fee waiver determinations. Paragraph (b) of § 51-8.10 (Fees) conforms to recent decisions of the D.C. Circuit Court of Appeals addressing two FOIA fee categories: “representative of the news media” and “educational institution.” See *Cause of Action v. FTC*, 799 F.3d 1108 (D.C. Cir. 2015); *Sack v. DOD*, 823 F.3d 687 (D.C. Cir. 2016). The Committee's existing FOIA regulations state that a representative of the news media is “any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.” In *Cause of Action*, 799 F.3d at 1125, the court held that a representative of the news media need not work for an entity that is “organized and operated” to publish or broadcast news. Therefore, the definition of “representative of the news media” is revised to remove the “organized and operated” requirement. The definition of “educational institution” is revised to reflect the holding in *Sack*, 823 F.3d at 688, that students who make FOIA requests in furtherance of their coursework or other school-sponsored activities may qualify under this requester category.

Paragraph (d)(2) of § 51-8.10, which addresses restrictions on charging fees when the FOIA's time limits are not met, is revised to reflect changes made to those restrictions by the FOIA Improvement Act of 2016. Specifically, these changes reflect that agencies may not charge search fees (or duplication fees for representatives of the news media and educational/non-commercial scientific institution requesters) when the agency fails to comply with the FOIA's time limits. The restriction on charging fees is excused and the agency may charge fees as usual when it satisfies one of three exceptions detailed at 5 U.S.C. 552(a)(4)(A)(viii)(II).

Lastly, this rule revises paragraph (k) of § 51-8.10, which addresses the requirements for a waiver or reduction of fees, to specify that requesters may seek a waiver of fees and to streamline

and simplify the description of the factors to be considered by components when making fee waiver determinations. These updates do not substantively change the analysis, but instead present the factors in a way that is clearer to both the Committee and requesters. Rather than six factors, the amended section provides for three overall factors. Specifically, a requester should be granted a fee waiver if the requested information (1) sheds light on the activities and operations of the government; (2) is likely to contribute significantly to public understanding of those operations and activities; and (3) is not primarily in the commercial interest of the requester. This streamlined description facilitates easier understanding and application of the statutory standard.

Section 51-8.1 (General) is revised to delete the reference to the Department's policy regarding discretionary release of information whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, because that foreseeable harm standard is now part of the FOIA statute itself as a result of the FOIA Improvement Act of 2016.

Section 51-8.2 (Proactive disclosure of Department records) is revised to more clearly reflect the FOIA Improvement Act of 2016's requirement that records the FOIA requires agencies to make available for public inspection must be in an electronic format, rather than simply made available for public inspection and copying.

Additional information about the Committee's FOIA program -- including how to submit a FOIA request to the Committee can be found at

[https://www.abilityone.gov/laws,\\_regulations\\_and\\_policy/foia.html](https://www.abilityone.gov/laws,_regulations_and_policy/foia.html).

### **III. Expected Impact of the Proposed Rule**

The Committee actively works to make certain its FOIA system operates as efficiently as possible. The website provides explicit instructions for those who wish to submit a FOIA

request. The Committee's requesters are a diverse community, including lawyers, industry professionals, reporters, and members of the public. Costs for these requestors can include the time required to research the current FOIA rule and the time and preparation required to respond to a request/appeal.

The Agency receives about an average of 15 FOIA requests per year. The majority of the FOIA requests, include request for information on the number of disabled personnel working on individual projects, hourly wages of personnel with disabilities working individual projects. These proposed revisions will make it easier to research and review the Committee's FOIA rule before submitting a request. Many of the measures discussed in Section II of this document should facilitate FOIA requests and production. Although the Committee is unable to quantify these savings, the Committee does believe it is deregulatory in nature in that it provides relief to requestors.

#### **IV. Regulatory Procedures**

*Executive Order 12866 - Regulatory Planning and Review and Executive Order 13563 --  
Improving Regulation and Regulatory Review*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This document is not a significant regulatory action, under EO 12866.

*Executive Order 13771 – Reducing Regulations and Controlling Regulatory Costs*

This proposed rule is expected to be an EO 13771 deregulatory action. Details can be found in Section III -- Expected Impact of the Proposed Rule.

**Regulatory Flexibility Act**

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

**Paperwork Reduction Act**

This rule does not contain an information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments.

**List of Subjects in 41 CFR Part 51-8**

Administrative practice and procedure, Freedom of Information Act, Privacy Act.  
For reasons set forth in the preamble, the Committee proposes to amend 41 CFR Part 51-8 to read as follows:

**PART 51-8 – PUBLIC AVAILABILTY OF AGENCY MATERIALS**

Sec.

- 51-8.1. General.
- 51-8.2. Proactive Disclosures.
- 51-8.3. Requirements for Making Requests.
- 51-8.4. Responsibility for Responding to Requests.
- 51-8.5. Timing of Responses to Requests.
- 51-8.6. Responses to Requests.
- 51-8.7. Confidential Commercial Information.
- 51-8.8. Administrative Appeals.
- 51-8.9. Preservation of Records.
- 51-8.10. Fees.
- 51-8.11. Other Rights and Services.

Authority: 5 U.S.C. 552

## **PART 51-8 – PUBLIC AVAILABILITY OF AGENCY MATERIALS**

### **§51-8.1. General.**

(a) This part contains the rules that the Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) 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 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 under part 51-9 as well as under this part. As a matter of policy, the Committee makes discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(b) The Committee has a centralized system for processing requests, all requests are handled by the FOIA Officer.

### **§51-8.2. Proactive Disclosures.**

Records that the Committee is required to make available for public inspection in an electronic format may be accessed through the Committee’s public website: [www.abilityone.gov](http://www.abilityone.gov). The Committee 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. The Committee shall ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. The Committee's FOIA Public Liaison contact information is available at [http://www.abilityone.gov/laws, regulations and policy/foia.html](http://www.abilityone.gov/laws,_regulations_and_policy/foia.html).

### **§51-8.3. Requirements for Making Requests.**

#### *(a) General Information.*

(1) The Committee has designated a FOIA office to process and respond to all FOIA requests. All Committee departments have the capability to receive requests electronically either through email or a web portal. A request will receive the quickest possible response if it is addressed to the FOIA office. To make a request for records, a requester should write directly to the FOIA office.

(2) A requester may submit a request for records to the Executive Director at the Committee's offices, 1401 S. Clark Street, Suite 715, Arlington, Virginia 22202-3259, or via email to [FOIA@abilityone.gov](mailto:FOIA@abilityone.gov), or via facsimile to (703) 603-0655. The request must be in writing and should indicate that it is being made under the FOIA. Failure to submit a request in accordance with these procedures may delay the processing of the request.

(3) A requester who is making a request for records about himself or herself must comply with the verification of identity provision set forth in part 51-9.

(4) Where a request for records pertains to a third party, 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 has deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Committee can 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 records sought in sufficient detail to enable Committee personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the FOIA office or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request the FOIA office determines that it does not reasonably describe the records sought, the FOIA office shall inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA office or FOIA Public Liaison, each of whom is available to assist the requester in reasonably describing the records sought. If a

request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(c) If the Committee determines that a request does not reasonably describe the records, it shall inform the requester of this fact and extend to the requester an opportunity to clarify the request or to confer promptly with knowledgeable Committee personnel to attempt to identify the records being sought or to reformulate a request. The Committee may offer assistance in identifying records and reformulating a request where: the description is deemed insufficient, the production of voluminous records is required, or a considerable number of work hours would be required to complete the request that would interfere with the business of the Committee.

#### **§51-8.4. Responsibility for Responding to Requests.**

(a) *In general.* Except in the instances described in paragraphs (c) of this section, the Committee is responsible for responding to a record request it received. In determining which records are responsive to a request, the Committee ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the Committee shall 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. The Committee has no obligation to create a record solely for the purpose of making it available under the FOIA.

(b) *Authority to grant or deny requests.* The Executive Director, or designee, is authorized to grant or deny any request for records that are maintained by the Committee.

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

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

(2) *Referral.*

(i) When upon the receipt of the request the Committee determines that a different agency, or other Federal Government office is best able to determine whether to disclose the record, the Committee should refer the responsibility for responding to the request to the other agency, as long as that agency is subject to the FOIA. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. However, if the Committee processing the request and the originating agency jointly agree that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the Committee refers any part of the responsibility for responding to a request to another agency, it shall document the referral, maintain a copy of the record that it refers, and

notify the requester of the referral and inform 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 the Committee 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 publically known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Committee 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 Committee, upon receipt of the request, should coordinate with the originating component or agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the Committee.

(d) *Classified information.* 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 Committee shall 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 a component's record contains information that has been derivatively classified (e.g., when it contains information classified by another agency), the Committee shall 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 the Committee will be handled according to the date that the FOIA request was received by the first agency.

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

#### **§51-8.5. Timing of Responses to Requests.**

(a) *In general.*

(1) The Committee ordinarily will respond to requests according to their order of receipt. The time limits prescribed in the FOIA will begin only after the Committee identifies a request as being made under the FOIA and deemed received by the Committee.

(2) An initial determination whether, and to what extent, to grant each request for records or a fee waiver shall be made within 10 business days after receipt of that request. The requester shall be notified as soon as the determination is made.

(3) When a requester complies with the procedures established in this part for obtaining records under the FOIA, the request shall receive prompt attention, and a response will be made within 20 business days.

(b) *Unusual circumstances.* Whenever the Committee cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the Committee extends the time limit on that basis, the Committee shall, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, the Committee 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. The Committee shall make available its FOIA office and its FOIA Public Liaison for this purpose. The agency must also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services.

(c) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, the Committee 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. The Committee shall not aggregate multiple requests that involve unrelated matters.

(d) *Multitrack processing.* (1) The Committee may use two or more processing tracks by distinguishing between simple, complex, and expedited requests based on the amount of work and/or time needed to process a request or the number of pages involved. Expedited processing shall be in accordance with the standards set forth in paragraph (g) of this section. Among the factors a component may consider are the number of pages involved in processing the request and the need for consultations or referrals. The Committee shall advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track.

(e) *Expedited processing.* (1) Requests and appeals may be taken out of order and given expedited treatment 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; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) through (iv) of this section must be submitted to the Committee’s FOIA office.

(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, the Committee may waive the formal certification requirement.

(4) The Committee shall 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 will be given priority and processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

#### **§51-8.6. Responses to Requests.**

(a) *In general.* The Committee should, to the extent practicable, communicate with requesters having access to the Internet using electronic means, such as email or web portal.

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

(c) *Grants of requests.* When the Committee makes a determination to grant a request in full or in part, it shall notify the requester in writing. The Committee shall inform the requester of any fees charged under subpart 51-8.10 of this part and shall disclose the requested records to the requester promptly upon payment of any applicable fees. The Committee must inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(d) *Adverse determinations of requests.* If the Committee makes an adverse determination denying a request in any respect, the requester will be notified 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.

(e) *Content of denial.* The denial will be signed by the Executive Director or designee and 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 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;

(4) A statement that the denial may be appealed under subpart 51-8.8 of this part, and a description of the appeal requirements set forth therein; and

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

### **§51-8.7. Confidential Commercial Information.**

(a) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the Committee 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, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The Committee will promptly provide written notice to the 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, the Committee determines that it may be required to disclose the records, provided:

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

(ii) The Committee 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 under that exemption or any other applicable exemption.

(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, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish notification.

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

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

(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 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 Committee shall give the submitter written notice of any final decision to disclose the information and shall provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.*

(1) The Committee will specify a reasonable time period within which the submitter must respond to the notice referenced above. If a submitter has any objections to disclosure, it should provide the Committee 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 privileged or confidential.

(2) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received by the Committee after the date of any disclosure decision shall not be considered by the Committee. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Committee 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.*

(1) Whenever the Committee decides to disclose information over the objection of a submitter, the Committee will provide the submitter written notice, which will include:

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

(ii) A description of the information to be disclosed; and

(iii) A specified disclosure date, which must be a reasonable time after the notice, and not less than 10 business days after the date of the notice submission.

(iv) A statement that the submitter must notify the Committee immediately if the submitter intends to seek injunctive relief.

(2) Notwithstanding paragraph (e)(2) of this section, even if the submitter fails to respond to Committee's notice specified in paragraph (c) of this section, whenever the Committee decides to disclose the commercial information, the Committee will provide the submitter written notice of disclosure, as specified in paragraph (g)(1) of this section.

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

(i) *Requester notification.* The Committee 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.

### **§51-8.8. Administrative Appeals.**

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the Committee's Chief FOIA Officer. The contact information for the FOIA Officer is available at the Committee's website, at [http://www.abilityone.gov/laws\\_regulations\\_and\\_policy/foia.html](http://www.abilityone.gov/laws_regulations_and_policy/foia.html). Appeals can be submitted through email or the web portal accessible on the FOIA webpage. Examples of adverse determinations are provided in §51-8.6(d). The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the Committee's determination that is being appealed and the assigned request 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) *Adjudication of appeals.*

(1) The Committee Executive Director or designee will act on behalf of the Committee 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 Committee's Chief FOIA Officer shall take appropriate action to ensure compliance with

(c) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds a Committee determination will contain a statement that identifies the reasons for the affirmance, 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 mediation 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 a Committee's decision is remanded or modified on appeal, the requester will be notified of that

determination in writing. The Committee will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If the Committee agrees to participate in the mediation services provided by the Office of Government Information Services, 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 a Committee's adverse determination, a requester generally must first submit a timely administrative appeal.

#### **§51-8.9. Preservation of Records.**

The Committee will preserve all correspondence pertaining to the requests 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. Records will not be destroyed while they are the subject of a pending request, appeal, or lawsuit under the Act.

#### **§51-8.10. Fees.**

(a) *In general.* The Committee will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, the Committee may contact a requester for additional information. The Committee shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The Committee will ordinarily collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order payable to the United States Department of Treasury.

(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. The Committee'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.

(2) *Direct costs* are those expenses that an agency 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 the requester's role at the educational institution. The Committee may seek assurance from the requester that the request is in furtherance of scholarly research and agencies 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 the student's 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.

(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 shall not be considered to be for a commercial use. "Freelance" journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Committee shall also consider a requester's past publication record in making this determination.

(7) *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 §51-8.7 of this subpart, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *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.

(c) *Charging fees.* In responding to FOIA requests, the Committee 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, the Committee 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. The Committee will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The Committee may properly charge for time spent searching even if responsive records are not located or if the Committee determines that the records are entirely exempt from disclosure.

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

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

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

(2) *Duplication.* Duplication fees shall be charged to all requesters, subject to the restrictions of paragraph (d) of this section. The Committee shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the Committee in the form or format requested. Where photocopies are supplied, agencies will provide one copy per request at the cost of 25¢ per page. For copies of records produced on tapes, disks, or other media, the Committee 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 shall also pay the direct costs associated with scanning those materials. For other forms of duplication, agencies will charge the direct costs.

(3) *Review.* The Committee 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 the Committee 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 the Committee'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) No search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(2)(i) If the Committee fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in 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 the Committee has determined that unusual circumstances, as defined by the FOIA, apply and the Committee 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 the Committee has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Committee 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. The Committee must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the Committee 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, the Committee 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, Committee shall 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 the Committee determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the requesting party will be notified of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless a written statement from the requester has been received indicating a willingness to pay fees as high as those anticipated. If only a portion of the fee can be readily estimated, the Committee shall advise the requester accordingly. If the requester is a noncommercial use requester, the notice shall 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 shall advise the requester whether those entitlements have been provided.

(2) If the Committee 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. The Committee is not required to accept payments in installments.

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

(4) The Committee will make available the FOIA Public Liaison or other personnel 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 the Committee 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.* The Committee may charge interest on any unpaid bill for processing FOIA requests starting on the 31<sup>st</sup> day following the date of billing the requester. Interest rates will be assessed at the rate provided in 31 U.S.C. § 3717 and will accrue from the billing date until payment is received by the Committee.

(h) *Aggregating requests.* When the Committee reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Committee may aggregate those requests and charge accordingly. The Committee 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, the Committee will aggregate them only where there is a reasonable basis for determining that aggregating the requests is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(i) *Advance payments.*

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

(2) When the Committee 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. The Committee 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 within 30 calendar days of the billing date, the Committee may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Committee may require that the requester make an advance payment of the full amount of any anticipated fee before the Committee begins to process a new request or continues to process a pending request or any pending appeal. Where the Committee 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 the Committee requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Committee'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, the Committee shall 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) The Committee 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 (ii) 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 the Committee 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. The Committee ordinarily 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, the Committee will consider the following criteria:

(A) The Committee 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 for profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Committee 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) through (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The Committee ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) through (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

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

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Committee and should address the criteria referenced above. A requester may

submit a fee waiver request at a later time as 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.

**§51-8.11. 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.

Patricia Briscoe,

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(Pricing and Information Management)

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