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## COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY

### 5 CFR Part 9800

RIN 3219-AA01

### Revision of Freedom of Information Act Regulations

**AGENCY:** Council of the Inspectors General on Integrity and Efficiency.

**ACTION:** Interim final rule.

**SUMMARY:** The Council of the Inspectors General on Integrity and Efficiency (CIGIE) is issuing this interim final rule to amend its regulations under the Freedom of Information Act (FOIA) to incorporate certain changes made to FOIA by the FOIA Improvement Act of 2016. The rule also implements changes in accordance with the Inspector General Empowerment Act of 2016.

**DATES:** This interim final rule is effective October 3, 2018. Written comments may be submitted by November 2, 2018.

**ADDRESSES:** You may submit comments by any of the following methods:

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

- *Email:* [comments@cigie.gov](mailto:comments@cigie.gov).

- *Fax:* (202) 254-0162.

- *Mail:* Atticus J. Reaser, General Counsel, Council of the Inspectors General on Integrity and Efficiency, 1717 H Street NW, Suite 825, Washington, DC 20006.

- *Hand Delivery/Courier:* Council of the Inspectors General on Integrity and Efficiency, 1717 H Street NW, Suite 825, Washington, DC 20006.

**FOR FURTHER INFORMATION CONTACT:** Atticus J. Reaser, General Counsel, CIGIE, (202) 292-2600.

#### SUPPLEMENTARY INFORMATION:

#### Background Information

This rule amends CIGIE's regulations under the Freedom of Information Act

(FOIA) to incorporate certain changes made to FOIA, 5 U.S.C. 552, by the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (June 30, 2016). The FOIA Improvement Act requires all agencies to review and update their FOIA regulations in accordance with its provisions. CIGIE is making changes to its regulations accordingly, including highlighting the electronic availability of records, notifying requesters of their right to seek assistance from the FOIA Public Liaison and the Office of Government Information Services, changing the time limit for appeals, and describing limitations on assessing search fees if the response time is delayed.

Additionally, on December 16, 2016, the Inspector General Empowerment Act of 2016, Public Law 114-317, 130 Stat. 1595 (IGEA) was signed into law by the President thereby amending the Inspector General Act of 1978, as amended, 5 U.S.C. app., (Inspector General Act) and expanding CIGIE's records maintenance responsibilities to include maintenance of the records of CIGIE's Integrity Committee (IC) by CIGIE's Chairperson. IC records were previously maintained pursuant to the Inspector General Act by the Federal Bureau of Investigation (FBI). To conform to the IGEA and meet its obligations thereunder, CIGIE is amending its regulations implementing FOIA to reflect that CIGIE has a centralized FOIA program and requesters should no longer submit FOIA requests for IC-related records to the FBI.

In addition, CIGIE is restructuring its regulations under FOIA to more closely conform to the format recommended by the Department of Justice Office of Information Policy. Accordingly, due to the restructuring and number of changes, CIGIE is reissuing its FOIA regulations in their entirety.

In 2008, Congress established CIGIE as an independent entity within the executive branch to address integrity, economy, and effectiveness issues that transcend individual Government agencies; and increase the professionalism and effectiveness of personnel by developing policies, standards, and approaches to aid in the establishment of a well-trained and highly skilled workforce in the offices of the Inspectors General (OIG). CIGIE's membership is comprised of all

Inspectors General whose offices are established under section 2 or section 8G of the Inspector General Act (*i.e.*, those Inspectors General that are Presidentially-appointed/Senate-confirmed and those that are appointed by agency heads) as well as the Controller of the Office of Federal Financial Management, a designated official of the FBI, the Director of the Office of Government Ethics, the Special Counsel of the Office of Special Counsel, the Deputy Director of the Office of Personnel Management, the Deputy Director for Management of the Office of Management and Budget (OMB), and the Inspectors General for the Intelligence Community, Central Intelligence Agency, Library of Congress, Capitol Police, Government Publishing Office, Government Accountability Office, and Architect of the Capitol. The Deputy Director for Management of OMB serves as the Executive Chairperson of CIGIE.

#### Administrative Procedure Act

Pursuant to 5 U.S.C. 553(d)(3), CIGIE has found that good cause exists for waiving the general notice of proposed rulemaking and public comment procedures as to these amendments and for issuing this interim final rule without a delayed effective date. The notice and comment procedures are being waived because most of the revisions are being made in accordance with the mandates of the FOIA Improvement Act of 2016 and the IGEA and CIGIE is not exercising discretion on substantive matters in issuing these revisions.

#### Executive Orders 12866 and 13563

In promulgating this rule, CIGIE has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. OMB has determined that this rule is not "significant" under Executive Order 12866.

#### Regulatory Flexibility Act

These regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis as provided by the Regulatory Flexibility Act, as amended, is not required.

**Paperwork Reduction Act**

These regulations impose no additional reporting and recordkeeping requirements. Therefore, clearance by OMB is not required.

**Federalism (Executive Order 13132)**

This rule does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

**List of Subjects in 5 CFR Part 9800**

Administrative practice and procedure, Freedom of Information, Privacy.

■ Accordingly, for the reasons set forth in the preamble, 5 CFR part 9800 is revised to read as follows:

**PART 9800—FREEDOM OF INFORMATION ACT REGULATIONS**

Sec.

- 9800.101 General provisions.
- 9800.102 Requirements for making FOIA requests.
- 9800.103 Consultations, referrals, and coordination.
- 9800.104 Timing of responses to requests.
- 9800.105 Responses to requests.
- 9800.106 Confidential commercial information.
- 9800.107 Administrative appeals.
- 9800.108 Preservation of records.
- 9800.109 Fees.
- 9800.110 Public reading room.
- 9800.111 Other rights and services.

**Authority:** Section 11 of the Inspector General Act of 1978, as amended, 5 U.S.C. app.; Section 3 of the Inspector General Empowerment Act of 2016, Pub. L. 114–317, 130 Stat. 1595; 5 U.S.C. 301, 552, 552a; 31 U.S.C. 9701.

**§ 9800.101 General provisions.**

(a) *In general.* This part contains the rules that the Council of the Inspectors General on Integrity and Efficiency (CIGIE) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read in conjunction with the text of 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 9801 as well as under this part.

(b) *Centralized system.* CIGIE has a centralized system for processing FOIA requests, with one office receiving and

coordinating the processing of all FOIA requests made to CIGIE.

(c) *Authority to grant or deny requests.* The Executive Director of CIGIE, or designee, is authorized to grant or deny any requests for records that are maintained by CIGIE. For purposes of any request for records maintained by the CIGIE Integrity Committee (IC) established under section 11(d) of the Inspector General Act of 1978, as amended, 5 U.S.C. app. (Inspector General Act), the designees are the IC Chairperson and IC Vice Chairperson.

**§ 9800.102 Requirements for making FOIA requests.**

(a) *Requests generally.* (1) A request for CIGIE records under FOIA must be made in writing. The request must be sent by:

(i) Regular mail addressed to: FOIA Officer, Council of the Inspectors General on Integrity and Efficiency, 1717 H Street NW, Suite 825, Washington, DC 20006; or

(ii) By fax sent to the FOIA Officer at (202) 254–0162; or

(iii) By email to [FOIASTAFF@cigie.gov](mailto:FOIASTAFF@cigie.gov).

(2) For the quickest handling, both the request letter and envelope or any fax cover sheet or email subject line should be clearly marked “FOIA Request.” Whether sent by mail, fax, email, or other prescribed electronic method, a FOIA request will not be considered to have been received by CIGIE until it reaches the FOIA office.

(3) A requester who is making a request for records about himself or herself, as a parent or guardian of a minor, or as the guardian of someone determined by a court to be incompetent, must comply with the verification of identity provisions set forth in part 9801.

(4) Where a request for records pertains to another individual, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). As an exercise of administrative discretion, CIGIE can require a requester to supply additional information if necessary to verify that a particular individual has consented to disclosure.

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable

CIGIE personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist CIGIE 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 making their requests, requesters may contact CIGIE’s FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request CIGIE determines that it does not reasonably describe the records sought, CIGIE will inform the requester what additional information is needed to perfect the request or why the request is otherwise insufficient. CIGIE will toll the processing of the request when it notifies the requester that additional information is needed or that the request is otherwise insufficient. CIGIE may toll one time for this purpose. Requesters who are attempting to reformulate or modify such a request may discuss their request with CIGIE’s FOIA Public Liaison. If the requester does not provide the additional information within 30 days, the request will be closed.

(c) *Preferred format.* Requests may specify the preferred form or format (including electronic formats) for the records sought. CIGIE will accommodate the request if the record is readily reproducible in that form or format.

(d) *Requester contact information.* Requesters must provide contact information, such as a telephone number, email address, and/or mailing address, to assist CIGIE in communicating with requester and providing released records.

**§ 9800.103 Consultations, referrals, and coordination.**

(a) *In general.* When reviewing records located by CIGIE in response to a request, CIGIE will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under FOIA. As to any such record, CIGIE will proceed in one of the following ways:

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

(2) *Referral.* (i) When CIGIE believes that a different agency of the Federal Government is best able to determine whether to disclose the record, CIGIE typically will refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. However, if CIGIE 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 CIGIE refers any part of the responsibility for responding to a request to another agency, it will 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 CIGIE, in responding to a request for records on a living third party, locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if CIGIE 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, to avoid harm to an interest protected by an applicable exemption, CIGIE will coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination will then usually be conveyed to the requester by CIGIE.

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

(c) *Agreements regarding consultations and referrals.* CIGIE may

establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

(d) *Classified information.* On receipt of any request involving classified information, CIGIE must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable Executive order concerning the classification of records, CIGIE must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever CIGIE's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), CIGIE must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

#### **§ 9800.104 Timing of responses to requests.**

(a) *In general.* Ordinarily, CIGIE will have 20 days (excepting Saturdays, Sundays, and legal public holidays) from when a request is received to determine whether to grant or deny the request and will respond to requests according to their order of receipt in each track as addressed in paragraph (b) of this section. In determining which records are responsive to a request, CIGIE ordinarily will include only records in its possession as of the date on which it begins its search for them. If any other date is used, CIGIE will inform the requester of that date.

(b) *Multitrack processing.* (1) CIGIE processes requests using a multitrack processing system. There are four processing tracks: An expedited track, if the request qualifies; a simple track for relatively simple requests; a complex track for more complex and lengthy requests; and a remanded track, when a FOIA appeal is granted. After CIGIE assigns a request to a track for processing, CIGIE will notify the requester of that assignment.

(2) CIGIE may provide requesters in its complex track with an opportunity to limit the scope of their requests to qualify for faster processing within the specified limits of the simple track.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of "unusual circumstances," as defined in FOIA, and CIGIE extends the time limit

on that basis, CIGIE will, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, CIGIE will, as described by FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing. CIGIE will make available its designated FOIA contact and its FOIA Public Liaison for this purpose. CIGIE will also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services.

(d) *Aggregating requests.* For the purposes of satisfying unusual circumstances under FOIA, CIGIE may aggregate requests in cases where it reasonably appears that multiple requests, made either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. CIGIE will not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) Requests and appeals will be processed on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; 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.

(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, CIGIE may waive the formal certification requirement.

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

#### **§ 9800.105 Responses to requests.**

(a) *In general.* CIGIE will, to the extent practicable, communicate with requesters having access to the internet using electronic means, such as email.

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

(c) *Grants of requests.* Once CIGIE makes a determination to grant a request in full or in part, it will notify the requester in writing. CIGIE also will inform the requester of any fees charged under § 9800.109 and will disclose the requested records to the requester promptly upon payment of any applicable fees. CIGIE will inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(d) *Adverse determinations of requests.* When CIGIE makes an adverse determination denying a request in any respect, it will notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to 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 include:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reasons for the denial, including any FOIA exemption applied by CIGIE in denying the request;
- (3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and
- (4) A statement that the denial may be appealed under § 9800.107 and a description of the requirements set forth therein.

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

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

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

(2) Should CIGIE invoke an exclusion, it will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

#### **§ 9800.106 Confidential commercial information.**

(a) *Definitions*—(1) *Confidential commercial information* means commercial or financial information obtained by CIGIE from a submitter that may be protected from disclosure under Exemption 4 of 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 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 shall 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) CIGIE will promptly provide written notice to a submitter of confidential commercial information whenever records containing such information are requested under FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, CIGIE 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) CIGIE 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 will 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 it.

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

- (1) CIGIE determines that the information is exempt under 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 FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600; or
- (4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous, except that, in such a case, CIGIE will give the submitter written notice of any final decision to disclose the

information and must provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.*

(1) CIGIE 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 CIGIE a detailed written statement that specifies all grounds for withholding the particular information under any exemption of FOIA. 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 CIGIE after the date of any disclosure decision shall not be considered by CIGIE. Any information provided by a submitter under this part may itself be subject to disclosure under FOIA.

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

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

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

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

(3) A specified disclosure date, which will be a reasonable time subsequent to the notice.

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

(i) *Requester notification.* CIGIE will notify a 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.

#### **§ 9800.107 Administrative appeals.**

(a) *Appeals of adverse determinations.* A requester may appeal a determination denying a FOIA request in any respect to the CIGIE Chairperson c/o Office of General Counsel, Council of the Inspectors General on Integrity

and Efficiency, 1717 H Street NW, Suite 825, Washington, DC 20006. The appeal must be in writing, and must be submitted either by:

(1) Regular mail sent to the address listed in this subsection, above; or

(2) By fax sent to the FOIA Officer at (202) 254-0162; or

(3) By email to [FOIAAPPEAL@cigie.gov](mailto:FOIAAPPEAL@cigie.gov).

(b) *Submission and content.* The Office of General Counsel must receive the appeal within 90 calendar days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet or email subject line should be clearly marked "FOIA Appeal." The appeal letter must clearly identify the CIGIE determination (including the assigned FOIA request number, if known) being appealed.

(c) *Adjudication of appeals.* (1) The CIGIE Chairperson or designee will act on all appeals under this section.

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

(3) On receipt of any appeal involving classified information, CIGIE will take appropriate action to ensure compliance with applicable classification rules.

(d) *Decisions on appeals.* Ordinarily, CIGIE will have 20 days (excepting Saturdays, Sundays, and legal public holidays) from receipt of the appeal to issue an appeal decision. 5 U.S.C. 552(a)(6)(A)(ii). CIGIE will provide its decision on an appeal in writing. A decision that upholds CIGIE's determination in whole or in part 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 dispute resolution services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If CIGIE's decision is remanded or modified on appeal, CIGIE will notify the requester of that determination in writing. CIGIE will then further process the request in accordance with that appeal determination and will respond directly to the requester.

(e) *Engaging in dispute resolution services provided by the Office of Government Information Services.* Mediation is a voluntary process. If CIGIE 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.

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

#### **§ 9800.108 Preservation of records.**

CIGIE will preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code and the relevant approved records retention schedule. Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under FOIA.

#### **§ 9800.109 Fees.**

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

(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. CIGIE'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. CIGIE will notify requester if requester is placed in the commercial use category.

(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 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. CIGIE may seek assurance from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this 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. CIGIE will notify requester if requester is placed in the noncommercial scientific institution category.

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

representative of the news media category.

(7) *Review* is the examination of a record located in response to a request 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 § 9800.106, 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, CIGIE 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, CIGIE will 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. Search fees will be charged for all other requesters, subject to the restrictions of paragraph (d) of this section. CIGIE may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

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

(iii) Requesters will 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 will 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 National Archives and Records Administration, additional costs will be charged in accordance with the Transactional Billing Rate Schedule established by National Archives and Records Administration.

(2) *Duplication.* Duplication fees will be charged to all requesters, subject to the restrictions of paragraph (d) of this section. CIGIE will honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by CIGIE in the form or format requested. Where photocopies are supplied, CIGIE will provide one copy per request at a cost of five cents per page. For copies of records produced on tapes, disks, or other media, CIGIE will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication, CIGIE shall charge the direct costs.

(3) *Review.* Review fees shall be charged to requesters who make commercial use requests. Review fees shall be assessed in connection with the initial review of the record, *i.e.*, the review conducted by CIGIE 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 CIGIE's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees shall 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) If CIGIE fails to comply with 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)(i) through (iii) of this section.

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

(ii) If CIGIE has determined that unusual circumstances as defined by FOIA apply, and more than 5,000 pages are necessary to respond to the request, CIGIE 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. CIGIE will have provided timely written notice of unusual circumstances to the requester in accordance with FOIA and CIGIE will have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, CIGIE may charge all applicable fees incurred in the processing of the request.

(iii) If a court has determined that exceptional circumstances exist, as defined by FOIA, a failure to comply with the time limits will 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, CIGIE will 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) When, after first deducting the 100 free pages (or its cost equivalent) and the first two hours of search, a total fee calculated under paragraph (c) of this section is \$25.00 or less for any request, no fee will be charged.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When CIGIE determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, CIGIE will notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review, or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, CIGIE will advise the requester accordingly. If the requester is a noncommercial use requester, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication

at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) In cases in which a requester has been notified that the actual or estimated fees exceed \$25.00, the request shall not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a 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. CIGIE is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but CIGIE estimates that the total fee will exceed that amount, CIGIE shall toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. CIGIE 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) CIGIE will make available their FOIA Public Liaison or other FOIA professional 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 CIGIE chooses to do so as a matter of administrative discretion, the direct costs of providing the service shall be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* CIGIE may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by CIGIE. CIGIE will follow the provisions of the Debt Collection Act of 1982, Public Law 97-365, 96 Stat. 1749, as amended, and its administrative procedures, including

the use of consumer reporting agencies, collection agencies, and offset.

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

(i) *Advance payments.* (1) For requests other than those described in paragraph (i)(2) or (3) of this section, CIGIE will 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 CIGIE 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. CIGIE may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

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

(4) In cases in which CIGIE requires advance payment, the request shall 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 days after the date of CIGIE'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, CIGIE 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) CIGIE will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that 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. In deciding whether this standard is satisfied CIGIE will consider the factors described in paragraphs (k)(2)(i) through (iii) of this section.

(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 would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey

information to the public must be considered. CIGIE 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, CIGIE will consider the following criteria:

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

(B) If there is an identified commercial interest, CIGIE must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. CIGIE ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) and (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 will be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to CIGIE and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester shall be required to pay any costs incurred up to the date the fee waiver request was received.

#### **§ 9800.110 Public reading room.**

CIGIE maintains an electronic public reading room on its website, <http://www.ignet.gov>, which contains the records that FOIA requires be regularly made available for public inspection and copying, as well as additional records of interest to the public. CIGIE 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. CIGIE must ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. CIGIE's FOIA Public Liaison can assist individuals in locating records at CIGIE.

#### **§ 9801.111 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 FOIA.

Dated: September 26, 2018.

**Michael E. Horowitz,**

*Chairperson of the Council of the Inspectors General on Integrity and Efficiency.*

[FR Doc. 2018-21548 Filed 10-2-18; 8:45 am]

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## **DEPARTMENT OF AGRICULTURE**

### **Agricultural Marketing Service**

#### **7 CFR Part 945**

[Doc. No. AMS-SC-17-0077; SC18-945-1 FR]

#### **Irish Potatoes Grown in Certain Designated Counties in Idaho, and Malheur County, Oregon; Modification of Handling Regulations**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements a recommendation from the Idaho-Eastern Oregon Potato Committee (Committee) to revise the varietal classifications that determine the size requirements for Irish potatoes grown in certain designated counties of Idaho, and Malheur County, Oregon. As provided under section 8e of the Agricultural Marketing Agreement Act of 1937, this modification also applies to all imported long type Irish potatoes. This final rule also makes administrative revisions to the subpart headings to bring the language into conformance with the Office of Federal Register requirements.

**DATES:** Effective November 2, 2018.

**FOR FURTHER INFORMATION CONTACT:** Barry Broadbent, Marketing Specialist, or Gary D. Olson, Regional Manager, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326-2724, Fax: (503) 326-7440, or Email: