

representative. To seek permission to transit the area, the Captain of the Port Baltimore and his designated representatives can be contacted at telephone number 410-576-2693 or on Marine Band Radio, VHF-FM channel 16 (156.8 MHz). The Coast Guard vessels enforcing this section can be contacted on Marine Band Radio, VHF-FM channel 16 (156.8 MHz). Upon being hailed by a U.S. Coast Guard vessel, or other Federal, State, or local agency vessel, by siren, radio, flashing lights, or other means, the operator of a vessel shall proceed as directed. If permission is granted, all persons and vessels must comply with the instructions of the Captain of the Port Baltimore or his designated representative and proceed at the minimum speed necessary to maintain a safe course while within the zone.

(4) *Enforcement.* The U.S. Coast Guard may be assisted in the patrol and enforcement of the zone by Federal, State, and local agencies.

(d) *Enforcement periods.* This section will be enforced as follows:

(1) During the air show practice from 8 a.m. until 6 p.m. on September 1, 2011.

(2) Air show practice and modified show from 9 a.m. until 6 p.m. on September 2, 2011.

(3) Twilight performance from 4:30 p.m. until 8:30 p.m. on September 2, 2011.

(4) Air show performances from 8 a.m. until 7 p.m. on September 3, 2011 and from 8 a.m. until 7 p.m. on September 4, 2011.

Dated: August 4, 2011.

**Mark P. O'Malley,**

*Captain, U.S. Coast Guard, Captain of the Port Baltimore.*

[FR Doc. 2011-21185 Filed 8-18-11; 8:45 am]

**BILLING CODE 9110-04-P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Parts 1 and 2

RIN 2009-AN72

#### Release of Information From Department of Veterans Affairs Records

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** This document amends the Department of Veterans Affairs (VA) regulations governing the submission and processing of requests for information under the Freedom of Information Act (FOIA) in order to

implement provisions of the OPEN Government Act of 2007, and to reorganize and clarify existing regulations.

**DATES:** *Effective Date:* This final rule is effective September 19, 2011.

**FOR FURTHER INFORMATION CONTACT:**

Catherine Nachmann, Staff Attorney, Office of General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7684. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On October 14, 2010, VA published a proposed rule in the **Federal Register** (75 FR 63120). We proposed to amend VA's regulations pertaining to release of information under 5 U.S.C. 552 and implementation of the FOIA, which are codified at 38 CFR 1.550 through 1.562. In addition, we proposed to update VA's FOIA regulations to implement FOIA amendments in Open Government Act of 2007, Public Law 110-175. We also proposed to accommodate various means of communication with VA, streamline existing procedures, incorporate changes in the procedural requirements of the FOIA and make VA's procedures easier for the public to understand, and generally reorganize and renumber the applicable provisions. VA provided a 60-day comment period, which ended on December 13, 2010.

We received comments from one commenter, which generally expressed support for the proposed rule. The comments included five recommendations for modification of the proposed-rule provisions. We address each of those recommendations below.

First, the commenter suggested that VA modify proposed § 1.561(h)(2) to direct VA's FOIA professionals to provide requesters with a breakdown of the total fee estimate for their FOIA request. Proposed § 1.561(h)(2) prescribed that under circumstances in which the requester owes a fee, the FOIA Officer will provide the requester with an estimate of the fee. We agree with the commenter that, particularly under certain circumstances, such as where the estimated fee is substantial, a breakdown of the fee would provide more clarification for the requester. We believe that as written, however, § 1.561(h)(2) adequately addresses the needs of the public in receiving an estimate of the fee owed while allowing necessary flexibility. Providing the appropriate detail in a particular estimate will be addressed through training and internal procedural guidance for FOIA Officers. The procedural guidance will be a subject

covered by VA's FOIA Handbook. In our view, the level of detail required for any estimate provided under this final rule will depend upon the complexity of the request. Accordingly, we decline to prescribe a specific standard for the estimates required by § 1.561(h)(2).

Second, while the commenter supported proposed § 1.559(a), which would allow for informal resolution of a request before an appeal in appropriate cases, the commenter recommended that VA add language to this section that also directs requesters to work with VA's FOIA public liaisons to resolve disputes.

We note that VA referred to the availability of FOIA public liaisons in proposed § 1.552(b) in order to advise requesters that public liaisons would be available to assist in the resolution of requests and to refer requesters to VA's FOIA internet home page for additional information. VA intends to provide information regarding public liaisons, as necessary, on its FOIA home page. We also intend to address the role of VA's public liaison personnel in internal guidance. Overall, we are satisfied that the proposal for providing notice regarding public liaisons, without actually requiring requesters to work with liaisons, is consistent with the FOIA, as amended.

Third, proposed § 1.559 addressed appeals of initial agency determinations under the FOIA. The commenter suggested adding language to § 1.559(e) directing VA to work with the Office of Government Information Services (OGIS) to resolve disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. In a related comment, the commenter recommended that the Office of the General Counsel (OGC) provide notice regarding the OGIS mediation program in its final appeal determinations.

The FOIA, as revised, establishes OGIS's authority to provide mediation services. The proposed rule concerned VA's administration of the FOIA. VA proposed to establish binding rules for the public regarding FOIA requests and for VA personnel responsible for processing such requests. Accordingly, the commenter's suggestion in this regard is beyond the scope of this rulemaking.

Regarding the commenter's recommendation that OGC provide notice concerning OGIS mediation, we note that DOJ provided guidance to agencies recommending the inclusion of notice of OGIS mediation services in final agency decisions. VA follows DOJ's guidance and includes OGIS's recommended language in its final agency determinations. Accordingly, we

believe that VA fully addresses OGIS's concerns in this regard.

Finally, the commenter suggested that VA include language in its FOIA regulations directing agency personnel to coordinate collaboratively with OGIS in its review of agencies' policies and procedures, as established in 5 U.S.C. 552(h). However, as described above, the proposed rule concerned VA's administration of the FOIA; it addressed the agency's practices and procedures to implement the FOIA. VA's compliance with OGIS policies and collaboration with OGIS in FOIA matters, therefore, is beyond the scope of this rulemaking.

In summary, we appreciate the commenter's review of VA's proposed rule. VA is committed to providing service to FOIA requesters that is in keeping with current law and policy pertaining to the release of information. We believe that as written, VA's proposed rule reflected this commitment and addressed the commenter's concerns.

We proposed to clarify in § 1.559(b) that appeals regarding FOIA requests for Office of Inspector General (OIG) records should be referred to OIG for review. However, we neglected to propose a corresponding change to VA's delegations of authority in 38 CFR part 2. Accordingly, consistent with § 1.559(b), we are amending 38 CFR 2.6(g) to add a new paragraph (3) regarding OIG's authority to decide appeals involving OIG records. This is not a substantive change. The amendment is for the limited purpose of providing notice that the Secretary of Veterans Affairs has delegated authority to make decisions regarding these appeals to OIG.

In the proposed rule, we included a definition of "sensitive medical or mental health records." We do not use the term, however, in the regulatory text. Accordingly, we determined that the definition was unnecessary and we removed it from the final rule. This is not a substantive change. The revision merely eliminates an unnecessary definition from the final rule.

In addition, as noted above, we amended 38 CFR 2.6(g) to reflect a delegation of authority to OIG to decide appeals involving OIG records; we included 38 U.S.C. 552a as authority for this delegation of authority. Citation to 38 U.S.C. 552a was erroneous; accordingly, we deleted it from the authority section following 38 CFR 2.6(g). This is not a substantive change; it merely eliminates an erroneous citation.

With regard to OIG appeal authority, as indicated above, we proposed in § 1.559(b) that FOIA appeals regarding

requests for OIG records should be referred to OIG for review. By using the phrase "should be referred" however, we may have inadvertently implied that the requester has the option of sending the appeal to OGC or to OIG; we did not intend the language to appear to provide that option. For clarification, therefore, we changed the language in the final rule to "must be sent" to eliminate any potential for confusion or misunderstanding and to clarify VA's intended procedure.

We have also made minor, non-substantive changes to the proposed rule to correct typographical or grammatical errors and to make the language of the text more consistent.

Based on the rationale provided in the preamble to the proposed rule and in this preamble, VA adopts the proposed rule as a final rule with the minor changes noted above.

#### **Unfunded Mandates**

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

#### **Paperwork Reduction Act**

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

#### **Regulatory Flexibility Act**

The Secretary of Veterans Affairs hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This final rule concerns the procedures for requesting information from VA and the payment of certain fees for processing such requests. The fees prescribed by this final rule will generally comprise only an insignificant portion of a small entity's expenditures. Therefore, this final rule is exempt, pursuant to 5 U.S.C. 605(b), from the final regulatory flexibility analysis requirements of section 604.

#### **Executive Order 12866**

Executive Order 12866, Regulatory Planning and Review, directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select

regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

#### **Catalog of Federal Domestic Assistance**

There is no Catalog of Federal Domestic Assistance number for the program affected by this final rule.

#### **Signing Authority**

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on August 1, 2011, for publication.

#### **List of Subjects**

##### *38 CFR Part 1*

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, Wages.

## 38 CFR Part 2

Authority delegations (Government agencies).

Dated: August 11, 2011.

**Robert C. McFetridge,**

*Director, Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.*

For the reasons stated in the preamble, VA amends 38 CFR parts 1 and 2 as follows:

## PART 1—GENERAL PROVISIONS

■ 1. The authority citation for part 1 continues to read as follows:

**Authority:** 38 U.S.C. 501(a), and as noted in specific sections.

■ 2. In Part 1, revise the undesignated center heading immediately preceding § 1.550 to read as follows:

### Procedures for Disclosure of Records Under the Freedom of Information Act

\* \* \* \* \*

■ 2a. In Part 1, following the newly revised undesignated center heading remove the Note and authority citation preceding § 1.550.

■ 3. Revise § 1.550 to read as follows:

#### § 1.550 Purpose.

(a) Sections 1.550 through 1.562 contain the rules followed by VA in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. These regulations should be read together with the FOIA, which provides the underlying legal basis for the regulations and other information regarding requests for records in the custody of a Federal agency. The regulations also should be read together with VA's FOIA Reference Guide, available on VA's FOIA home page (see § 1.552(a) for the pertinent Internet address) and FOIA fee guidance provided by the Office of Management and Budget (OMB), Uniform Freedom of Information Act Fee Schedule and Guidelines, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/omb/infogreg/foia\\_fee\\_schedule\\_1987.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/omb/infogreg/foia_fee_schedule_1987.pdf).

(b) Requests for records about an individual protected by the Privacy Act, 5 U.S.C. 552a, including one's own records and records that pertain to an individual and that may be sensitive, will be processed under the FOIA and the Privacy Act. In addition to the following FOIA regulations, see §§ 1.575 through 1.584 for regulations applicable to Privacy Act records.

(c) Requests for records relating to a claim administered by VA pursuant to

38 U.S.C. 5701 will be processed under the FOIA and 38 U.S.C. 5701. In addition to the following FOIA regulations, see §§ 1.500 through 1.527 for regulations implementing 38 U.S.C. 5701.

(d) Requests for records relating to healthcare quality assurance reviews pursuant to 38 U.S.C. 5705 will be processed under the FOIA and 38 U.S.C. 5705. In addition to the following FOIA regulations, see 38 CFR 17.500 through 17.511 for regulations implementing 38 U.S.C. 5705.

(e) Requests for records relating to treatment for the conditions specified in 38 U.S.C. 7332, such as drug abuse, alcoholism or alcohol abuse, infection with the Human Immunodeficiency Virus (HIV), or sickle cell anemia, will be processed under the FOIA and 38 U.S.C. 7332. In addition to the following FOIA regulations, see §§ 1.460 through 1.499 of this part for regulations implementing 38 U.S.C. 7332.

Authority: Sections 1.550 to 1.562 issued under 72 Stat. 1114; 38 U.S.C. 501, 552, 552a, 5701, 5705, 7332.

■ 4. Add § 1.551 to read as follows:

#### § 1.551 Definitions.

As used in §§ 1.550 through 1.562, the following definitions apply:

**Agency** means any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the Federal government, or independent regulatory entity.

**Appeal** means a requester's written disagreement with an adverse determination under the FOIA.

**Beneficiary** means a veteran or other individual who has received benefits (including medical benefits) or has applied for benefits pursuant to title 38, United States Code.

**Benefits records** means an individual's records, which pertain to programs under any of the benefits laws administered by the Secretary of Veterans Affairs.

**Business day** means the time during which typical Federal government offices are open for normal business. It does not include Saturdays, Sundays, or Federal legal public holidays. The term "day" means business day unless otherwise specified.

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

**Component** means each distinct VA entity, including Administrations, staff offices, services, or facilities.

**Expedited processing** means giving a FOIA request priority for processing ahead of other pending requests because VA has determined that the requester has shown an exceptional need or urgency for the records as provided in these regulations.

**Fees.** For fees and fee-related definitions, see § 1.561.

**FOIA Officer** means the individual within a VA component whose responsibilities include addressing and granting or denying requests for records under the FOIA.

**Perfect request** means a written FOIA request that meets the requirements set forth in § 1.554 of this part and for which there are no remaining issues about the payment of applicable fees or any other matter that requires resolution prior to processing.

**Reading room** means space made available, as needed, in VA components where records are available for review pursuant to 5 U.S.C. 552(a)(2).

Ordinarily, the VA component providing a public reading room space will be the component that maintains the record.

**Record** means a document, a portion of a document, and information contained within a document, and can include information derived from a document or a database. Such documents may be maintained in paper, electronic, and other forms, but do not include objects, such as tissue slides, blood samples, or computer hardware.

**Request** means a written demand for records under the FOIA as described below. The term *request* includes any action emanating from the initial demand for records, including an appeal related to the initial demand.

**Requester** means, generally, any individual, partnership, corporation, association, or foreign or state or local government, which has made a demand to access an agency record.

**Submitter** means any person or entity (including corporations, state, local and tribal governments and foreign governments) from whom VA obtains trade secrets or confidential commercial or financial information either directly or indirectly.

**VA** means the Department of Veterans Affairs.

**VA Central Office (VACO)** means the headquarters of the Department of Veterans Affairs. The mailing address is 810 Vermont Avenue, NW., Washington, DC 20420.

**Written or in writing** means communications such as letters, photocopies of letters, electronic mail, and facsimiles (faxes), and does not include any form of oral communication.

■ 5. Revise §§ 1.552 and 1.553 to read as follows:

**§ 1.552 General provisions.**

(a) *Additional information.* The following Internet link will provide access to VA's information that is electronically available under the FOIA: <http://www.foia.va.gov/>.

(b) *Public Liaisons.* VA has made available FOIA Public Liaisons to assist in the resolution of disputes between the agency and the requester. Contact information for VA's FOIA Public Liaisons can be found on VA's FOIA home page. See § 1.552(a) for the pertinent Internet address.

(c) *FOIA Annual Report.* Under 5 U.S.C. 552(e), VA is required to prepare an annual report regarding its FOIA activities. The report includes information about FOIA requests and appeals. Copies of VA's annual FOIA report may be obtained from VA's Chief FOIA Officer or by visiting VA's FOIA Web site. See § 1.552(a) for the pertinent Internet address.

**§ 1.553 Public reading rooms and discretionary disclosures.**

(a) VA maintains a public reading room electronically at its FOIA home page on the Internet, which contains the records that the FOIA requires to be regularly made available for public inspection and copying. See § 1.552(a) for the pertinent Internet address. Information routinely provided to the public (press releases, for example) may be provided without following these sections. In addition, as a matter of policy, VA may make discretionary releases of records or information exempt from disclosure under the FOIA when permitted to do so in accordance with current law and governmental policy. Each VA component is responsible for determining which of its records are required to be made available and for making its records available electronically.

(b) VA may process, in accordance with the FOIA, records that it makes publicly available. Information in a public reading room record will be redacted, for example, if its release would be a clearly unwarranted invasion of an individual's personal privacy.

(c) Some VA components may also maintain physical public reading rooms. Information regarding these components and their contact information is available on VA's FOIA home page on the Internet. See § 1.552(a) for the pertinent Internet address. If the requester does not have access to the Internet and wishes to obtain information regarding publicly available

information or components that have a physical reading room, he or she may write VA's Chief FOIA Officer at the following address: Department of Veterans Affairs, FOIA Service (005R1C), 810 Vermont Avenue, NW., Washington, DC 20420.

**§ 1.553a [Removed]**

■ 6. Remove § 1.553a.

■ 7. Revise § 1.554 to read as follows:

**§ 1.554 Requirements for making requests.**

(a) *Requests by letter and facsimile (fax).* The FOIA request must be in writing. VA accepts facsimiles (faxes) as written FOIA requests. If the request concerns documents involving a personal privacy interest or documents protected by another confidentiality statute, the request must contain an image of the requester's handwritten signature. To make a request for VA records, write directly to the FOIA Officer for the VA component that maintains the records. If requesting records from a particular medical facility or regional office, for example, the request should be sent to the FOIA Office at the address listed for that component. If requesting records from a component within VA's Central Office, the request should be sent to the Central Office address of the FOIA Office listed for that component. A list of FOIA contacts is available on the Internet. A legible return address must be included with the FOIA request; the requester may wish to include other contact information as well, such as a telephone number and electronic mail (e-mail) address. If the requester is not sure where to send the request, he or she should seek assistance from the FOIA Contact for the office believed to manage the programs whose records are being requested or send the request to the Director, FOIA Service (005R1C), 810 Vermont Avenue, NW., Washington, DC 20420, who will refer it for action to the FOIA contact at the appropriate component. For the quickest possible handling, the request letter and the envelope of any FOIA request should be marked "Freedom of Information Act Request." The requester may find it helpful to refer to VA's FOIA home page on the Internet when making the request; available reference material includes VA's FOIA Reference Guide and the text of the FOIA. See § 1.552(a) for the pertinent Internet address.

(b) *Requests by e-mail.* VA will accept an e-mail request. If the request concerns documents protected by another confidentiality statute, the e-mail transmission must contain an image of the requester's handwritten signature, such as an attachment that

shows the requester's handwritten signature. In order to assure prompt processing, e-mail FOIA requests must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA requests. An e-mail FOIA request that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA request. Mailbox addresses designated to receive e-mail FOIA requests are available on VA's FOIA home page. See § 1.552(a) for the pertinent Internet address.

(c) *Making a request for another individual's records.* If the requester is making a request for records about another individual, it will be helpful under certain circumstances to provide proof that the requester is authorized to obtain the records, such as a legally sufficient prior written authorization for the release of information signed by that individual, proof that the individual is deceased (e.g., a copy of a death certificate), or proof that the requester is the authorized representative of the individual or the individual's estate. This information will assist in determining whether and to what degree the records may be released.

(d) *Description of records sought.*  
 (1) The requester must describe the records sought in enough detail to allow VA personnel to locate them with a reasonable amount of effort. To the extent possible, the requester should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the document. Generally, the more information the requester provides about the record sought, the more likely VA personnel will be able to locate any responsive records. Wide-ranging requests that lack specificity, or contain descriptions of very general subject matters, with no description of specific records, may be considered "not reasonably described" and thus not subject to further processing.

(2) Requests for voluminous amounts of records may be placed in a complex track of a multitask processing system pursuant to § 1.556(b); such requests also may meet the criteria for "unusual circumstances," which are processed in accordance with § 1.556(c) and may require more than twenty (20) business days to process despite the agency's exercise of due diligence.

(3) If the FOIA Officer determines that the request does not reasonably describe the records sought, the FOIA Officer will tell the requester why the request is insufficient. The FOIA Officer will also provide an opportunity to discuss the request by documented telephonic communication or written

correspondence in order to modify it to meet the requirements of this section.

(4) The time limit for VA to process the FOIA request will not start until the FOIA Officer determines that the requester has reasonably described the records sought in the FOIA request. If the FOIA Officer seeks additional clarification regarding the request and does not receive the requester's written response within thirty (30) calendar days of the date of its communication with the requester, he or she will conclude that the requester is no longer interested in pursuing the request and will close VA's files on the request.

(e) *Agreement to pay fees.* The time limit for processing the request will be tolled while any fee issue is unresolved. If the FOIA Officer anticipates that the fees for processing the request will exceed the amount that the requester has stated that he or she is willing to pay or will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify the requester. In such cases, the FOIA Officer may require the requester to agree in writing to pay the estimated fee. In addition, if the estimated fee amount exceeds \$250.00 or the requester previously has failed to pay a FOIA fee in a timely manner, the FOIA Officer may require the requester to pay the FOIA fee in advance, before beginning to process the FOIA request. If the FOIA Officer does not receive a written response within ten (10) business days of the date of the FOIA Officer's communication with the requester, the FOIA Officer will conclude that the requester is no longer interested in pursuing the request and will close the request. If the requester seeks a fee waiver under § 1.561, he or she nonetheless may state a willingness to pay a fee up to an identified amount in the event that the fee waiver is denied; this will allow the component to process the requester's FOIA request while considering the fee waiver request. If the requester is required to pay a fee in advance, and pays the fee, and if VA later determines that the requester overpaid or is entitled to a full or partial fee waiver, a refund will be made. (For more information on the collection of fees under the FOIA, see § 1.561.)

(f) The requester must meet all of the requirements of this section in order for the request to be perfected.

#### § 1.554a [Removed]

■ 8. Remove § 1.554a.

■ 9. Revise §§ 1.555 through 1.557 to read as follows:

#### § 1.555 Responsibility for responding to requests.

(a) *General.* Except as stated in paragraphs (c) and (d) of this section, the FOIA Officer of the component that first receives a request for records is responsible for either processing the request or referring it to the designated FOIA Officer for the appropriate component. Offices that are within the component responsible for processing the FOIA request shall provide the component FOIA Officer all documents responsive to the request that are in their possession as of the date the search for responsive records begins.

(b) *Authority to grant or deny requests.* Each component shall designate a FOIA Officer who is responsible for making determinations pursuant to the FOIA.

(c) *Consultations and referrals.* When a component FOIA Officer determines that the component maintains responsive records that either originated with another component or agency, or which contain information provided by, or of substantial interest to, another component or agency, then the FOIA Officer shall either:

(1) Respond to the request, after consulting with the component or the agency that originated or has a substantial interest in the records involved; or

(2) Refer the responsibility for responding to the request or portion of the request to the component best able to determine whether to disclose the relevant records, or to the agency that created or initially acquired the record as long as that agency is subject to the FOIA. Ordinarily, the component or agency that created or initially acquired the record will be presumed to be best able to make the disclosure assessment. The referring component shall document the referral and maintain a copy of the records that it refers.

(d) *Classified information.* The FOIA Officer will refer requests for records containing classified information to the component or agency that classified the information for processing.

(e) *Notice of referral.* Whenever a FOIA Officer refers all or part of a request and responsibility for processing the request to another component or agency, the FOIA Officer will notify the requester in writing of the referral and provide the requester the name and contact information of the entity to which the request has been referred, after consulting with the entity to which the request is to be referred to ensure that the request is being referred to the correct entity. If only part of the request was referred, the FOIA Officer will inform the requester and identify the

referred part at the time of the referral or in the final response.

#### § 1.556 Timing of responses to requests.

(a) *General.* Components ordinarily shall respond to requests according to their order of receipt and within the time frames established under the FOIA. If a request for expedited processing is granted in accordance with paragraph (d) of this section, such request will be processed prior to requests in either of the tracks described in paragraph (b) of this section.

(b) *Multitrack processing.* (1) VA will use two processing tracks in addressing a request for records: Simple and complex, based upon the amount of work and/or time needed to process the request, including consideration of the number of pages involved.

(2) The FOIA Officer shall advise the requester of the track into which the request has been placed and of the criteria of the faster track. The FOIA Officer will provide requesters in the slower track the opportunity to limit the scope of their requests in order to qualify for processing in the faster track. The FOIA Officer may contact the requester either by telephone or in writing, whichever the FOIA Officer determines is most efficient and expeditious; telephonic communication will be documented.

(c) *Unusual circumstances.* (1) FOIA Officers may encounter "unusual circumstances," where it is not possible to meet the statutory time limits for processing the request. In such cases, the FOIA Officer will extend the twenty (20)-business day time limit for ten (10) more business days and notify the requester in writing of the unusual circumstances and of the date by which it expects to complete processing of the request. Where the extension is for more than ten (10) business days, the FOIA Officer will provide the requester with an opportunity to either modify the request so that it may be processed within the time limits or to arrange an alternative time period with the FOIA Officer for processing the request or a modified request. Unusual circumstances consist of the following:

(i) The need to search for and collect the requested records from field facilities or other components other than the office processing the request;

(ii) The need to search for, collect and examine a voluminous amount of separate and distinct records that are the subject of a single request; or

(iii) The need for consultation with two or more components or another agency having a substantial interest in the subject matter of a request.

(2) Where the FOIA Officer reasonably believes that certain requests from the same requester, or a group of requesters acting in concert, actually constitute the same request that would otherwise satisfy the unusual circumstances specified in this paragraph, and the requests involve clearly related matters, the FOIA Officer may aggregate those requests. Multiple requests involving unrelated matters will not be aggregated.

(d) *Expedited processing.* (1) Requests will be processed out of the order in which they were received by the component responsible for processing the FOIA request and given expedited treatment when VA determines that:

(i) The failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) There is an urgency to inform the public concerning actual or alleged Federal government activity, if the request is made by a person primarily engaged in disseminating information;

(iii) In the discretion of the FOIA Officer, the request warrants such treatment; or

(iv) There is widespread and exceptional interest in which possible questions exist about the government's integrity which affect public confidence.

(2) A requester who is seeking expedited processing must submit a statement, certified to be true to the best of the requester's knowledge and belief, providing a detailed basis for how there is a compelling need. VA may waive the requirement for certification of the statement of compelling need as a matter of administrative discretion.

(3) Within ten (10) calendar days of its receipt of a request for expedited processing, the FOIA Officer shall determine whether to grant the request and will provide the requester written notice of the decision. If the FOIA Officer grants a request for expedited processing, the FOIA Officer shall give the request priority and process it as soon as practicable. If the FOIA Officer denies the request for expedited processing, the requester may appeal the denial, which appeal shall be addressed expeditiously.

#### § 1.557 Responses to requests.

(a) *Acknowledgement of requests.* When a request for records is received by a component designated to receive requests, the component's FOIA Officer will assign a request number for future reference and send the requester a written acknowledgement of receipt.

(b) *Processing of requests.* Upon receipt of a perfected request by the appropriate component, the FOIA

Officer will make a reasonable effort to search for records responsive to the request. The FOIA Officer ordinarily will include as responsive those records in its possession and control as of the date the search for responsive records began. This includes searching for records in electronic form or format, unless to do so would interfere significantly with the agency's automated information systems. If fees for processing the request are due under § 1.561, the FOIA Officer shall inform the requester of the amount of the fee as provided in § 1.554(e) and § 1.561. When a request is granted in part, the FOIA Officer shall mark, redact, or annotate the records to be released to show the amount of information deleted and, where technically feasible, indicate the exemption at the place of redaction unless doing so would harm an interest protected by an applicable exemption. The FOIA Officer will provide the records in the form or format sought by the requester, if readily reproducible in that form or format.

(c) *Time limits for processing requests.* Ordinarily, a component will have twenty (20) business days from the date of VA's receipt of the request to make a determination whether to grant the request in its entirety, grant the request in part, or deny the request in its entirety. If the request must be referred to another component, the response time will begin on the date that the request was received by the appropriate component, but in any event not later than ten (10) business days after the referring office receives the FOIA request.

(d) *Adverse determinations of requests.* Whenever a component makes an adverse determination denying the request in any respect, the component FOIA Officer shall promptly notify the requester of the adverse determination in writing. Adverse determinations include the following: A determination to withhold a requested record in whole or in part; a determination that the requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been sought is not a record subject to the FOIA; a determination on any disputed fee matter, including the denial of a fee waiver; and a denial of a request for expedited treatment. The adverse determination notice must be signed by the component head or the component's FOIA Officer, and will include the following:

(1) The name and title or position of the person responsible for the adverse determination;

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied by the FOIA Officer in denying the request;

(3) The amount of information withheld in number of pages or other reasonable form of estimation; an estimate is not necessary if the volume is indicated on redacted pages disclosed in part or if providing an estimate would harm an interest provided by an applicable exemption; and

(4) Notice that the requester may appeal the adverse determination and a description of the requirements for an appeal under § 1.559 of this part.

■ 10. Add §§ 1.558 through 1.562 to read as follows:

*	*	*	*	*
Sec.				
1.558	Business information.			
1.559	Appeals.			
1.560	Maintenance and preservation of records.			
1.561	Fees.			
1.562	Other rights and services.			
*	*	*	*	*

#### § 1.558 Business information.

(a) *General.* Business information received by VA from a submitter will be considered under the FOIA pursuant to this section and in accordance with the requirements set forth in § 1.557 of this part.

(b) *Designation of business information.* The submitter of business information may designate that specific records or portions of records submitted are business information, at the time of submission or within a reasonable time thereafter. The submitter must use good faith efforts in designating records that the submitter claims could be expected to cause substantial competitive harm and thus warrant protection under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). The submitter may mark the record submission as confidential or use the words "business information" or describe the specific records that contain business information. Such designation will be considered, but will not control, the FOIA Officer's decision on disclosing the material. A designation will remain in effect for a period of not more than 10 years after receipt by VA, unless the submitter provides acceptable justification for a longer period. The submitter may designate a shorter period by including an expiration date.

(c) *Notices to submitters.* (1) The FOIA Officer shall promptly notify the submitter in writing of a FOIA request seeking the submitter's business information whenever the FOIA Officer has reason to believe that the information may be protected under

FOIA Exemption 4, 5 U.S.C. 552(b)(4), regarding business information. The written notice will provide the submitter an opportunity to object to disclosure of any specified portion of the records within the reasonable time period specified in the notice. The notice will either describe in detail the business information requested (*e.g.*, an entire contract identified by a unique number) or shall provide copies of the requested record(s) or record portions containing the business information. When notification of a voluminous number of submitters is required, the FOIA Officer may notify the submitters by posting or publishing the notice in a place reasonably likely to accomplish notification.

(2) If the FOIA Officer determines to release business information over the objection(s) of the submitter, the FOIA Officer will notify the submitter pursuant to paragraph (e) of this section.

(3) Whenever the FOIA Officer notifies the requester of a final decision, the FOIA Officer will also notify the submitter by separate correspondence. This notification may be contained in VA's FOIA decision.

(4) Exceptions to this notice provision are contained in paragraph (f) of this section.

(d) *Opportunity to object to disclosure.* When notification to a submitter is made pursuant to paragraph (c)(1) of this section, the submitter may object to the disclosure of any specified portion(s) of the record(s). The submitter's objection(s) must be in writing, addressed to the FOIA Officer, and must be received by the reasonable date specified in the FOIA Officer's notice in order for VA to consider such objections. If the submitter has any objection to disclosure of the record(s) requested, or any specified portion(s) thereof, the submitter must identify the specific record(s) or portion(s) of records for which objection(s) are made. The objection will specify in detail all grounds for withholding any record(s) or portion(s) of the record(s) upon which disclosure is opposed under any exemption of the FOIA. In particular, if the submitter is asserting that the record is protected under Exemption 4, 5 U.S.C. 552(b)(4), it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. The submitter must explain in detail how and why disclosure of the specified records would likely cause substantial competitive harm in the case of a required submission or state whether the records would customarily be disclosed by the submitter upon a request from the public in the case of a

voluntary submission. The submitter's objections must be contained within a single written response; oral responses or subsequent, multiple responses generally will not be considered. If the submitter does not respond to the notice described in paragraph (c)(1) of this section within the specified time limit, the submitter will be considered to have no objection to disclosure of the information.

(e) *Consideration of objection(s) and notice of intent to disclose.* The FOIA Officer will consider all pertinent factors, including but not limited to the submitter's timely objection(s) to disclosure and the specific grounds provided by the submitter for non-disclosure in deciding whether to disclose business information. Information provided by the submitter after the specified time limit and after the component has made its disclosure decision generally will not be considered. In addition to meeting the requirements of § 1.557, when a FOIA Officer decides to disclose business information over the objection of the submitter, the FOIA Officer will provide the submitter with written notice, which includes:

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

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

(3) A specified disclosure date of not less than ten (10) days from the date of the notice (to allow the submitter time to take necessary legal action).

(f) *Exceptions to notice requirements.* The notice requirements set forth in paragraphs (c) and (g) of this section will not apply if:

(1) The FOIA Officer determines that the information should not be disclosed;

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

(3) Disclosure of the information is required by statute, other than the FOIA, or by a regulation issued in accordance with the requirements of Executive Order 12600 or any other Executive Order.

(g) *Notice to requesters.* When VA receives a request for records that may contain confidential commercial information protected by FOIA Exemption 4, 5 U.S.C. 552(b)(4), regarding business information, the requester will be notified that the request is being processed under the provisions of this regulation and, as a consequence, there may be a delay in receiving a response. The notice to the requester will not include any of the specific information contained in the records being requested.

#### § 1.559 Appeals.

(a) *Informal resolution prior to appeal.* Before filing an appeal, the requester may wish to communicate with the contact person listed in the FOIA response or the component's FOIA Officer to see if the issue can be resolved informally. Informal resolution of the requester's concerns may be appropriate, for example, where additional details may be required for a search for responsive records. Communication with VA at this level does not toll the time limit for filing an administrative appeal.

(b) *How to file and address a written appeal.* The requester may appeal an adverse determination denying the request, in any respect, except for those concerning Office of Inspector General records, to the VA Office of the General Counsel (024), 810 Vermont Avenue, NW., Washington, DC 20420. Any appeals concerning Office of Inspector General records must be sent to the VA Office of Inspector General, Office of Counselor (50), 810 Vermont Avenue, NW., Washington, DC 20420. The FOIA appeal must be in writing. VA accepts facsimiles (faxes) as written FOIA appeals. If the appeal concerns documents protected by another confidentiality statute, the appeal must contain an image of the requester's handwritten signature, such as an attachment that shows the requester's handwritten signature. Information regarding where to fax the FOIA appeal is available on VA's FOIA home page on the Internet. See § 1.552(a) for the pertinent Internet address. A legible return address must be included with the FOIA appeal; the requester may include other contact information as well, such as a telephone number and electronic mail (e-mail) address.

(c) *How to file an e-mail appeal.* VA will accept a FOIA appeal by e-mail. If the appeal concerns documents protected by another confidentiality statute, the email transmission must contain an image of the requester's handwritten signature, such as an attachment that shows the requester's handwritten signature. In order to assure prompt processing, e-mail FOIA appeals must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA appeals; an e-mail FOIA appeal that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA appeal. Mailbox addresses designated to receive e-mail FOIA appeals are available on VA's FOIA home page. See § 1.552(a) for the pertinent Internet address.

(d) *Time limits and content of appeal.* The appeal to the VA OGC (024), or VA

Office of Inspector General (50), as appropriate, must be postmarked no later than sixty (60) calendar days after the date of the adverse determination. The appeal must clearly identify the determination being appealed, including any assigned request number. Other information should also be included, such as the name of the FOIA officer, the address of the component, the date of the component's determination, if any, and the precise subject matter of the appeal. If appealing only a portion of the component's determination, the requester must specify which part of the determination he or she is appealing. Copies of the request and VA's response, if any, should be included with the appeal. An appeal is not perfected until VA either receives the information identified above or the appeal is otherwise sufficiently defined. Appeals should be marked "Freedom of Information Act Appeal." The General Counsel, Deputy General Counsel, or Assistant General Counsel with jurisdiction over information disclosure matters (024) will act on behalf of the Secretary on all appeals under this section, except those pertaining to the Office of Inspector General. The designated official in the Office of Inspector General will act on all appeals pertaining to Office of Inspector General records. A determination by the General Counsel, Deputy General Counsel, or Assistant General Counsel, or designated official within the Office of Inspector General, will be the final VA action.

(e) *Responses to appeals.* The Office of the General Counsel or the Office of Inspector General, as applicable, will provide the requester a decision on the appeal in writing. The decision will include a brief statement of the reasons for the decision, including, if applicable, any FOIA exemptions applied and notice of the right to judicial review of the decision.

(f) *Court review.* Unless the requester has been deemed to have exhausted all administrative remedies, he or she must first appeal the adverse determination in accordance with this section before seeking review by a court.

#### **§ 1.560 Maintenance and preservation of records.**

(a) Each component will preserve all correspondence pertaining to FOIA requests as well as copies of pertinent records, until disposition is authorized under title 44, U.S.C., or the National Archives and Records Administration's General Records Schedule 14.

(b) The FOIA Officer must maintain copies of records that are the subject of a pending request, appeal, or lawsuit

under the FOIA. A copy of all records shall be provided promptly to the Office of the General Counsel upon request.

#### **§ 1.561 Fees.**

(a) *General.* Components will charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (e) of this section or where a waiver or reduction of fees is granted under paragraph (n) of this section. The FOIA Officer will collect all applicable fees before releasing copies of requested records to the requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States. Note that fees associated with requests from VA beneficiaries, applicants for VA benefits, or other individuals, for records retrievable by their names or individual identifiers processed under 38 U.S.C. 5701 (records associated with claims for benefits) and 5 U.S.C. 552a (the Privacy Act), will be assessed fees in accordance with the applicable regulatory fee provisions relating to VA benefits and VA Privacy Act records.

(b) *Definitions.* For purposes of assessing or determining fees, the following definitions apply:

(1) *All other requests* means a request that does not fit into any of the categories in this section.

(2) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, to include furthering those interests through litigation. To the extent possible, the FOIA Officer shall determine the use to which the requester will put the requested records. When the intended use of the records is unclear from the request or when there is reasonable cause to doubt the use to which the requester will put the records sought, the FOIA Officer will provide the requester a reasonable opportunity to submit further clarification.

(3) *Direct costs* mean expenses that VA incurs in responding to a FOIA request, including searching for and duplicating (and in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits costs) and the cost of operating duplication machinery. Direct costs do not include overhead expenses, such as the costs of space or heating and lighting of the facility where the records are kept.

(4) *Duplication* means making a copy of a record necessary to respond to a FOIA request; copies may take the form of paper, microform, audiovisual materials or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

(5) *Educational institution* means a pre-school, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, or an institution of vocational education, which operates a program or programs of scholarly research. To be in this category, the FOIA Officer must make a determination that the request is authorized by and made under the auspices of a qualifying institution and that the records are sought to further a scholarly research goal of the institution and not the individual goal of the requester or a commercial goal of the institution.

(6) *Non-commercial scientific institution* means an institution that is not operated on a "commercial" basis (as that term is defined in paragraph (b)(2) of this section) and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, the requester 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 sought for a commercial use.

(7) *Representative of the news media* means 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 broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of "news") who make their products available for purchase or subscription or free distribution to the general public. These examples are not all-inclusive. As methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media that otherwise meet the criteria for news media shall be considered to be news-media entities.

Freelance journalists may be regarded as working for a news-media entity if they can demonstrate a solid basis for expecting publication through that entity, even though not actually employed by it. A publication contract would be the clearest proof, but the requester's publication history may also be considered. To be in this category, the requester must not be seeking the requested records for a commercial use; a records request supporting the requester's news-dissemination function shall not be considered to be for a commercial use.

(8) *Review* means examining a record including audiovisual, electronic mail, data bases, documents and the like in response to a commercial use request to determine whether any portion of it is exempt from disclosure. Review includes the deletion of exempt material or other processing necessary to prepare the record(s) for disclosure. Review time includes time spent contacting any submitter and considering or responding to any objections to disclosure made by a submitter under § 1.558(d) but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if, after review, a record is not disclosed.

(9) *Search* means the process of looking for and retrieving records that are responsive to a request, including line-by-line or page-by-page identification of responsive information within records. *Search* also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The component will conduct searches in the most efficient and least expensive manner reasonably possible. The FOIA Officer may charge for time spent searching even if he or she does not locate any responsive record(s) or if any record(s) located is withheld as entirely exempt from disclosure.

(c) *Categories of requesters and fees to be charged each category.* 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. Unless a waiver or reduction of fees is granted under paragraph (n) of this section or is limited in accordance with paragraph (e) of this section, specific levels of fees will be charged for each category as follows:

(1) *Commercial use requesters.* Subject to the limitations in paragraph (e) of this section, commercial use requesters will be charged the full direct costs of the search, review, and

duplication of records sought. Commercial use requesters are not entitled to 2 hours of free search time or the first 100 pages of reproduced documents free of charge.

(2) *Educational and non-commercial scientific institution requesters.* Subject to the limitations in paragraph (e) of this section, educational and non-commercial scientific institution requesters will be charged for the cost of reproduction only, excluding charges for the first 100 pages.

(3) *Representative of the news media.* Subject to the limitations in paragraph (e) of this section, representatives of the news media will be charged for the cost of reproduction only, excluding charges for the first 100 pages.

(4) *All other requesters.* Subject to the limitations in paragraph (e) of this section, a requester who does not fit into any of the categories in this section will be charged fees to recover the full, reasonable direct cost of searching for and reproducing records responsive to a request, except that the first 2 hours of search time and the first 100 pages of reproduction will be furnished without cost.

(d) *Fees to be charged.* The following fees will be used when calculating the fee owed pursuant to a request or appeal. The fees also apply to making documents available for public inspection and copying under § 1.553 of this part.

(1) *Search.* (i) *Search fees.* When a FOIA Officer determines that a search fee applies, the fee will be based on the hourly salary of VA personnel performing the search, plus 16 percent of the salary. The type and number of personnel involved in addressing the request or appeal depends on the nature and complexity of the request and responsive records. Fees are charged in quarter hour increments.

(ii) *Computer search.* In cases where a computer search is required, the requester will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (e)(1) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (e)(4) of this section) will be entitled to the cost of 2 hours of employee search time without charge. When a computer search is required, VA will combine the hourly cost of operating the computer with the employee's salary, plus 16 percent of the salary. When the cost of the search (including the employee time, to include the cost of developing a search methodology, and the cost of the computer to process a request) equals the dollar amount of 2 hours of the salary of the employee performing

the search, VA will begin to assess charges for a computer search.

(2) *Duplication.* When a duplication fee applies, the FOIA Officer will charge a fee of 15 cents per one-sided page for a paper photocopy of a record; no more than one copy will be provided. For other forms of duplication, including electronic copies, the FOIA Officer will charge the direct costs of that duplication.

(3) *Review.* When review fees apply, review fees will be charged at the initial level of review only, when the component responsible for processing the request determines whether an exemption applies to a record or portion of a record. For review at the appeal level, no fee will be charged for an exemption that has already been applied and is determined to still apply. However, record or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable. Review fees will be charged at the same rates as those charged for search under paragraph (d)(1) of this section.

(e) *Limitations on charging fees.* (1) No search fee will be charged for requests by educational institutions, non-commercial scientific institutions, or representatives of the news media.

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

(3) No search fee (or duplication fee, when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or a representative of the news media) will be charged in accordance with this section if the agency fails to comply with the time limit under § 1.556(a), and if no unusual or exceptional circumstances apply to the processing of the request pursuant to § 1.556(c). Duplication and search fees may still be charged to commercial use requesters. Duplication fees may still be charged for "all other" requesters.

(4) Except for requesters seeking records for a commercial use, the following will be provided without charge:

(i) The first 100 pages of duplication (or the cost equivalent).

(ii) The first 2 hours of search time (or the cost equivalent).

(5) Whenever a total fee calculated under paragraph (d) of this section is less than \$25.00, no fee will be charged.

(6) VA may provide free copies of records or free services in response to an official request from other government agencies and Congressional offices and when a component head or designee

determines that doing so will assist in providing medical care to a VA patient or will otherwise assist in the performance of VA's mission.

(f) The following table summarizes the chargeable fees for each category of requester.

Category	Search fees	Review fees	Duplication fees
(1) Commercial Use .....	Yes .....	Yes .....	Yes.
(2) Educational Institution .....	No .....	No .....	Yes (100 pages free).
(3) Non-Commercial Scientific Institution .....	No .....	No .....	Yes (100 pages free).
(4) News Media .....	No .....	No .....	Yes (100 pages free).
(5) All other .....	Yes (2 hours free) .....	No .....	Yes (100 pages free).

(g) *Fee schedule.* If it is determined that a fee will be charged for processing the FOIA request, VA will charge the requester to search for, review, and duplicate the requested records according to his or her fee category (see § 1.561(c)) and the following fee schedule. In addition, VA will charge the requester for any special handling or services performed in connection with processing the request and/or appeal. The following fees will be used by VA; these fees apply to services performed in making documents available for public inspection and copying under § 1.553 as well. The duplicating fees

also are applicable to records provided in response to requests made under the Privacy Act. Fees will not be charged under either the FOIA or the Privacy Act where the total amount of fees for processing the request is \$25.00 or less or where the requester has met the requirements for a statutory fee waiver.

(1) Search and review (review applies to commercial-use requesters only). Fees are based on the average hourly salary (base salary plus DC locality payment), plus 16 percent for benefits, of employees in the following three categories. Fees will be increased annually consistent with

Congressionally approved pay increases. Fees are charged in quarter-hour increments.

(i) Clerical—Based on GS-6, Step 5, pay (all employees at GS-7 and below).

(ii) Professional—Based on GS-11, Step 7, pay (all employees at GS-8 through GS-12).

(iii) Managerial—Based on GS-14, Step 2, pay (all employees at GS-13 and above).

**Note to paragraph (g)(1):** Fees for the current fiscal year are posted on VA's FOIA home page (see § 1.552(a) for the pertinent Internet address).

(2) Schedule of fees:

Activity	Fees
(i) Duplication of standard size (8½" x 11"; 8½" x 14"; 11" x 14") paper records.	\$0.15 per page.
(ii) Duplication of non-paper items (e.g., x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings), or other items which do not fall under category (1), in paragraph (c)(1) of this section.	Direct cost to VA.
(iii) Record search by manual (non-automated) methods .....	Basic hourly salary rate of the employee(s), plus 16 percent. *Note—If a component uses a single class of personnel for a search, e.g., all clerical or professional, an average rate for the grades of employees involved in the search may be used.
(iv) Record search using automated methods, such as by computer .....	Direct cost to perform search.
(v) Record review (for Commercial Use Requesters only) .....	Basic hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
(vi) Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the federal government is not a party to, and does not have an interest in, the litigation.	Direct cost to VA.

(h) *Notification of fee estimate or other fee issues.* (1) Threshold for charging fees: VA will not charge the requester if the fee is \$25.00 or less.

(2) When a FOIA Officer determines or estimates that the fees to be charged under this section will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify the requester in writing of the actual or estimated amount of the fees, and ask the requester to provide written assurance of the payment of all fees or fees up to

a designated amount, unless he or she has indicated a willingness to pay fees as high as those anticipated. Any such agreement to pay the fees shall be memorialized in writing. In addition, when the requester does not provide sufficient information upon which VA can identify a fee category (see paragraphs (c)(1) through (4) of this section), or an issue otherwise arises regarding fee assessment, the FOIA Officer may seek clarification from the requester. In either case, the timeline for responding to the request will be tolled

and no further work will be done on it until the fee issue has been resolved. If VA does not receive a written response within ten (10) days after contacting the requester regarding a fee issue, it will assume that the requester no longer wishes to pursue the request and will close the file on the request.

(i) *Charges for other services.* Apart from the other provisions of this section, when special service, such as certifying that records are true copies or sending them by other than ordinary mail, is requested, and the FOIA Officer chooses

to provide such a service as a matter of administrative discretion, the direct costs of providing the service ordinarily will be charged.

(j) *Charging interest.* The FOIA Officer may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue until payment is received by the component. Components will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(k) *Aggregating requests.* Whenever a FOIA Officer reasonably believes that a requester or group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the FOIA Officer may aggregate those requests and charge accordingly. FOIA Officers may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, the FOIA Officer will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(l) *Advance payments.* (1) For requests other than those described in paragraphs (1)(2) and (1)(3) of this section, a FOIA Officer shall not require the requester to make an advance payment—in other words, a payment made before work is begun or continued on a request. Payment owed for work already completed (*i.e.*, a prepayment before copies are sent to the requester) is not an advance payment.

(2) Where a FOIA Officer determines or estimates that a total fee to be charged under this section will be more than \$250.00, the FOIA Officer may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request.

(3) Where the requester previously has failed to pay a properly charged FOIA fee to any component within thirty (30) days of the date of billing, a FOIA Officer may require the requester to pay the full amount due, plus any applicable interest as specified in this section, and to make an advance payment of the full amount of any anticipated fee, before the FOIA Officer begins to process a new request or continues to process a pending request from that requester.

(4) When the requester has a history of prompt payment, the FOIA Officer may accept a satisfactory assurance of full payment from the requester rather than an advance payment.

(5) In cases in which a FOIA Officer requires advance payment or payment is due under this section, the timeline for responding to the request will be tolled and further work will not be done on it until the required payment is received.

(m) *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. Where records responsive to requests are maintained for distribution by agencies operating such statutorily-based fee schedule programs, the FOIA Officer will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(n) *Requirements for waiver or reduction of fees.* (1) Waiving or reducing fees. Fees for processing the request may be waived if the requester meets the criteria listed in this section. The requester must submit adequate justification for a fee waiver; without adequate justification, the request will be denied. The FOIA Officer may, at his or her discretion, communicate with the requester to request additional information, if necessary, regarding the fee waiver request. If such additional information is not received within ten (10) business days, VA will assume that the requester does not agree to pay the required fees and the file will be closed pending receipt of the requester's notice that he or she will pay the required fee. Requests for fee waivers are decided on a case-by-case basis; receipt of a fee waiver in the past does not establish entitlement to a fee waiver each time a request is submitted.

(2) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (d) of this section where a FOIA Officer determines, based on all available evidence, that the requester has demonstrated that:

(i) 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

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(3) To determine whether the fee waiver requirement under paragraph (n)(2)(i) of this section is met, the FOIA

Officer will consider the following factors:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.* The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."* 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. The requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.* The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The FOIA Officer will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is important enough to be made public.

(4) To determine whether the fee waiver requirement under paragraph (n)(2)(ii) of this section is met, the FOIA Officer will consider the following factors:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* The FOIA Officer shall consider any commercial interest of the requester (with reference to the definition of “commercial use” in paragraph (b)(2) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is “primarily in the commercial interest of the requester.”* A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The FOIA Officer ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

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

(6) Requests for the waiver or reduction of fees should address the factors listed in paragraph (n)(3) and (4) of this section, insofar as they apply to each request. FOIA Officers will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in this decision-making process, however, in deciding to grant waivers or reductions of fees.

(7) An appeal from an adverse fee determination will be processed in accordance with § 1.559.

(8) When considering a request for fee waiver, VA may require proof of identity.

#### § 1.562 Other rights and services.

Nothing in this part 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.

**Authority:** Sections 1.550 to 1.562 issued under 72 Stat. 1114; 38 U.S.C. 501.

### PART 2—DELEGATIONS OF AUTHORITY

■ 11. The authority citation for part 2 continues to read as follows:

**Authority:** 5 U.S.C. 302, 552a; 38 U.S.C. 501, 512, 515, 1729, 1729A, 5711; 44 U.S.C. 3702, and as noted in specific sections.

■ 12. Amend § 2.6 by:

■ a. Revising paragraph (e)(10).

■ b. Adding paragraph (g)(3).

■ c. Revising the authority citation at the end of paragraph (g).

The revisions and addition read as follows:

#### § 2.6 Secretary’s delegations of authority to certain officials (38 U.S.C. 512).

\* \* \* \* \*

(e) \* \* \*

(10) Except as prescribed in paragraph (g)(3) of this section, the General Counsel, Deputy General Counsel, and the Assistant General Counsel for Professional Staff Group IV are authorized to make final Departmental decisions on appeals under the Freedom of Information Act, the Privacy Act, and 38 U.S.C. 5701, 5705 and 7332.

(Authority: 38 U.S.C. 512)

\* \* \* \* \*

(g) \* \* \*

(3) The Office of Inspector General is authorized to make final decisions on appeals submitted pursuant to the Freedom of Information Act concerning any Office of Inspector General records.

(Authority: 38 U.S.C. 512)

[FR Doc. 2011-20774 Filed 8-18-11; 8:45 am]

**BILLING CODE P**

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 52

[EPA-R05-OAR-2008-0514; FRL-9451-1]

#### Approval and Promulgation of Air Quality Implementation Plans; Ohio; Control of Emissions of Organic Materials That Are Not Regulated by Volatile Organic Compound Reasonably Available Control Technology Rules

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is approving, as part of Ohio’s State Implementation Plan (SIP) under the Clean Air Act (CAA), a revised rule 3745-21-07, “Control of emissions of organic materials from

stationary sources (*i.e.*, emissions that are not regulated by rule 3745-21-09, 3745-21-12, 3745-21-13, 3745-21-14, 3745-21-15, 3745-21-16, or 3745-21-18 of the Administrative Code).” This rule has been revised because the prior version of 3745-21-07, in Ohio’s SIP, has inadequate compliance test methods and definitions. On February 8, 2008, the previously existing rule 3745-21-07, which was part of Ohio’s SIP, was rescinded by Ohio EPA. The most significant problem with the prior version is the definition of “photochemically reactive material,” which is different than the definition of “volatile organic compounds” (VOC), upon which EPA’s reasonably available control technology (RACT) regulations are based. The revised rule is approvable because it satisfies the applicable requirements for VOC sources under the CAA. EPA proposed this rule for approval on April 13, 2011, and received no comments.

**DATES:** This final rule is effective on September 19, 2011.

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-R05-OAR-2008-0514. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Steven Rosenthal, Environmental Engineer, at (312) 886-6052 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Steven Rosenthal, Environmental Engineer, Air Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-6052.

**SUPPLEMENTARY INFORMATION:** Throughout this document whenever “we,” “us,” or “our” is used, we mean EPA. This supplementary information section is arranged as follows: