

coordinates are based on the World Geodetic System (WGS 84).

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Long Island Sound (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative on VHF-FM channel 16 or by telephone at (866) 299-8031. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Effective dates and Enforcement period.* This rule is effective from 6 a.m. on September 25, 2026, through 4 p.m. on September 26, 2026. It will only be subject to enforcement, however, from 6 a.m. until 4 p.m. on September 25, 2026, and again during those same hours on September 26, 2026.

Paul J. Mangini,

Captain, U.S. Coast Guard, Captain of the Port, Sector Long Island Sound.

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ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1120

[Docket No. ATCB-2026-0004]

RIN 3014-AA51

Revision of Freedom of Information Act Regulations

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Final rule.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board or Board) is issuing this final rule to update its regulations under the Freedom of Information Act (FOIA). The Board replaces its existing FOIA regulations with this rule, which streamlines the language of several procedural provisions; updates procedures consistent with current

technology; incorporates changes required by amendments to the FOIA under the OPEN Government Act of 2007 and the FOIA Improvement Act of 2016, and developments in case law; and conforms to Department of Justice guidelines for agency FOIA regulations.

DATES: The rule is effective on September 23, 2026.

FOR FURTHER INFORMATION CONTACT:

Frances Spiegel, Attorney Advisor, (202) 272-0041, foia@access-board.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction and Legal Authority

The final rule will update the Access Board's regulations under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Board replaces its existing FOIA regulations with this rule, which streamlines the language of several procedural provisions; incorporates changes required by amendments to the FOIA under the OPEN Government Act of 2007, Public Law 110-175, 121 Stat. 2524, and the FOIA Improvement Act of 2016, Public Law 114-185, 130 Stat. 538 (enacted June 30, 2016); and conforms to Department of Justice's guidelines for agency FOIA regulations. This final rule follows a notice of proposed rulemaking (NPRM), 91 FR 49377, published on August 4, 2026.

The Board's FOIA regulations, 36 CFR part 1120—Public Availability of Information, were initially published in 1980, and revised in 1987 and 1990. *See* 45 FR 80976 (Dec. 8, 1980); 52 FR 43195 (Nov. 10, 1987); 55 FR 2521 (Jan. 25, 1990). While the Board has always administered its FOIA program consistent with the FOIA legislation and administrative directives, the Board now updates its FOIA regulations to reflect these changes.

The format and content of the Access Board's updated FOIA regulation is consistent with the Department of Justice's guidance for agencies on FOIA regulations. *See* U.S. Dept. of Justice, Guidance for Agency FOIA Regulations (June 26, 2019), available at <https://www.justice.gov/oip/oip-guidance/guidance-agency-foia-regulations>. In addition to achieving consistency with statutory and administrative authorities that dictate the substance of agency FOIA regulations, the content has been updated to reflect changes in the Access Board's FOIA procedures due to advances in technology since the original regulation was published.

II. Comments Received and Changes to the Rule Text

The Access Board received eight comments in response to its NPRM. One was nonresponsive to the specific

proposed rule text, and one took issue with the way the Access Board characterized its reasons for updating the regulation but provided no substantive suggestions. Another seemed to misunderstand the purpose of the rulemaking, expressing concern that the rulemaking would affect how individuals request Access Board services, which it does not. That comment, along with a fourth, expressed a general desire for the Access Board's FOIA program to be accessible to individuals with disabilities, a theme that is discussed below. The fourth comment also expressed general support for the rulemaking and a desire that the final rule result in a regulation that is fair and useable by the public.

The other comments raised substantive concerns, which the Access Board carefully considered. These concerns are described below, along with any resulting changes made to the final regulation.

Timing of Initial Response

One commenter indicated that the regulation lacks a restatement of the statutory timeframe for agencies to provide an initial response to FOIA requests. The Board agrees and has added a sentence in section 1120.5 indicating that the FOIA office will respond to requests within 20 working days unless the other circumstances delineated in that section apply.

Another commenter expressed concern that section 1120.3(b) does not explain how the statutory timeframe for response is affected when the agency must seek clarification from the requester regarding the request. The Board has clarified in section 1120.3(b) that the statutory timeframe will be tolled from when the agency seeks additional information from the requester until the information is provided.

Consequences of Failure To Sufficiently Describe Records Sought

In section 1120.3(b), the proposed rule text indicated that if the request did not reasonably describe the records sought, the agency's response may be delayed. A commenter expressed concern that this language understates the consequences of failing to reasonably describe the records sought. The Access Board agrees. The statutory time period for response will be tolled while the agency seeks clarification, which will delay the agency's response. However, if sufficient information is not provided in response to the agency's inquiries, ultimately the request must be denied. The Board has therefore revised

section 1120.3(b) to clarify that if sufficient information is not provided to reasonably describe the records sought, or otherwise perfect the request, the request will be denied.

Expedited Processing

Two commenters took issue with the Board's proposed language of 1120.5(e)(1) as insufficiently specific. The proposed language stated that expedited processing will be granted upon demonstration of "compelling need," and in "other cases as determined by the agency." The commenters asserted that the "other cases" must be defined in the regulation. Unlike some other agencies, such as the Department of Justice, the Access Board can identify no class of records that it maintains other than those falling under the definition of "compelling need" at 5 U.S.C. 552(a)(6)(E)(i) that would warrant, as a category, expedited processing. In the NPRM preamble, the Board explained that it was leaving open the possibility that a unique situation could present a significant and substantiated level of urgency similar to a compelling need, such that the Board would expedite processing in that instance. However, after further consideration in light of the comment, the Board has removed the reference to "other cases as determined by the agency."

Fees

One commenter did not feel that the Board sufficiently substantiated its proposed fee schedule as reflective of the actual salaries of staff performing search and review for FOIA requests. The proposed fee schedule included search and review at the following rate categories, listed below with hourly rates from the 2026 federal salary scales with Washington D.C. locality pay for informational purposes: clerical personnel charged at a salary rate equivalent to a GS-9/step 5 (\$38.35); professional/managerial personnel charged at a salary rate equivalent to a GS-14/step 5 (\$78.15); senior executive¹ personnel and Board members charged at a salary rate equivalent to an EX-Level IV (\$94.49).

Upon review of the pay grades of the individuals conducting FOIA searches, and in response to the comment received, in the final rule the Access Board has added the category of Information Technology personnel at the GS 13 Step 5 level (\$66.14/hour). The Board had previously planned to

include this type of personnel within the clerical category; however, IT staff have a significant role in many FOIA searches for electronic records and are paid at a salary well above the GS 9 Step 5 level. The Board has also renamed the clerical category as "clerical/administrative" to reflect the variety of positions whose work would be charged at this fee level.

Salary information upon which the fee schedule is based is as follows. FOIA searches at the Access Board are coordinated and conducted primarily by an attorney at the GS 14 Step 9 level (\$87.35/hour). Initial email searches are run by an information technology staff person at the GS 13 Step 3 level (\$62.24/hour), or an IT contractor for which the agency pays, overall, a higher hourly rate. In specific instances, managerial staff, administrative/clerical staff, Board members, and senior executives may also be called upon to assist with a search.

Managerial positions at the Access Board, other than senior executive personnel, are classified at the GS 15 level (\$81.11 minimum per hour). The Access Board has only one clerical position: an executive assistant position previously hired at the GS 9 level but recently reclassified as a GS 11 position with additional duties (\$40.94 minimum per hour). In addition to the executive assistant, other administrative staff at positions classified at the GS 11 level or above may be called on to provide clerical support for FOIA search or review.

Board members are paid at the Executive Level IV salary (\$94.49 per hour), and both the General Counsel and the Executive Director earn salaries exceeding that level. Review is typically performed exclusively by attorneys at the GS 14 Step 9 level, and the General Counsel who is classified at the senior professional level; however, there may be instances where clerical support will be required from the agency's administrative staff.

The Board has set all the fee categories at the Step 5 level to account for variation in the specific step of the individual holding the position at any given time, and the variation of employees across categories, while providing clarity to requesters on the fees to be charged.

The fee schedule in section 1120.10 does not overestimate the direct costs incurred by the agency in responding to requests, and in many cases, significantly underestimates them. The Board does not find that these fees will exceed the actual cost to the agency of performing the work required to respond to FOIA requests.

One commenter objected to the Board's shift from an hourly fee published in the regulation to a fee schedule tied to the federal salary scales. That commenter proposed that the Access Board include the hourly rate in its FOIA regulation and then update the regulation annually as salaries change. The Board respectfully declines this suggestion. Federal salary scales are publicly available and easily searchable on the Office of Personnel Management website.

In the final rule, the Board clarifies in section 1120.10(c)(1)(ii) that the salaries listed in the fee schedule will be calculated with Washington, D.C. locality pay, which reflects actual costs to the agency. The Board has also revised section 1120.10(a) to clarify that the FOIA office may provide an electronic means to pay FOIA fees.

Submitter Objections

Two commenters expressed concern that under section 1120.7, the Board would defer to the opinions of submitters of confidential commercial information. The Board does not find that the language of 1120.7 would lead the agency to this result and thus declines to revise this section. The Board highlights that section 1120.7 provides the submitter with notice and an opportunity to be heard with respect to whether information provided by the submitter is lawfully withheld under FOIA Exemption 4. Ultimately, as stated in section 1120.7(f), the agency is only required to "consider" the submitter's objections; it need not defer to a submitter's preference if the Board does not concur that Exemption 4 is applicable. Further, section 1120.7(g) provides a notification process when the Board decides to disclose information "over the objection of a submitter." The language of the section clearly indicates that the Board will make an independent determination as to whether information should be withheld under FOIA Exemption 4 upon consideration of all relevant information, including any information provided by the submitter.

Content of Denial

Where the FOIA officer has made an adverse determination, section 1120.6(e)(2) requires the agency to provide in a denial letter a brief statement of the reasons for the denial, including any FOIA exemption applied by the agency in denying the request. One commenter requested that section 1120.6(e)(2) explicitly require the agency to specify in a denial letter an explanation of the "foreseeable harm" the agency expects from each disclosure

¹ "Senior executive" as used in this rule refer to Senior Executive Service positions, and senior professional positions, such as SL (senior level) or ST (scientific and technical).

of information withheld under a discretionary exemption. The Board declines to make this change. The Access Board makes withholding decisions consistent with the requirements of the FOIA statute, including the requirement that an agency withhold information only where the agency reasonably foresees that disclosure would harm an interest protected by an exemption or the disclosure is prohibited by law. 5 U.S.C. 552(a)(8)(A). The FOIA statute does not require an agency in an initial denial letter to provide a detailed analysis for each piece of information withheld. The statute provides for an appeal process should a requester wish to challenge the agency's decision with respect to a specific withholding.

Accessibility of Records

Three commenters remarked on the accessibility of requested records, with one commenter specifically requesting that the regulation contain a provision under section 1120.6(f) requiring that markings identifying withheld material not be conveyed solely through visual formatting, and another commenter generally requesting that responsive records be furnished in an accessible format without a requester needing to describe or document a disability. The Access Board appreciates these comments, as accessibility for people with disabilities is central to its mission.

With respect to these comments, the Board notes that letters from the agency describing a determination under FOIA are agency official communications that must be accessible pursuant to regulations issued under section 508 of the Rehabilitation Act, 36 CFR 1194, Appendix A, E205.3(B), and requested records are required to be made accessible under section 504 of the Rehabilitation Act to individuals upon request and based on their specific disability. As accessibility of FOIA determinations and requested records already falls under regulations issued under the Rehabilitation Act, the Access Board declines to require specific accessibility in its regulation issued under the FOIA, noting that the FOIA statute is silent as to accessibility requirements. *See generally* 5 U.S.C. 552. Access Board staff are always available to work with requesters on accessibility needs.

III. Regulatory Process Matters

Regulatory Review (E.O. 12866): The Office of Management and Budget has determined that this rule is not a "significant regulatory action" under Executive Order 12866, § 3(f), Regulatory Planning and Review, and

accordingly this rule has not been reviewed by that Office.

Regulatory Flexibility Act: In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Access Board certifies that this regulation will not have a significant economic impact on a substantial number of small entities. This rule will affect those who make requests for access to information under the provisions of the FOIA. Under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters, and only for certain classes of requester and when particular conditions are satisfied. In satisfying these conditions, the Access Board typically does not charge fees for processing FOIA requests. While the Access Board has not updated its FOIA regulation since 1990, it has nevertheless been following the current statutory requirements of the FOIA and related administrative directives as reflected in DOJ's FOIA regulations template. Thus, other than revising the fee schedule, this rulemaking simply serves to codify existing practice, which is already required by law and administrative authorities.

Unfunded Mandates Reform Act of 1995: This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act: This regulation contains no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act. *See* 44 U.S.C. 3501, *et seq.*

List of Subjects in 36 CFR Part 1120

Administrative practice and procedure; Freedom of Information Act; Privacy.

Approved by vote of the Access Board.
Christopher Kuczynski,
General Counsel.

■ For the reasons stated in the preamble, the Access Board amends title 36, chapter XI, of the Code of Federal Regulations by revising and republishing part 1120 to read as follows:

PART 1120—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Sec.

- 1120.1 General provisions.
- 1120.2 Proactive disclosure of agency records.
- 1120.3 Requirements for making requests.
- 1120.4 Responsibility for responding to requests.
- 1120.5 Timing of responses to requests.
- 1120.6 Responses to requests.
- 1120.7 Confidential commercial information.
- 1120.8 Administrative appeals.
- 1120.9 Preservation of records.
- 1120.10 Fees.
- 1120.11 Other rights and services.

Authority: 5 U.S.C. 552, the Freedom of Information Act, as amended.

§ 1120.1 General provisions.

This part contains the rules that the Architectural and Transportation Barriers Compliance Board ("U.S. Access Board," "Access Board," or "agency") follows in processing requests for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. The rules in this part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Act 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 36 CFR 1121 as well as under this part.

§ 1120.2 Proactive disclosure of agency records.

Records that are required by the FOIA to be made available for public inspection in an electronic format may be accessed through the Access Board's website at www.access-board.gov.

§ 1120.3 Requirements for making requests.

(a) *General information*. (1) Requests for records must be submitted in writing. The Access Board has a central FOIA office that processes all records requests for the agency. To make a request for Access Board records, a requester should send an email to foia@access-board.gov or submit a request to the Access Board through the FOIA.gov portal (www.foia.gov). Alternatively, requesters may send requests to FOIA Officer, U.S. Access Board, 1331 F Street NW, Suite 1000, Washington, DC 20004.

(2) The agency's FOIA Officer and FOIA Public Liaison are available to assist requesters. Contact information for these individuals is available on the agency's website at www.access-board.gov.

(3) A requester who is making a request for records about himself or herself must comply with verification of

identity procedures specified by the FOIA officer.

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

(b) *Description of records sought.* Requesters must describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist the agency in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the agency's FOIA officer or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request the agency determines that it does not reasonably describe the records sought, the agency shall inform the requester what additional information is needed or why the request is otherwise deficient. The timeframe for response described in 1120.5(a) will be tolled upon notification to the requester that additional information is needed to process the request until sufficient information is received by the agency such that the request can be processed. If sufficient information is not subsequently provided by the requester to reasonably describe the records sought or otherwise perfect the request, the request will be denied.

§ 1120.4 Responsibility for responding to requests.

(a) *In general.* Except in the instances described in paragraph (c) of this section, the agency's FOIA office is responsible for responding to the request. Only the agency's Chief FOIA Officer or designee is authorized to

grant or to deny any requests for agency records.

(b) *Re-routing of misdirected requests.* Where a request for records is received by agency personnel other than FOIA office personnel, the receiving personnel shall route the request to the FOIA office for processing.

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

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

(2) *Referral.* (i) When FOIA office personnel conclude that a different agency or other Federal Government office is best able to determine whether to disclose the record, the Access Board will typically refer the responsibility for responding to the request regarding that record, as long as the referral is to an agency or office that is subject to the FOIA. Ordinarily, the agency or office that originated the record will be presumed to be best able to make the disclosure determination. However, if the Access Board and the originating agency or office jointly agree that the Access Board is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the Access Board refers any part of the responsibility for responding to a request to another agency or office, it shall document the referral, maintain a copy of the record that it refers, and notify the requester of the referral and inform the requester of the name of the agency or office to which the record was referred.

(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. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the agency should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the

coordination should then be conveyed to the requester by the Access Board.

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

§ 1120.5 Timing of responses to requests.

(a) *In general.* The FOIA office will provide an initial response to the requester within 20 working days of receipt of the request, except as otherwise provided in this section. The FOIA office will typically respond to requests according to their order of receipt. In instances involving misdirected requests that are re-routed pursuant to § 1120.4(b), the response time will commence on the date that the request is received by the FOIA office, but in any event not later than 10 working days after the request is first received by an agency employee.

(b) *Multitrack processing.* The FOIA office may designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors the FOIA office may consider are the number of pages involved in processing the request and the need for consultations or referrals. If multitrack processing has been established for the fiscal year at the time a request is filed, the FOIA officer shall advise the requester of the track into which the request falls and, when appropriate, shall offer the requester an opportunity to narrow the request so that it can be placed in a different processing track. Requests that are granted expedited processing in accordance with the standards set forth in paragraph (e) of this section shall be placed in a separate track for expedited processing regardless of whether multitrack processing has otherwise been established.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of "unusual circumstances," as defined in the FOIA, and the agency extends the time limit on that basis, the agency shall notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, the agency shall, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing. The agency shall make available its FOIA officer and its FOIA Public

Liaison for this purpose. The agency will notify the requester of 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 the FOIA, the agency may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The agency shall not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) The Access Board will process requests and appeals on an expedited basis when the requester demonstrates a compelling need. A compelling need exists when:

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

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

(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, the agency may waive the formal certification requirement.

(4) The agency shall notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited

requests, and shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

§ 1120.6 Responses to requests.

(a) *In general.* The agency will communicate with requesters primarily via electronic mail and telephone, unless a physical mailing address is the only contact information provided.

(b) *Tracking numbers.* The FOIA office shall assign a request an individualized tracking number if it will take longer than 10 working days to process.

(c) *Grants of requests.* Once the agency makes a determination to grant a request in full or in part, it shall notify the requester in writing. The agency also shall inform the requester of any fees charged under § 1120.10 and shall disclose the requested records to the requester promptly upon payment of any applicable fees. The agency shall inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(d) *Adverse determinations of requests.* The agency shall notify the requester of an adverse determination denying a request in any respect in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(e) *Content of denial.* The denial shall be signed by the agency's Chief FOIA Officer, or designee, and shall include:

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

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

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

(4) A statement that the denial may be appealed under § 1120.8(a), and a description of the requirements set forth therein; and

(5) A statement notifying the requester of the assistance available from the Agency's 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 shall 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 shall also be indicated on the record, if technically feasible.

§ 1120.7 Confidential commercial information.

(a) *Definitions.* (1) *Confidential commercial information* means commercial or financial information obtained by the agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides 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) The agency shall promptly provide written notice to a submitter of confidential commercial information whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, the agency determines that it may be required to disclose the records, provided:

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

(ii) The agency 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 shall 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 shall not apply if:

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

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

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

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

(e) *Opportunity to object to disclosure.*

(1) The agency will specify a reasonable time period within which the submitter must respond to the notice referenced above. If a submitter has any objections to disclosure, it should provide the agency a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential.

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

(f) *Analysis of objections.* The agency 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 the agency decides to disclose information over the objection of a submitter, the agency will provide the submitter written notice, including:

(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 shall 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, the agency will promptly notify the submitter.

(i) *Requester notification.* The agency 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.

§ 1120.8 Administrative appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations. Appeals can be submitted by email to FOIA@access-board.gov or by regular mail to: Chief FOIA Officer, Office of General Counsel, U.S. Access Board, 1331 F. Street NW, Suite 1000, Washington, D.C. 20004. Examples of adverse determinations are provided in § 1120.6(d). The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the agency's determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The agency's Chief FOIA Officer or designee will adjudicate appeals.

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

(c) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds the initial determination will contain a statement that identifies the reasons for the affirmance, including any FOIA

exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the initial decision is modified on appeal, the requester will be notified of that determination in writing. The FOIA office will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If the agency agrees to participate in the mediation services provided by the Office of Government Information Services, it will actively engage as a partner to the process in an attempt to resolve the dispute.

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

§ 1120.9 Preservation of records.

The agency shall preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 14 of the National Archives and Records Administration. Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 1120.10 Fees.

(a) *In general.* The Access Board shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, the FOIA office may contact a requester for additional information. The agency shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The Access Board 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, or by a method of electronic payment specified by the FOIA office.

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

(1) *Commercial use request* is a request that asks for information for a

use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The agency's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

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

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

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester's role at the educational institution. The Access Board 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.

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

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

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

(5) *Noncommercial scientific institution* is an institution that is not operated on a "commercial" basis, as defined in paragraph (b)(1) of this section and that is operated solely for

the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

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

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 1120.7, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts

expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the Access Board will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. The fee amounts provided below include the direct costs associated with a given fee type.

(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 shall be charged for all other requesters, subject to the restrictions of paragraph (d) of this section. The agency 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) Search fees, including for electronic searches that do not require new programming, will be calculated based on the Washington, DC. Locality Pay Area hourly rates (basic pay plus 16% for benefits) of the personnel conducting the search, rounded down to the nearest full hour, as follows:

(A) Searches by clerical/administrative personnel will be charged at a salary rate equivalent to a GS-9/step 5;

(B) Searches by information technology personnel will be charged at a salary rate equivalent to a GS-13/step 5;

(C) Searches by professional/managerial personnel will be charged at a salary rate equivalent to a GS-14/step 5; and

(D) Searches by senior executive personnel and Board members will be charged at a salary rate equivalent to an EX-Level IV.

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

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

(2) *Duplication.* Duplication fees shall be charged to all requesters, subject to the restrictions of paragraph (d) of this section. The agency will honor a requester's preference for receiving a

record in a particular form or format where it is readily reproducible by the agency in the form or format requested. Where photocopies are supplied, the agency will provide one copy per request at a cost of \$0.20 per page. For copies of records produced on tapes, disks, or other media, the agency will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication, the agency will 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 the agency to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the 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 the agency fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(i) through (iii) of this section.

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

(ii) If the agency has determined that unusual circumstances as defined by the FOIA apply, and more than 5,000 pages are necessary to respond to the request, the agency may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees if the following

steps are taken. The agency must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the agency must 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, the agency 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 the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) Except for requesters seeking records for a commercial use, the agency 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.

(4) 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.

(5) No fees will be charged if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When the agency determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the agency 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, the agency 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 are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or

in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The agency is not required to accept payments in installments.

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

(4) The Access Board's FOIA officer and FOIA Public Liaison is available to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

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

(g) *Charging interest.* The agency may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the agency. The Access Board 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.

(h) *Aggregating requests.* When the agency reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the agency may aggregate those requests and charge accordingly. The agency may presume that multiple requests of this type made within a 30-day period have

been made in order to avoid fees. For requests separated by a longer period, the agency 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 shall not be aggregated.

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

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

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

(4) In cases in which the agency 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 calendar days after the date of the agency's fee determination, the request will be closed.

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

the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) The agency 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, the agency 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. The agency will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest

of the requester, the agency will consider the following criteria:

(A) 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, 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. The agency 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 shall be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted 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.

§ 1120.11 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.

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