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U·S·DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT

DIRECTIVES SYSTEM

Subject Number: INF-3

Transmittal Number: 497

Date: 12/8/88

Subject: Freedom of Information Act (FOIA)

Approval: [signature] **Title:** Deputy Director

1. PURPOSE

This directive provides internal guidelines and procedures for responding to requests made under the Freedom of Information Act (FOIA), 5 U.S.C. 552 and Department of the Interior regulations (43 CFR Part 2, Subpart B as amended, 52 FR 45584, November 30, 1987).

2. POLICY

It is the policy of the Office of Surface Mining Reclamation and Enforcement to make the records of the Agency available to the public to the greatest extent possible, in keeping with the spirit of the FOIA (43 CFR 2.13(a)(b)), while ensuring that the public interest and the rights of individuals are accorded all necessary and appropriate protection under FOIA and other statutes (43 CFR 2.13(c)).

3. DEFINITIONS. See pages 2 & 3 following

4. RESPONSIBILITIES. See pages 3 & 4 following

5. PROCEDURES. See pages 5 through 7 following

6. CONTENT OF RESPONSE. See pages 7 through 9 following

7. FEES. See pages 9 through 12 following

8. CLEARANCE AND SIGNATURE AUTHORITY. See pages 12 through 13 following

9. REPORTING REQUIREMENTS. Annual Report. The Chief, RDIM Office will send a form by January 15 to all Field Office and Field Operation FOIA Coordinators to collect FOIA information, including data on requests, affirmative responses and denials. The Field Office and Field Operations Coordinators will return the completed forms to the Chief, RDIM Office by February 1. This information is collected by the Department of Interior to be submitted to Congress.

10. REFERENCES. DM Part 316;5 USC 552 et seq.; 43 CFR Part 2, Subpart B.

11. EFFECT ON OTHER DOCUMENTS. Supersedes directive INF-3 dated 07/09/85.

12. EFFECTIVE DATE. Date of issuance.

13. CONTACT. Chief, Regulatory Development and Issues Management Staff, (202)343-5241 or FTS 8-343-5241.

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FOIA GUIDELINES

I. DEFINITIONS

(A) Freedom of Information Act (FOIA), 5 U.S.C. 552

The Act which generally provides that any person has a right enforceable in court, of access to records maintained by agencies within the Executive Branch of the Federal Government, except to the extent that such records (or portions of these records) are protected from disclosure by one of nine exemptions listed in the Act.

(B) FOIA Request

Any request for any reason by any person for documents or records which meets the following criteria (with 43 CFR references):

(1) Is made in writing (43 CFR 2.14(b)(1)).
(2) Reasonably describes the records sought. The description of the record is sufficient to enable an Agency employee familiar with the subject area to locate the record with a "reasonable amount of effort". (43 CFR 2.14(b)(2)).
(3) States in the letter that the request is made under FOIA (43 CFR 2.14(b)(1)).

NOTE: On occasion, other written requests should be treated as FOIA requests by OSMRE even though they do not meet the above criteria. The following situations are examples:
(a) When a party is interested in viewing Agency files. In most cases files contain documents protected from disclosure by the FOIA or other statutes.
(b) When a request has been made for a specific document which is protected by one of the FOIA exemptions.

(C) FOIA Response

A response is always made in writing and includes a separate list of documents being released, if any; a separate list of documents being withheld and the exemption relied on for withholding each document; and a statement of appeal rights and officials responsible for withholding documents; and a determination of fee charges or fee waivers.

(D) Exempted Documents

A document (or part of that document) may be withheld from release to the requester only if it is a document which is protected from disclosure by one of the nine exemptions listed in 5 USC 552(b). (See pages A-3 through A-8 of Appendix for lists of exemptions and further explanations). In general, the courts look with disfavor upon withholding documents.

II. RESPONSIBILITIES

(A) The Director:

- Oversees compliance with the requirements of the FOIA.
- Institutes a program which ensures impartial administration of FOIA by OSMRE.
- Assures protection of the rights accorded to the public by the Act.

(B) The Chief, Regulatory Development and Issues Management (RDIM) Staff:

- Is the designated FOIA Officer for OSMRE.
- Develops guidance, controls and procedures for processing requests.
- Monitors and evaluates program effectiveness.
- Initiates action to correct deficiencies in operating procedures.
- Serves as the focal point for coordinating all OSMRE FOIA actions with the Assistant Solicitor, Branch of Governmental Relations, Division of Surface Mining.
- Coordinates all FOIA requests directed to OSMRE that involve documents in files maintained by the Secretary, Under Secretary, or other offices within the Department.
- Provides authoritative guidance on which documents can be released or are exempt under the Act.
- Advises the Director on policy matters involving FOIA
- Prepares the Annual Report on FOIA activities.
- Responsible for maintaining a complete set of all documents released or denied under the FOIA to ensure a complete administrative record for any FOIA appeal.

(C) Assistant Director:

- Oversees the development of responses to all FOIA requests which concern his or her program.
- Familiarize himself/herself and subordinates with applicable policies and procedures.
- A responsible official for documents within his or her jurisdiction which are withheld, and accountable for such decisions.

(D) Western and Eastern Operations Assistant Directors:

- Designate a FOIA Coordinator, who will be responsible for providing information on preparing a response in accordance with this directive, and for direction on review of documents for FOIA exemptions at their respective offices.
- Provide the name and title of the individual designated as FOIA Coordinator to the Chief, RDIM.
- Develop guidelines and operating procedures consistent with this directive.
- Coordinate the FOIA activities for requests made to their offices.
- A responsible official for documents within his or her jurisdiction which are withheld, and accountable under the law for such decisions.

(E) Field Office Director:

- Designate a FOIA Coordinator, who will be responsible for providing information on preparing a response in accordance with this directive, and for direction on review of documents for FOIA exemptions at their respective office.
- Provide the name and title of the individual designated as the FOIA Coordinator provided to the Chief, RDIM.
- Develop guidelines and operating procedures consistent with this directive.
- Coordinate the FOIA activities for requests made to their Area Offices.
- A responsible official for documents within his or her jurisdiction which are withheld, and accountable under the law for such decisions.

(F) FOIA Coordinator:

- Assist in answering questions concerning the application of the FOIA guidelines.
- Provide training concerning the above FOIA guidelines if necessary.
- Control and track the FOIA request as it is being prepared.
- Ensure that the action office responding to the FOIA follows the procedures in this directive (See A-1 & A-2 of Appendix for procedures checklist)
- Provide direction on review of documents for FOIA exemptions at their respective offices, and provides answers to RDIM concerning the exemption checklist on pg A-8 of Appendix.
- Provide review of FOIA responses to ensure their consistency with FOIA prior to sending a response to RDIM.

III. Procedures (See page A-1 & A-2 of the Appendix for Procedure Checklist)

(A) Control:

FOIAs Received by Headquarters:

The RDIM Office is the controlling unit for all FOIA requests received at Headquarters. Other Headquarters offices that have directly received a FOIA request should date-stamp the letter and handcarry the original to RDIM for control.

The following are procedures RDIM will take when a FOIA request is received:

(1) All FOIA requests will be date-stamped when received.
(2) The due date will be established as ten working-days from the date of receipt of the letter by RDIM or another Headquarter's office which received the letter initially.
(3) If the Department receives a FOIA request and assigns it to OSMRE for action, the Department will mark the date and time of receipt, and OSMRE will have the normal ten working-days for action on the FOIA request.
(4) In cases where OSMRE determines that a request should be treated as a FOIA (See section (I)(B)), the ten-day period begins with the date of this determination and the requester shall be advised of that date in the response.
(5) When RDIM receives a FOIA or copy of the letter from another office it will enter the request into the Director's Issue Management System (DIMS) for tracking and mark the OSMRE FOIA correspondence folder to make the document readily identifiable. The DIMS sheet and folder shall accompany the request until the action is complete.
(6) Expedite delivering (handcarry, FAX etc.) the FOIA request to the action office.
(7) Send copies of the request to the staff attorney handling FOIA in the Office of the Assistant Solicitor, Governmental Relations, Division of Surface Mining, and when appropriate, the FOIA coordinator in the field office or field operations who may have an interest in the subject.
(8) Monitor all requests to assure compliance with the due date.
(9) Send the draft final response with two copies of the attachments to RDIM at least four days before the due date, as well as a copy of the Wordperfect diskette.
(10) RDIM will review response and enclosures and handcarry documents to the Assistant Solicitor for Governmental Relations for review.

FOIA's received by Field Offices and Eastern and Western Field Operations:

The FOIA coordinators will be the controlling unit for FOIA requests received in the the offices above (including respective area offices). The following are procedures that the FOIA coordinators in field offices and Eastern and Western Field Operation's offices will take upon receipt of a FOIA for response.

(1) All FOIA requests will be date stamped when received.
(2) The due date will be established as ten work-days from the date of receipt.
(3) The FOIA Coordinator will track the response and mark the OSMRE FOIA correspondence folder to make the document readily identifiable. RDIM will be notified on who will have the action on the FOIA.
(4) In cases where OSMRE determines that a request should be treated as a FOIA (See section (I)(B)), the ten-day period begins with the date of this determination and the requester shall be advised of that date in the response.
(5) Expedite delivering (handcarry, FAX etc.) the FOIA request to the action office.
(6) Send copies of the request to RDIM, and to all other offices that may have an interest in the response or may need to coordinate the response. RDIM will send copies to the staff attorney handling FOIA in the Office of the Assistant Solicitor, Governmental Relations, Division of Surface Mining.
(7) Monitor all requests to assure compliance with the due date.
(8) Send the draft final response with two copies of the attachments to RDIM four days before the due date.

(B) Assignment and Coordination

(1) Assistant Directors and Field Office Directors shall make staff assignments for response within one day of receipt of the request.
(2) The responsible staff person shall begin preparation of a response as soon as possible, assuring that sufficient time is available for reviewing and surnaming the response within the ten working-days.
(3) The responsible staff person shall discuss the proposed response with the Headquarters FOIA Contact in the RDIM Office. Questions concerning withholding and releasing certain documents shall be directed to the Headquarters FOIA Contact. RDIM will consult with the Assistant

Solicitor, Governmental Relations, Division of Surface Mining. This Solicitor's Office reviews all FOIA responses and all enclosures.

If the request references material contained in another Office (For example, if the FOIA Contact is in Headquarters and requested materials are also in a field office (or vice versa)), the responsible staff person shall contact the designated Office FOIA Coordinator in that other OSMRE office immediately. The responsible staff person should have the lead for coordinating development of the response with the Field Office.

(4) A decision to withhold a requested record, to release a record that is exempt from disclosure, or to deny a fee waiver shall be made only after consultation with the Office of the Assistant Solicitor, Governmental Relations, Division of Surface Mining (43 CFR 2.16(a)(4)). RDIM will coordinate the review of these records with the Office of the Solicitor, Division of Surface Mining.

NOTE: Attorneys in Field Offices of the Solicitor will not be routinely involved in preparation or review of FOIA responses. In the relatively rare instances in which, because of the volume of documents being reviewed, it is appropriate to obtain the assistance of a Field Office attorney on a FOIA response, the referral to a Field Office attorney, will be made through the Headquarters Office of the Solicitor.

(IV) Nature and Content of Response to FOIA Requests:

(A) A FOIA Response Does Not:

(1) Require that agencies organize or reorganize file systems.
(2) Require that new burdensome reprogramming of computer programs be done to produce information.
(3) Require that new reports be created from existing "information".
(4) Require release of documents not yet in existence as of the date of the request.

(B) Interim responses are required:

** (1) When the requester has not stated a willingness to pay fees as high as are anticipated, or
** (2) When the requester has not been granted a full fee waiver, or
** (3) Must be notified of a required advance payment, or

** (4) When the requester has not identified himself as being in one of the fee categories identified in section V, or

** (5) When the request is so general that a reasonable determination of the nature and location of the requested documents cannot be made, or

(6) When a determination cannot be reached within the time limit or extended due period (20 days at the most), or

(7) When OSMRE must provide to a submitter of information a notice and opportunity to request withholding of certain submitted information that may be exempt under FOIA exemption (b)(4). (For example - proprietary information in contracts).

**(the 10-day due period begins when the questions above are resolved).

See Appendix for specific examples of responses.

(C) Introductory paragraph for all FOIA responses:

Identify that the request was made under FOIA.
Indicate date of the incoming letter and date received.
Indicate specifically the documents which have been requested. (Usually by quoting from the incoming FOIA request).

(D) Affirmative response:

Responses releasing or providing access to all documents included in a FOIA request shall:

(1) Mention in the body of the response that documents being released are set forth on an enclosed list. Specifically identify the documents being released under the request on a separate enclosure page (See pg A-19 of Appendix). Each released document should be identified by a number or other identifier, and the identifier should be marked on the corresponding document being released. Documents should be listed chronologically, commencing with the most recent documents.

(2) Clearly state the time and place the material will be available for inspection (if applicable), and the person who should be contacted to make arrangements for the inspection

(3) Specify the amount of money due, if search, copying, review or postage fees are involved, and the procedures for billing and payment. (See pgs A-9 through A-11 of Appendix).

(E) Denials or partial denials:

Responses denying all or part of the requested documents shall:

(1) Mention in the body of the letter that there is an enclosed list that specifically identifies the documents being withheld. Identify these documents on a separate enclosure page (See pg A-21 of Appendix). Numbers or other identifiers, different from the numbers or identifiers used on the released documents should be used to identify each document, and the corresponding identifier should be marked on the document. (For e.x. use B-1, B-2, B-3 etc. instead of 1, 2, 3 etc.).

(2) Identify the specific exemption being invoked as the basis for withholding each of the withheld documents or portions of documents. Use the citations to the Act, 5 USC 552(b) (See Appendix pgs A-3 through A-8).

(3) For each document listed, include the date of the document, a brief description of the item, the originator and addressee.

(4) Within the body of the letter, list the names and titles of the senior officials and attorney responsible for the denial (See pg A-20 of Appendix).

(5) State the requester's appeal rights. (See pg A-20 of Appendix).

(V) Fees

(A) Charging Fees:

(1) Policy:

Unless fees are waived (See section on Fee Waiver following), fees for responding to FOIA requests shall be charged in accordance with the provisions of 43 CFR 2.20. Regulations now prescribe types and levels of fees for each category of FOIA requesters. These categories are:

(a) Commercial use,
(b) Educational and non-commercial Scientific Institution,
(c) Representatives of the News Media and
(d) All Other

The regulations at 43 CFR 2.20 define each category of requester. OSMRE should follow the schedule provided in 43 CFR Part 2, Appendix A for assessing fee charges. The categories should be identified in preparing the response prior to review by RDIM and the Office of the Solicitor. (See examples of fee charge language on pgs A-9 to A-11 of Appendix).

(B) Fee Collection:

In acordance with 43 CFR 2.20(j), a bill for collection, Form DI-1040, shall be used for collection of fees. A sentence in the letter is to be added (See Appendix):

> "A confirming invoice formally billing you for the amount and indicating where your payment should be forwarded will be sent by separate letter."

Once the response has been signed, a copy should be transmitted by the preparing office, via memorandum to: Chief, Programmatic Accounting, PO Box 25065, Room D-2025, Denver, Colorado 80225. The Denver Finance Office will then bill the requester and a copy of the bill and copy of the receipt of payment will be sent to the office preparing the FOIA.

(C) No Fees (43 CFR 2.20):

(1) No fees shall be charged if the total amount chargeable does not exceed $15.00 (43 CFR 2.20(a)(2)) (following the reduction in search time and duplication charges where applicable).
(2) No fees may be charged for services not described in 43 CFR 2.20(e)(2).
(3) If documents are already available in the Administrative Record, the requestor may be advised of the location where these documents can be copied. The availability of documents in the Administrative Record for public inspection does not exempt them from FOIA disclosure. However, their availability in the Administrative Record is a factor to be considered in determining whether to waive fees.

(D) Fee Waiver (43 CFR 2.21):

Documents shall be furnished without charge or at a charge reduced below the fees chargeable in 43 CFR Part 2, Appendix A, if the disclosure of the information is in the public interest because:

(1) The information is likely to contribute significantly to the public understanding of the operations or activities of the government, and

(2) The information is not in the commercial interest of the requester.

Factors to be considered are:

(a) In what way does the record requested concern the operations or activities of the Government? [Do they relate to or will they illuminate the manner in which the agency is carrying out identifiable activities which affect the public?]

(b) If these records concern the operations or activities of the Government, is disclosure likely to contribute to public understanding of these operations and activities?

(1) What is the connection between the content of the requested record and the operations in which you are interested?
(2) Do you have the knowledge and ability to disseminate the information to the public effectively?

(c) Is the requested information already in the public domain? [Waiver is inappropriate if the information is publicly available.]

(d) Is there a commercial interest that would be furthered if the information were disclosed?

(e) Will disclosure of this information primarily serve in a commercial interest?

These factors should be addressed when preparing the response before it is sent to RDIM and the Solicitor for review.

If the requester does not address these questions in his original FOIA request and he has asked for a fee waiver, a letter should be sent to him listing the necessary questions to determine whether fees can be waived (See pg A-15 of Appendix).

It is not always necessary to ask the requester to answer all of these questions. If OSMRE is in a better position to know the answer to a given question than is the requester, or if OSMRE already has the answer to a question, there is no need to ask the requester. For

example, in most cases, OSMRE may be able to answer questions (a) and (c) with no further information from the requester.

(3) The program person shall resolve the factors to be considered in determining whether a fee waiver is applicable or what fee category should be used. The Chief, RDIM Office will make the final determination whether to grant fee waivers for documents being released by Headquarters. The Assistant Directors of the Eastern and Western Field Operations and Field Office Directors will determine whether to grant fee waivers for documents being released by their offices.

(E) Advance Payment:

(1) Where it is anticipated that allowable fees are likely to exceed $250.00 and the requester does not have a history of prompt payment of FOIA fees, the requester will be required to make an advance payment of the entire fee before processing of his or her request (43 CFR 2.20(h)(1) (See pg A-12 of Appendix).

(2) Where a requester has previously failed to pay a fee within 30 calendar days of the date of billing, processing of any new request from that requester shall ordinarily be suspended until the requester pays any amount still owed, including applicable interest, and makes advance payment of allowable fees. (43 CFR 2.20(h)(2)) Interest can now be assessed after the 31st day following the day on which the bill was sent, in accordance with the Debt Collection Act of 1982.

(VI) Clearance and Signature Authority

(A) Interim Response

(1) For Headquarters: The Chief, RDIM Office will sign interim responses for Headquarters.

(2) For Field Offices and Field Operations: The Field Office Director and Assistant Directors, of the Eastern and Western Field Operations will sign interim responses for their areas of responsibility. Except for interim responses which concern solely time extensions, interim responses should be reviewed by the RDIM Headquarters FOIA coordinator, who will coordinate review with the Office of the Assistant Solicitor, Governmental Relations prior to signature.

(B) Affirmative Responses (Release of All Requested Documents) (See pg A-18 of Appendix).

(1) For Headquarters: The Chief, RDIM Office will sign all affirmative responses after concurrence by the Office of the Assistant Solicitor, Governmental Relations.

(2) For Field Office and Field Operations: The Field Office Director and Assistant Directors will sign responses that release all requested documents for their respective jurisdictions. However, two copies of each proposed response shall be provided to the Chief, RDIM prior to signature, for review and concurrence by the Office of the Assistant Solicitor, Governmental Relations.

(C) Responses that Deny Documents

All responses (including those in Headquarters, Field Offices, and Eastern and Western Field Operations) that deny the release of documents in full or in part will be signed by the Deputy Director, Administration and Finance following concurrence by the Chief, RDIM Office and Office of the Assistant Solicitor, Governmental Relations.

(D) Copies of Responses

Copies of all signed responses (including interim responses) to FOIA requests shall be sent to the Chief, RDIM Office, and RDIM will copy the Office of the Assistant Solicitor, Governmental Relations.

Copies of all signed responses (including interim responses) to requests involving a concern of a field unit shall be sent to the relevant Field Office and/or Field Operations FOIA Coordinator.

Copies of all signed responses that deny documents in full or in part shall be sent in a blue envelope to the Departmental FOIA Officer, Room 7358, Main Interior Building.

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STEP BY STEP PROCESS FOR PREPARING A FOIA RESPONSE

FOIA COORDINATOR IS
RESPONSIBLE FOR: (Items designated with one asterisk (*) and also following-up on (**) items).

PROGRAM PERSON IS
RESPONSIBLE FOR: (Items designated with two asterisks (**)).

* 1. Send to appropriate action office. (Action office will designate responsible program person). Send a copy of the incoming to RDIM. RDIM will copy the Assistant Solicitor's Office. (HQ SOL reviews for legal adequacy and for FO SOL involvement).

** 2. Coordinate with other offices if necessary.

* 3. Copy HQ FOIA Office and Assistant Solicitor's Office. (HQ SOL reviews for legal adequacy and FO SOL involvement).

** 4. If the request is too broad to determine what information is responsive, contact the author by letter. (See pg A-16 of Appendix of the FOIA Directive).

** 5. Determine which requester group the writer is in. (See 43 CFR 2.20(b)). The action office should keep a log of search times, review times and copying costs. (See fee charges on pgs A-9 through A-11).

** 6. If the requester has asked for a fee waiver, verify whether he answered applicable questions listed on page 10 of this directive. Sample language for fee waiver information requests can be found on pg A-15 of the Appendix.

** 7. Prepare an interim response if the first ten-day period will have expired before a response can be sent. Sample language can be found on pg A-17 of the Appendix.

** 8. Identify exempt documents according to 43 CFR 2.13(c) and pgs A-3 through A-8 of the Appendix. Provide RDIM with answers to qustions on Exemption Checklist on A-8.

** 9. Contact submitters or other agencies as appropriate if confidential commercial or financial information or documents originated by another agency are in the file to be released. (See pg A-22 of the Appendix).

** 10. Make lists for documents to be released and/or withheld according to the pgs A-18 through A-21 of the Appendix. Mark the documents with corresponding identifiers. (See pg A-8 of Appendix for exemption checklist).

** 11. Prepare response in accordance with this directive.

** 12. Send two complete copies of the final draft response and enclosures and a copy of the document on a diskette in Word Perfect to HQ/RDIM at least 4 days before the final due date.

13. Preparing office will retype any major changes.

14. Send <u>TWO</u> copies of signed responses (if signed in the Field Office) to RDIM (who will provide a copy to the Solicitor).

DOCUMENTS IN THE FOLLOWING CATEGORIES ARE EXEMPT FROM FOIA DISCLOSURE REQUIREMENTS:

(Exemptions (1),(8), and (9) are not normally applicable to OSMRE and are not included in this Appendix)

Source: 5 USC 552(b) or 43 CFR 2.13(c).
Note: (Use the US Code citation for citing exemptions on withholding lists):

Exemption 2 (5 USC 552(b)(2))

"related solely to the internal personnel rules and practices of an agency".

Comment: The courts have interpreted the exemption to encompass two distinct categories of information:

(a) Internal matters of a relatively trivial nature, and in which the public has no vested interest.

(b) More substantial internal matters the disclosure of which would allow circumvention of a statute or agency regulation, such as certain administrative manuals, performance ratings and lists of awards.

Exemption 3 (5 USC 552(b)(3))

"specifically exempted from disclosure by statute".

Comment: Its intent is to allow statutes which required or authorized the withholding of confidential information, to remain unaffected by the disclosure mandate of the FOIA.

This exemption applies to items such as:

(a) Information on archeological resources on public land and Indian land (pursuant to the Archeological Resources Protection Act of 1979, 16 USC 470).
(b) Information protected under sections 508(a)(12) and 508(b) of SMCRA.
(c) Federal income tax return information protected under the I.R.S. Code, 26 U.S.C. 6103.

Exemption 4 (5 USC 552(b)(4))

"trade secrets and commercial or financial information obtained from a person and privileged or confidential".

Comment: This exemption is intended to protect both the interests of commercial entities that submit proprietary information to the government, and the interests of the government in receiving continued access to such data. The exemption covers two broad categories of information in federal agency records:

(a) Trade secrets which are considered to be: "A secret, commercially valuable plan, formula, process or device that issued for the making, preparing, compounding or processing of trade commodities that can be said to be the end product of either innovation or substantial effort" (Public Citizen Health Research Group v. FDA, 704 F.2dd 1280, 1288 (D.C. Cir. 1983)), and

(b) Information which is:

(1) Commercial or financial: Relating to business or trade, in which the submitter may have a commercial interest. For example: Workforce data, business sales information, technical designs, direct or indirect ledger information, overhead and operating costs, government contract information, and information of financial condition.

NOTE: Executive Order No. 12600 mandates that all agencies notify submitters when their data is requested under FOIA in order to obtain their position on disclosure. (43 CFR 2.15(d)) (See pg A-22 of Appendix).

(2) Obtained from a person (not generated by the Federal Government), and

(3) Privileged or confidential if disclosure of the information is likely to have the following effects: (a) impair the Government's ability to obtain necessary information in the future; or (b) cause substantial harm to the competitive position of the person from whom the information was obtained.

Exemption 5 (5 USC 552(b)(5))

" ..inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; e.g.: pre-decisional, confidential attorney-client communications, or attorney work-product.

Comment: This is the exemption most frequently invoked by OSMRE. The three primary, most frequently invoked privileges which have been held to be incorporated into Exemption 5 are:

(a) The pre-decisional privilege, also known as the "executive privilege" on documents generated within the Executive Branch. These documents include advice, opinions, or recommendations (not strictly factual data) which are antecedent to the adoption of an official agency policy.

Pre-decisional documents may include drafts, discussions of proposed policy, advisory opinions, notes commenting on a pre-decisional document, and consultant reports that constitute the interpretation of technical data, and have not been adopted by the agency.

Documents not generally considered pre-decisional are: (1) A pre-decisional document adopted or incorporated into a final decision, (2) factual portions of otherwise deliberative documents and (3) documents previously released outside the Executive Branch, and which are no longer eligible to be withheld.

(b) Attorney work-product privilege protects documents and other memoranda prepared by an attorney in contemplation of actual litigation; or by staff at the request of an attorney in contemplation of litigation.

(c) Attorney-client privilege is not limited to the context of litigation as is the work-product privilege. It applies to facts divulged by OSMRE or the Department as client to the Solicitor or Justice as attorney; and it also encompasses opinions given by Solicitor or Justice to OSMRE for the Department based upon those facts.

Note: The DC Court of Appeals, has held that in order for an attorney-client communication to be withheld from disclosure under FOIA, not only must the advice be sought and given with the expectation that it would be kept

confidential, but the agency must therafter protect its confidentiality by giving it only to those who are authorized to speak or act for the agency with respect to the subject matter. (Coastal States Gas Corporation. v. Department of Energy, 617 F. 2d854 (D.C. Cir. 1980); Mead Data Central, Inc. v. Dept. of Air Force, 566 F.2d242 (D.C. Cir. 1977).

Exemption 6 (5 USC 552(b)(6))

"personnel and medical files and similar files disclosure of which would constitute a clearly unwarranted invasion of personal privacy".

Comment: This exemption is to protect personal privacy interests of individuals. Documents that come within this exemption are generally (but not always) within the purview of the Personnel Office.

Note: A third party request for information on another individual should alert the reviewer to a possible (b)(6) exemption. (Exemption (b)(6) cannot be used to withhold the name of a person making a FOIA request.)

Exempt files or parts of files may include: (a) personnel and medical file, (b) home address, (c) personal phone number, (d) social security number, and (e) identity of person filing citizen complaint under SMCRA.

Note: A suggested procedure for program persons to ensure confidentiality of a citizen's complainant's identity, is to inquire and document whether the individual wished their identity to remain confidential. Lack of proof of that request for confidentiality may create doubt as to the legal basis for withholding the information. (Ideally, the inquiry about confidentiality would take place when the complaint is received.)

Exemption 7 (5 USC 552(b)(7))

"investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would..." cause one of the following six harms:

(A) Could reasonably be expected to interfere with enforcement proceedings (Cite 5 USC 552(b)(7)(A)).
(B) Would deprive a person of a right to a fair trial or an impartial adjudication (Cite 5 USC 552(b)(7)(B)).
(C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy (Cite 5 USC 552(b)(7)(C)).
(D) Could reasonably be expected to disclose the identity of a confidential source (Cite 5 USC 552(b)(7)(D)).
(E) Would disclose techniques and procedures for law enforcement investigations or prosecutions (Cite 5 USC 552(b)(7)(E)).
(F) Could reasonably be expected to endanger the life or physical safety of any individual (Cite 5 USC 552(b)(7)(F)).

Use the appropriate cite for whichever situation (or situations) apply.

Note: Investigatory documents originated by another agency or Department (for example, the Office of the Inspector General) should be sent to that agency for appropriate review, as well as a copy of the response to the requester, and the FOIA requester should be notified of that action and what office will be contacting him following that review.

FOIA EXEMPTIONS CHECK-LIST

Very often background information on documents that would justify withholding them is not provided when Headquarters receives the draft letter with attachments. Provide this information to RDIM when documents being reviewed fall under one or more of the categories below.

Indicate on a note attached to these documents the answers to these questions where applicable:

1) Complainant's Identities - Has the complainant requested confidentiality? If not he should be asked, and the response should be indicated to RDIM.

2) Attorney-Client Privileged - Was the information provided to the attorney with the intent that it would be held confidential? Has the information been kept confidential within OSMRE?

3) Attorney Work-Product - Was this information prepared in anticipation of future litigation? If prepared by OSMRE staff, was it prepared at the request of the Solicitor or Justice?

4) Financial Information - Is this information taken directly from the company's ledger? Is this a final audit summary or auditor's working papers?

5) Pre-Decisional Documents - Has this document ever been released outside OSMRE to a non-Federal Government source? If it has, in most cases, it should be released.

6) Pre-Decisional Documents - Is this document or section of document a final policy, or an opinion or recommendation?

7) Pre-Decisional Documents - If this document is not signed or dated, is it a final or draft document?

8) Phone Conversation Records - Only information otherwise withholdable under a FOIA exemption may be withheld; e.g., identifiers of confidential complaints, privileged attorney-client communication, etc. Phone conversation records are not per se withholdable, if they have been circulated within the agency or filed in agency files. Clarification on these items should be provided.

STANDARD LANGUAGE FOR COLLECTING FEES IN ADVANCE

Note: As indicated below and in 43 CFR 2.20(b)-(e) and Section (V)(A) of this directive, there are different types of fees according to the category of use to which the requested information will be put. The different categories are: commercial use requests, educational and noncommercial scientific institution requests, news media requests and other requests. Fees shall not be charged if the total amount chargeable does not exceed $15.00. For appropriate language to use in situations where fee charges exceed $250.00 (See pg A-12 of Appendix).

I. Commercial Use Requests:

	Total # of Units	Unit Charges	Amount
Document Search Time:			
Clerical	000 hrs.	@ $ 9.20 hr.	$0000
		*($2.30 quarter hr.)	
Professional or Managerial	000 hrs.	@ $18.60 hr.	0000
		*($4.65 quarter hr.)	
Document Review Time:			
Clerical	000 hrs.	@ $ 9.20 hr.	$0000
		*($2.30 quarter hr.)	
Professional or Managerial	000 hrs.	@ $18.60 hr.	0000
		*($4.65 quarter hr.)	
Duplication:	000 pages	$ .13/page **	000
Postage: ***			000
		Total	$0000

A confirming invoice formally billing you for the amount and indicating where your payment should be forwarded will be sent by separate letter. ****

FEE CHARGES

II. Educational and Noncommercial Scientific Institution:

	Total # of Units	Unit Charges	Amount
Duplication:	000 pages (the first 100 pgs. are without charge)	$ .13/page **	000
Postage: ***			
		Total	$0000

A confirming invoice formally billing you for the amount and indicating where your payment should be forwarded will be sent by separate letter. ****

III. News and Media Requests:

	Total # of Units	Unit Charges	Amount
Duplication:	000 pages (the first 100 pgs. are without charge)	$ .13/page **	000
Postage: ***			
		Total	$0000

A confirming invoice formally billing you for the amount and indicating where your payment should be forwarded will be sent by separate letter. ****

IV. Other Requests:

	Total # of Units	Unit Charges	Amount
Document Search Time:	(the first 2 hrs. are without charge)		
Clerical	000 hrs.	@ $ 9.20 hr.	$0000
		*($2.30 quarter hr.)	
Professional or Managerial	000 hrs.	@ $18.60 hr.	0000
		*($4.65 quarter hr.)	
Duplication:	000 pages	$ .13/page **	000
	(the first 100 pgs. are without charge)		
Postage: ***			000
		Total	$0000

A confirming invoice formally billing you for the amount and indicating where your payment should be forwarded will be sent by separate letter. ****

FOOTNOTES

* Portions of an hour are also included

** Separate cost estimates for computerized records (See 43 CFR Part 2, Appendix A, (10), and other unique copying costs/ such as photographs, blueprints, etc.

*** Mailing costs may be charged only for services (DHL, Express Mail etc.) that exceed the cost of first class postage.

**** Once the response has been signed, a copy should be transmitted via memorandum to: Chief, Programmatic Accounting, PO Box 25065, Room D-2025, Denver, Colorado 80225.

Note: Advance payments can be requested if: (1) It is anticipated that allowable fees are likely to exceed $250.00, and the requester does not have a history of prompt payment of FOIA fees; or (2) Where a requester has previously failed to pay a fee within 30 calendar days of the date of billing (43 CFR 2.20(h)).

I. If it is anticipated that allowable fees are likely to exceed $250.00 and the requester does not have a history of prompt payment of FOIA fees, use the following:

(a) Identify the FOIA and specific request
(b) List the appropriate fee charges as indicated on pg A-9 through A-11 of Appendix.
(c) "Upon receipt of your payment for these services, we are prepared to ship the documents.

A confirming invoice formally billing you for 80 percent of the above estimated charges, and indicating where your payment should be forwarded will be sent by separate letter. Once we have been notified by the Denver Division of Financial Management Center of your payment, we will continue processing your request.

[Once the response has been signed, a copy should be transmitted via memorandum to: Chief, Programmatic Accounting, PO Box 25065, Room D-2025, Denver, Colorado 80225. Request that Denver contact you as soon as payment has been received. (FTS 776-0343)]

II. Where a requester has failed to pay a fee within 30 calendar days of the date of billing for a previous request, use the following:

(a) & (b) above and

(c)

"On [date] you were mailed a response to your previous Freedom of Information Act request of [date] which requested payment of charges for processing that request. Our records indicate that payment was not received within 30 calendar days of the date of billing. Therefore, before we respond to your current FOIA request of [date] , you will be required to pay (include this language only if appropriate) [any amount still owed this Agency, including applicable interest, and] in advance the costs listed above for your pending request.

A confirming invoice formally billing you for the amount and indicating where your payment should be forwarded will be sent by separate letter. Once we have been notified by

the Denver Division of Financial Management Center or your payment, we will continue processing your request.

[Once the response has been signed, a copy should be transmitted via memorandum to: Chief, Programmatic Accounting, PO Box 25065, Room D-2025, Denver, Colorado 80225. Request that Denver contact you as soon as payment has been received. (FTS 776-0343)

FEES UNDER $15

ADDRESS

Dear _____:

Thank you for your Freedom of Information Act (FOIA) Request of ___[date]___ requesting ___[information requested]___.

Enclosure A lists the documents which are being provided in response to your request. [If the reply is a denial or partial-denial include:] Enclosure B lists documents being withheld for the reasons cited; [and the Appeal Language on pg A-20 of the Appendix].

Fees for providing these documents are less than $15 and are not being charged in accordance with 43 CFR 2.20(a)(2).

Sincerely

Field Office Director
(If denial, the Deputy
Director, Administration
and Finance)

Enclosure(s)

STANDARD LANGUAGE FOR DETERMINING PUBLIC INTEREST
FOR PURPOSES OF A FEE WIAVER
(See 43 CFR 2.21)
(Explanatory information included in brackets is for OSMRE use in evaluating the public interest information)

You requested a waiver of fees under FOIA. Before we can grant a waiver, we must determine whether your request meets the twofold objectives for fee waivers extablished by the Department of Justice; that is, whether disclosure of the information is in the public interest because it: (1) Is likely to contribute significantly to public understanding of the operations or activities of the Government; and (2) Is not primarily in the commercial interest of the requester.

Before we can make a decision on your request for a waiver, we ask that you provide information in response to the following questions so that we can determine if granting the waiver or a reduction in fees is in the public interest. [Questions to which OSMRE already knows the answer need not be asked]:

a. In what way does the record requested concern the operations or activities of the Government? [Do they relate to or will they illuminate the manner in which the agency is carrying out identifiable activities which affects the public? In most cases OSMRE will be better able than the requester to answer this question, and should not ask this question of the requester.]

b. If these records concern the operations or activities of the Government, is disclosure likely to contribute to public understanding of these operations and activities? (1) What is the connection between the content of the requested record and the operations in which you are interested? [In many cases OSMRE will know the answer to this, and will not need to ask the requester.] (2) Do you have the knowledge and ability to disseminate the information to the public effectively?

c. Is the requested information already in the public domain? [Waiver is inappropriate if the information is publicly available.] [In most cases, OSMRE will know the answer, and will not need to ask the requester.]

d. Is there a commercial interest that would be furthered if the information were disclosed?

e. Will disclosure of this information primarily serve in a commercial interest?

Note: If the two objectives for fee waivers are met, then in the body of the response indicate that: "Fees are being waived in accordance with 43 CFR 2.21(a)".

TOO GENERAL A REQUEST

ADDRESS

Dear _____:

Thank you for your Freedom of Information Act (FOIA) Request of (date) requesting (information requested). Section 552(a)(3)(A) of FOIA requires that a request "reasonably describe" the records sought. The information which you have provided in your FOIA request is not sufficient for our Agency staff to reasonably ascertain exactly which records you are seeking.

(Optional) To facilitate our search for these documents please answer the following questions: Appropriate questions should be provided by the responsible staff person).

Sincerely,

Field Director

ADDRESS

Dear _____:

Thank you for your Freedom of Information Act (FOIA) Request of ___[date]___ requesting ___[information requested]___.

USE THE APPLICABLE LANGUAGE:

I.

"Since we must search for and collect documents from offices other than the office processing the request, we are availing ourselves of the ten working-day extension in time provided in the Department of the Interior procedures for complying with the FOIA (43 CFR 2.17(c)(1))."

OR

II.

"Since we must search for and collect voluminous documents we are availing ourselves of the ten working-day extension of time provided in the Department of the Interior procedures for complying with the FOIA (43 CFR 2.17(c)(2)). "

OR

III.

"Since we must coordinate and consult with our Field Office personnel [or Solicitor's Office] we are availing ourselves of the ten working-day extension of time provided in the Department of the Interior procedures for complying with the FOIA (43 CFR 2.17(c)(3))."

Letters notifying of an extension of time can be signed by the Field Office Directors. For Headquarters, the Chief, RDIM will sign extensions.

AFFIRMATIVE RESPONSE

ADDRESS

Dear _____:

Thank you for your Freedom of Information Act (FOIA) Request of ___[date]___ requesting ___[information requested]___.

Enclosure A lists the documents we are providing in response to your request.

Charges for these documents are listed below: (Insert appropriate language from pgs A-9 through A-11 of Appendix).

Sincerely,

Field Office Director (or if Headquarters then the Chief, RDIM)

Enclosure A

ENCLOSURE A

Below is a list of documents being released:

[NOTE: List documents CHRONOLOGICALLY, usually starting with most recent documents. List date, names of sender and recipient (titles optional), and a brief description of the document].

	Date	
1.	11/20/87	Letter from James Smith to Carl Jones, Chief, Office of Regulatory Development, concerning the release of the draft toxic-material handling plan.
2.	10/15/85	Memorandum from John Ring, George Miller, Tennessee Field Office Director to Carl Close, Assistant Director, Eastern Field Operations, concerning Gordon Energy violations.
3.		OSMRE Notices of Violation:
	MSHA #	
	10/3/85	86-92-162-019
	5/4/87	87-95-163-029

RESPONSE WITHHOLDING DOCUMENTS

ADDRESS

Dear _____:

Thank you for your Freedom of Information Act (FOIA) Request of [date] requesting [information requested].

Enclosure A lists the documents we are providing in response to your request [if applicable]. Enclosure B lists the documents we are withholding for the reasons cited.

[When another agency or Department's documents are within the file being requested, that organization must be notified if permission has not already been granted to release those files]. A 10/9/87 memorandum concerned an Investigation Report originating from the Office of the Inspector General (OIG). The Investigation report is an attachment to item (B-1) of Enclosure B, and is being forwarded to the OIG at the address below for review and direct response to your request. [Give name and title of contact, address, and phone #].

Charges for these documents are listed below: (If there are charges, refer to language on pgs A-9 through A-11 of Appendix).

You may appeal the [partial] denial of your request to the Assistant Secretary of the Interior for Policy, Budget and Administration under 43 CFR 2.18 by writing to: Freeedom of Information Act Officer, Office of the Assistant Secretary, U.S. Department of the Interior, Washington, D.C. 20240. Your appeal must be received within 20 days (Saturdays, Sundays, and public legal holidays excepted) of your receipt of this letter. Your appeal must be accompanied by copies of the original request and this initial denial. The appeal letter, with the legend FREEDOM OF INFORMATION APPEAL. In order to expedite the appellate process and insure full consideration of your appeal, your letter should contain a brief statement of the reasons why you believe this initial decision to be in error.

The officials responsible for the [partial] denial of your request are [name], Director, [Field Office], OSMRE; [name] Deputy Director, Administration and Finance, OSMRE; and [name], Staff Attorney, Branch of Government Relations, Division of Surface Mining.

Sincerely,

Deputy Director,
Administration and Finance

Enclosures

ENCLOSURE B

Documents being withheld with the reasons cited:

	Date	
B-1	12/28/87	Part of a Conversation Record of a telephone call to Kirk Lind from a citizen complainant concerning damage to his property. Name of complainant has been deleted. Exempt under 5 USC 552(b)(7)(C) & (b)(7)(D), information the release of which could reasonably be expected to disclose the identity of a confidential source and constitute an unwarranted invasion of personal privacy.
B-2.	11/15/85	Memorandum from Joan Harvey, Field Attorney to Robert Boldt, Deputy Director, Administration and Finanace concerning the draft toxic-material handling plan. Exempt under 5 USC 552(b)(5) as pre-decisional and attorney-client privileged.
B-3.	6/19/84	Audit working papers, concerning weight tickets and receipts are exempt under 5 USC 552(b)(4) as commercial or financial information obtained from a person and privileged or confidential.

* Use a different numbering system than the one used for documents being released (e.g., B-1, B-2 etc. instead of 1,2,3 etc.).

FOR LENGTHY LISTS OF WITHHELD DOCUMENTS, you may use a "key" at the beginning of the withheld list, and just refer to the cite following each withheld item. For example:

Reasons for withholding documents:

(b)(7)(D) = 5 USC 552(b)(7)(D)
"Information the release of which could reasonably be expected to disclose the identity of a confidential source".

NOTICE TO SUBMITTERS OF
COMMERCIAL INFORMATION

According to 43 CFR 2.15(d), if a request seeks a record containing trade secrets or commercial or financial information submitted by a person outside of the Federal Government, the bureau processing the request shall provide the submitter with notice of the request whenever:

(1) The submitter has made a good faith designation of the information as commercially or financially sensitive or
(2) The bureau has reason to believe that disclosure of the information may result in commercial or financial injury to the submitter.

STANDARD LANGUAGE FOR REVIEW OF COMMERCIAL INFORMATION

ADDRESS

Dear [Submitter]:

On August 17, 1987, the Office of Surface Mining Reclamation and Enforcement (OSMRE) received a Freedom of Information Act (FOIA) request for [describe documents] submitted by your company, which are enclosed.

In accordance with 5 USC 552(b)(4) and 43 CFR 2.15(d) we are sending you this information for the following reasons: In the event you object to the release of any portion of this material, please specify those portions of any document which you believe should not be released. For each portion, please specify the manner, if any, in which release of the material would cause harm to your competitive position. You may provide any other information which could assist us in determining whether such materials should be withheld under FOIA. You are requested to advise this office no later than [ten calendar days from the date of the letter] if there are any objections. Please address any questions or correspondence to [name and address of contact].

Sincerely,

Project Head

Enclosures

RESPONSE TRANSFERRING A FOIA

ADDRESS

Dear _____:

Thank you for your Freedom of Information Act Request (FOIA) of ___[date]___ requesting ___[information requested]___.

Because the document which responds to your request was generated by [name of the Federal department or agency], OSMRE is transferring your request to that organization for response. You may contact them at the office listed below:

[Give name and title of contact, phone #, and address].

Sincerely,

[Field Office or Operations Director or Chief, RDIM (if at Headquarters)]

NOTICE OF DELAY IN RESPONDING

ADDRESS

Dear _____:

Thank you for your Freedom of Information Act Request (FOIA) of ___[date]___ requesting ___[information requested]___.

At this time we are currently processing your request and you should hear from us shortly. However, in accordance with 43 CFR 2.17(e)&(f) this is to notify you that a determination has not yet been reached concerning your request.

In accordance with 43 CFR 2.18(a)(4), you may treat this delay as a withholding of the requested information, and you may file an appeal to the Assistant Secretary of the Interior for Policy, Budget and Administration by writing to : Freedom of Information Act Officer, Office of the Assistant Secretary - Policy, Budget and Administration, U.S. Department of the Interior, Washington, D.C. 20240. Your appeal must be received within 20 work-days (Saturdays, Sundays, and public legal holidays excepted) of your receipt of this letter. Your appeal must be accompanied by copies of the original request, and a copy of this letter. The appeal should be marked both on the envelope and on the face of the appeal letter, with the legend FREEDOM OF INFORMATION APPEAL. In order to expedite the appellate process and insure full consideration of your appeal, your letter should contain a brief statement of the grounds for your appeal.

Sincerely,

[name]
Deputy Director,
Administration and
Finance

federal register

Monday
November 30, 1987

Part V

Department of the Interior

Office of the Secretary

43 CFR Part 2

Records and Testimony; Freedom of Information Act; Final Rule

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 2

Records and Testimony; Freedom of Information Act

AGENCY: Office of the Secretary, Interior

ACTION: Final rule.

SUMMARY: This final rule amends the Freedom of Information Act (FOIA) regulations of the Department of the Interior to incorporate the changes concerning fee charges, fee waivers and law enforcement records made by the Freedom of Information Reform Act of 1986. The revisions conform to the provisions of the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget on March 27, 1987 and the Executive Order 12600 of June 23, 1987 pertaining to predisclosure notification procedures for confidential commercial information. The rule also clarifies the Department's submitter notice procedures, and revises, updates and simplifies the Department's procedures governing submission and consideration of FOIA requests.

EFFECTIVE DATE: December 30, 1987.

FOR FURTHER INFORMATION CONTACT: Richard A. Stephan, Division of Directives and Regulatory Management, Office of Management Analysis (202) 343-6191.

SUPPLEMENTARY INFORMATION: On May 12, 1987, the Department of the Interior published for comment in the **Federal Register** a proposed rule amending its Freedom of Information Act regulations on fee charges, fee waivers and law enforcement records to reflect the Freedom of Information Reform Act of 1986. The Department also proposed to clarify its submitter notice procedures, and to revise, update and simplify its procedures governing submission and consideration of FOIA requests. The preamble to the proposed rule described the basis and purpose of the amendments. 52 FR 17780.

By the end of the comment period, June 11, 1987, the Department of the Interior had received seven public comments representing four identifiable categories of commentators: Representatives of the news media (1); Public interest groups affiliated with the news media (1); Other public interest groups (3); and Indian organizations (2).

A summary of the comments and the Department's responses follows.

1. *Submission of requests.* One commenter objected to proposed § 2.14(c), which provides that a FOIA request "may not seek" creation of records. The commenter pointed out that creation of records may be to the advantage of both the agency and the requester. This comment in meritorious. While the law is quite clear that an FOIA requester may not require an agency to create a new record, there may be instances where doing so will be less burdensome on the agency and the requester than disclosing large volumes of unassembled material.

Accordingly, § 2.14(c) is modified to state that a request "may not require" creation of new records, making clear that the Department may, in its discretion, agree to creation of a new record as an alternative to disclosing existing records.

2. *Submitter notice.* One commenter objected to inclusion of the submitter notification procedures proposed in § 2.15(d). The commenter argued that these procedures "undermine the mandatory disclosure procedures" of the FOIA and may impair timely response to requests. The Department does not agree. The proposed submitter notice procedures, which formalize longstanding Departmental practice, are designed to assure that the Department has sufficient information to reach disclosure decisions that take full account of both the public's rights to access to information and the rights of third party submitters of information reflected in the FOIA's exemptions. The procedures are drafted to provide for prompt consultation with submitters and require that requesters be notified if consultation cannot be concluded within the Act's time limits.

Subsequent to issuance of the Department's proposed rule, the President issued Executive Order 12600 (June 23, 1987), which requires agencies to adopt submitter notice procedures. The Department has reviewed its proposal in light of the Executive Order and finds that, with minor exceptions, it conforms to the Order's requirements. Changes made in the final rule in response to the Executive Order are the following: (1) A provision is added to § 2.15(d)(1) allowing for notification of a voluminous number of submitters by posting or publishing a notice in a place reasonably calculated to accomplish notification. (2) The notification exception in § 2.15(d)(4)(v) is modified to indicate that submitters will be notified of requests for information that they did not designate as confidential at the time of submission if there is substantial reason to believe that disclosure of the information would result in competitive harm. (3) A new § 2.15(d)(5) provides for notification to submitters of litigation seeking to compel disclosure of information. (4) In accordance with section 8(f) of the Executive Order, § 2.16(b) is modified to provide that submitters who have not been consulted on a request because their claims of confidentiality have been found frivolous will be notified before the requested information is disclosed.

The Executive Order provides for its full procedures to be phased in, effective January 1, 1988. Because the Department's submitter notification procedures are based on past Departmental practice, the Department has decided not to avail itself of this option.

3. *Fee Charges.* Four commenters addressed comments to provisions in proposed § 2.20(b)–(e) defining the various categories of FOIA requests for purposes of fee charges. These provisions are intended to implement 5 U.S.C. 552(a)(4)(A)(ii), as amended by the Freedom of Information Reform Act, and are based on the final Uniform Fee Schedule and Guidelines published by the Office of Management and Budget on March 27, 1987 (52 FR 10012–20).

Two commenters objected generally to the Department's reliance on the OMB guidelines, arguing that the Freedom of Information Reform Act authorized OMB to issue only a fee schedule, not guidance on the categories of requests. The Department does not agree. As is clearly reflected in section 552(a)(4)(A)(ii), differing levels of fees for different categories of requests are an essential element of agency fee schedules. To assure uniform treatment on a Governmentwide basis, definition of these categories is as important as establishment of fee levels. In any event, the Department, based on its own examination, believes the guidelines to reflect a sound construction of the statute.

One commenter stated that the definition of "commercial use request" should be changed to cover only requests from commercial entities. This recommendation is inconsistent with the plain language of the Reform Act. The "news media" and "educational or noncommercial scientific institution" categories defined by the statute turn, in whole or part, on the identity of the requester. The wording of the commercial use category, in contrast, refers only to the use to which requested information will be put. Although commercial use requests will normally be made by commercial, profit making entities, it is possible that other entities or individuals may seek records for a commercial or profit purpose.

The same commenter suggested that the definition of commercial use should

specifically exclude media requests. The Department agrees that, under the statute, requests from representatives of the news media are not commercial use requests, even though the employing organization may be in business to make a profit. However, the Department believes that inclusion of a separate definition for news media requests is sufficient to make clear the status of such requests.

Two commenters commented on the definition of "educational institution" requests. One commenter suggested that the Department should define educational institution by reference to section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3). This suggestion is not helpful because tax deductible status under section 501(c)(3) is not limited to educational institutions. The question of distinguishing educational institutions from other entities is thus left open. The second commenter suggested that educational institution be defined to include any entity or person that conducts research, compiles information and makes it available to the public for educational purposes. As did OMB in response to similar comments, the Department believes that this comment is insufficiently discriminating. The comment confuses the question of whether a requester is entitled to the fee rate for educational institutions with the separate question of whether the requester, whatever his or her institutional status, is entitled to waiver of otherwise applicable fees under the fee waiver provision of 5 U.S.C. 552(a)(4)(A)(ii).

One commenter suggested that the definition of noncommercial scientific institution should extend to institutions engaged in either scientific research or scholarly research. The Department rejects this suggestion for the same reason that similar suggestions were rejected by OMB. Since the Freedom of Information Reform Act and its legislative history recite the formula "educational or scientific institution/scholarly or scientific research", it seems clear that the phrase was meant to be read disjunctively so that scholarly applies to educational institutions and scientific applies to noncommercial scientific institutions.

Four commenters objected to the definition of "news" in § 2.20(d)(3)(i) as "information about current events or that is (or would be) of current interest to the public." The primary basis of these objections was that application of the definition could require the Department to judge whether particular requested information was of current and newsworthy interest. This reading of the definition is not correct. The issue in determining whether a requester is entitled to the fee rate for representatives of the news media is whether the requester represents an entity that is in the business of disseminating the news as a general proposition, not whether the particular information sought by the requester is information that ought to be published. The Department believes that § 2.20(d)(3)(1), as written, reflects this understanding of the statute.

Two commenters questioned the treatment in § 2.20(d)(3)(ii) of free-lance journalists. The Department believes that this treatment is an appropriate effort to separate legitimate free-lance journalists from persons who claim this status without foundation, but has added "evidence of a specific free-lance assignment from a news organization" to the list of examples demonstrating journalistic status. This addition recognizes that free-lance assignments are not always reduced to a publication contract. The Department has not, however, adopted one commenter's suggestion that determination of free-lance status should turn, *inter alia*, on the likelihood of publication based on the information requested. This approach would put the Department in the position of making news judgments, something to which the same commenter objected in connection with the definition of news.

One commenter argued that the Department does not have authority to adopt proposed § 2.20(f), which permits the Department to delay processing a request if the requester has not provided required information concerning the category in which the request falls. The Department believes that authority is provided by the requirement in 5 U.S.C. 552(a)(3) that requests meet the procedural requirements of agency rules. If a requester does not supply information on the category in which his request falls, the requester has not submitted a technically valid request. Inclusion of § 2.20(f) is particularly important because the catch-all or default fee category provides fees lower than the commercial use fee category, giving an incentive for commercial use requesters to not provide information on their status.

A commenter suggested that the Department should require advance fee payments only from requesters with a history of nonpayment or tardy payments of fees, but not from requesters with no history of payment as proposed in § 2.20(h)(1). The proposed is drawn from the OMB guidelines and the Department believes it to be appropriate. Under the Reform Act, the advance payment threshold is $250.00. When amounts of this size are in question, requiring advance payment in the absence of a payment record is appropriate.

4. *Fee waivers.* Three commenters urged that the Department's rule specifically reject the guidance on fee waivers under the Reform Act issued by the Department of Justice on April 2, 1987. The Department finds this suggestion unhelpful. The Reform Act requires, in 5 U.S.C. 552(a)(4)(A)(i), that agency regulations contain "guidelines for determining when * * * fees should be waived or reduced." Rejection, without more, of the Department of Justice guidance does not meet this affirmative direction. What the Department has attempted to do is to draw on the Department of Justice guidance, as well as the language of the statute, the legislative history, and cases construing the former statutory fee waiver, to develop guidance for members of the public who request fee waivers and for Department employees who must consider these requests.

The Department also finds unhelpful the suggestion of two commenters that it simply adopt the statutory fee waiver language. This approach does not comport with the requirement of the Reform Act that the Department issue guidelines for determining when fees should be waived or reduced.

Three commenters argued that the proposed rule failed to follow the legislative history of the Reform Act and was therefore deficient. As the Department of Justice correctly pointed out in its guidance, the words of the status control where they and the legislative history diverge. However, the Department has carefully reviewed the legislative history and has incorporated some elements from the legislative history in its rule.

Two commenters suggested that the Department's rule provide a presumptive fee waiver for public interest and media organizations. The Department has not adopted this suggestion. The Department agrees that such organizations will be entitled to a fee waiver in many, if not most, instances. However, other requesters may also make valid claims for fee waiver and the Department sees no principled basis on which to give preference to one group of requesters over another. Additionally, focusing solely on the identity of a requester neglects elements of the statutory standard. Each application for a waiver should be considered individually on its

merits taking into account all relevant factors under the statute.

5. Editorial changes have been made in response to comments received from departmental personnel.

The Department of the Interior has determined that this document is not a major rule under E.O. 12291 and certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). The effects of this document on small entities would be limited to occasions where such entities might file FOIA requests under circumstances in which the new charge to commercial requesters for review costs would increase processing fees. On the other hand, noncommercial small entities may face reduced fee charges.

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

This rule is excluded from the National Environmental Protection Act (NEPA) process because it is administrative, financial, legal and procedural in nature, and therefore neither an environmental assessment nor an environmental impact statement is required.

The principal author of this document is John D. Trezise, Office of the Solicitor.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Classified information, Freedom of Information Act, Privacy Act.

For the reasons set out in the preamble, Title 43, Subtitle A, Part 2, is amended as set forth below.

PART 2—[AMENDED]

1. The authority citation for 43 CFR Part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552 and 552a; 31 U.S.C. 9701; and 43 U.S.C. 1460.

2. The heading for Part 2 is revised to read as follows:

PART 2—RECORDS AND TESTIMONY; FREEDOM OF INFORMATION ACT

3. Subpart B of 43 CFR Part 2 is revised to read as follows:

Subpart B—Requests for Records

Sec.

2.11 Purpose and scope.
2.12 Definitions.
2.13 Records available.
2.14 Requests for records.
2.15 Preliminary processing of requests.
2.16 Action on initial requests.
2.17 Time limits for processing initial requests.
2.18 Appeals.
2.19 Action on appeals.
2.20 Fees.
2.21 Waiver of fees.
2.22 Special rules governing certain information concerning coal obtained under the Mineral Leasing Act.

Subpart B—Requests for Records

§ 2.11 Purpose and scope.

(a) This subpart contains the procedures for submission to and consideration by the Department of the Interior of requests for records under the Freedom of Information Act.

(b) Before invoking the formal procedures set out below, persons seeking records from the Department may find it useful to consult with the appropriate bureau FOIA officer. Bureau offices are listed in Appendix B.

(c) The procedures in this subpart do not apply to:

(1) Records published in the **Federal Register**, opinions in the adjudication of cases, statements of policy and interpretations, and administrative staff manuals that have been published or made available under Subpart A of this part.

(2) Records or information compiled for law enforcement purposes and covered by the disclosure exemption described in § 2.13(c)(7) if—

(i) The investigation or proceeding involves a possible violation of criminal law; and

(ii) There is reason to believe that—

(A) The subject of the investigation or proceeding is not aware of its pendency, and

(B) Disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings.

(3) Informant records maintained by a criminal law enforcement component of the Department under an informant's name or personal identifier, if requested by a third party according to the informant's name or personal identifier, unless the informant's status as an informant has been officially confirmed.

§ 2.12 Definitions.

(a) *Act* and *FOIA* mean the Freedom of Information Act, 5 U.S.C. 552.

(b) *Bureau* refers to all constituent bureaus of the Department of the Interior, the Office of the Secretary, and the other Departmental offices. A list of bureaus is contained in Appendix B.

(c) *Working day* means a regular Federal workday. It does not include Saturdays, Sundays or public legal holidays.

§ 2.13 Records available.

(a) *Department policy.* It is the policy of the Department of the Interior to make the records of the Department available to the public to the greatest extent possible, in keeping with the spirit of the Freedom of Information Act.

(b) *Statutory disclosure requirement.* The Act requires that the Department, on a request from a member of the public submitted in accordance with the procedures in this subpart, make requested records available for inspection and copying.

(c) *Statutory exemptions.* Exempted from the Act's statutory disclosure requirement are matters that are:

(1)(i) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and

(ii) Are in fact properly classified pursuant to such Executive order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than the Privacy Act), provided that such statute—

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information—

(i) Could reasonably be expected to interfere with enforcement proceedings,

(ii) Would deprive a person of a right to a fair or an impartial adjudication,

(iii) Could reasonably be excpected to constitute an unwarranted invasion of personal privacy,

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information

compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigtion, information furnished by a confidential source,

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(d) *Decisions on requests.* It is the policy of the Department to withhold information falling within an exemption only if—

(1) Disclosure is prohibited by statute or Executive order or

(2) Sound grounds exist for invocation of the exemption.

(e) *Disclosure of reasonably segregable nonexempt material.* If a requested record contains material covered by an exemption and material that is not exempt, and it is determined under the procedures in this subpart to withhold the exempt material, any reasonably segregable nonexempt material shall be separated from the exempt material and released.

§ 2.14 Requests for records.

(a) *Submission of requests.* (1) A request to inspect or copy records shall be made to the installation where the records are located. If the records are located at more than one installation or if the specific location of the records is not known to the requester, he or she may direct a request to the head of the appropriate bureau or to the bureau's FOIA officer. Addresses for bureau heads and FOIA officers are contained in Appendix B.

(2) *Exceptions.* (i) A request for records located in all components of the Office of the Secretary (other than the Office of Hearings and Appeals) shall be submitted to: Director, Office of Administrative Services, U.S. Department of the Interior, Washington, DC 20240. A request for records located in the Office of Hearings and Appeals shall be submitted to: Director, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203.

(ii) A request for records of the Office of Inspector General shall be submitted to: Inspector General, Office of the Inspector General, U.S. Department of the Interior, Washington, DC 20240.

(iii) A request for records of the Office of the Solicitor shall be submitted to: Solicitor, Office of the Solicitor, U.S. Department of the Interior, Washington, DC 20240.

(b) *Form of requests.* (1) Requests under this subpart shall be in writing and must specifically invoke the Act.

(2) A request must reasonably describe the records requested. A request reasonably describes the records requested if it will enable an employee of the Department familiar with the subject area of the request to locate the record with a reasonable amount of effort. If such information is available, the request should identify the subject matter of the record, the date when it was made, the place where it was made, the person or office that made it, the present custodian of the record, and any other information that will assist in locating the requested record. If the request involves a matter known by the requester to be in litigation, the request should also state the case name and court hearing the case.

(3)(i) A request shall—

(A) Specify the fee category (commercial use, news media, educational institution, noncommercial scientific institution, or other) in which the requester claims the request to fall and the basis of this claim (see § 2.20(b)–(e) for definitions) and

(B) State the maximum amount of fees that the requester is willing to pay or include a request for a fee waiver.

(ii) Requesters are advised that, under § 2.20 (f) and (g), the time for responding to requests may be delayed—

(A) If a requester has not sufficiently identified the fee category applicable to the request,

(B) If a requester has not stated a willingness to pay fees as high as anticipated by the Department or

(C) If a fee waiver request is denied and the requester has not included an alternative statement of willingness to pay fees as high as anticipated by the Department.

(4) A request seeking a fee waiver shall, to the extent possible, address why the requester believes that the criteria for fee waivers set out in § 2.21 are met.

(5) To ensure expeditious handling, requests should be prominently marked, both the envelope and on the face of the request, with the legend "FREEDOM OF INFORMATION REQUEST."

(c) *Creation of records.* A request may seek only records that are in existence at the time the request is received. A request may not seek records that come into existence after the date on which it is received and may not require that new records be created in response to the request by, for example, combining or compiling selected items from manual files, preparing a new computer program, or calculating proportions, percentages, frequency distributions, trends or comparisons. In those instances where the Department determines that creating a new record will be less burdensome than disclosing large volumes of unassembled material, the Department may, in its discretion, agree to creation of a new record as an alternative to disclosing existing records.

§ 2.15 Preliminary processing of requests.

(a) *Scope of requests.* (1) Unless a request clearly specifies otherwise, requests to field installations of a bureau may be presumed to seek only records at that installation and requests to a bureau head or bureau FOIA officer may be presumed to seek only records of that bureau.

(2) If a request to a field installation of a bureau specifies that it seeks records located at other installations of the same bureau, the installation shall refer the request to the other installation(s) or the bureau FOIA officer for appropriate processing. The time limit provided in § 2.17(a) does not start until the request is received at the installation having the records or by the bureau FOIA officer.

(3) If a request to a bureau specifies that it seeks records of another bureau, the bureau may return the request (or the relevant portion thereof) to the requester with instructions as to how the request may be resubmitted to the other bureau.

(b) *Intradepartmental consultation and referral.* (1) If a bureau (other than the Office of Inspector General) receives a request for records in its possession that originated with or are of substantial concern to another bureau, it shall consult with that bureau before deciding whether to release or withhold the records.

(2) As an alternative to consultation, a bureau may refer the request (or the relevant protion thereof) to the bureau that originated or is substantially concerned with the records. Such referrals shall be made expeditiously and the requester shall be notified in writing that a referral has been made. A referral under this paragraph does not restart the time limit provided in § 2.17.

(c) *Records of other departments and agencies.* (1) If a requested record in the possession of the Department of the Interior originated with another Federal department or agency, the request shall be referred to that agency unless—

(i) The record is of primary interest to the Department,

(ii) The Department is in a better position than the originating agency to assess whether the record is exempt from disclosure, or

(iii) The originating agency is not subject to the Act.

The Department has primary interest in a record if it was developed or prepared pursuant to Department regulations, directives or request.

(2) In accordance with Executive Order 12356, a request for documents that were classified by another agency shall be referred to that agency.

(d) *Consultation with submitters of commercial and financial information.*

(1) If a request seeks a record containing trade secrets or commercial or financial information submitted by a person outside of the Federal government, the bureau processing the request shall provide the submitter with notice of the request whenever—

(i) The submitter has made a good faith designation of the information as commercially or financially sensitive, or

(ii) The bureau has reason to believe that disclosure of the information may result in commercial or financial injury to the submitter.

Where notification of a voluminous number of submitters is required, such notification may be accomplished by posting or publishing the notice in a place reasonably calculated to accomplish notification.

(2) The notice to the submitter shall afford the submitter a reasonable period within which to provide a detailed statement of any objection to disclosure. The submitter's statement shall explain the basis on which the information is claimed to be exempt under the FOIA, including a specification of any claim of competitive or other business harm that would result from disclosure. The statement shall also include a certification that the information is confidential, has not been disclosed to the public by the submitter, and is not routinely available to the public from other sources.

(3) If a submitter's statement cannot be obtained within the time limit for processing the request under § 2.17, the requester shall be notified of the delay as provided in § 2.17(f).

(4) Notification to a submitter is not required if:

(i) The bureau determines, prior to giving notice, that the request for the record should be denied;

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

(iii) Disclosure is required by a statute (other than the FOIA) or regulation (other than this subpart);

(iv) Disclosure is clearly prohibited by a statute, as described in § 2.13(c)(3);

(v) The information was not designated by the submitter as confidential when it was submitted, or a reasonable time thereafter, if the submitter was specifically afforded an opportunity to make such a designation; however, a submitter will be notified of a request for information that was not designated as confidential at the time of submission, or a reasonable time thereafter, if there is substantial reason to believe that disclosure of the information would result in competitive harm.

(vi) The designation of confidentiality made by the submitter is obviously frivolous; or

(vii) The information was submitted to the Department more than 10 years prior to the date of the request, unless the bureau has reason to believe that it continues to be confidential.

(5) If a requester brings suit to compel disclosure of information, the submitter of the information will be promptly notified.

§ 2.16 Action on initial requests.

(a) *Authority.* (1) Requests to field installations shall be decided by the head of the installation or by such higher authority as the head of the bureau may designate in writing.

(2) Requests to the headquarters of a bureau shall be decided only by the head of the bureau or an official whom the head of the bureau has in writing designated.

(3) Requests to the Office of the Secretary may be decided by the Director of Administrative Services, an Assistant Secretary or Assistant Secretary's designee, and any official whom the Secretary has in writing designated.

(4) A decision to withhold a requested record, to release a record that is exempt from disclosure, or to deny a fee waiver shall be made only after consultation with the office of the appropriate associate, regional, or field solicitor.

(b) *Form of grant.* (1) When a requested record has been determined to be available, the official processing the request shall notify the requester as to when and where the record is available for inspection or, as the case may be, when and how copies will be provided. If fees are due, the official shall state the amount of fees due and the procedures for payment, as described in § 2.20.

(2) If a requested record (or portion thereof) is being made available over the objections of a submitter made in accordance with § 2.15(d), both the requester and the submitter shall be notified of the decision. The notice to the submitter (a copy of which shall be made available to the requester) shall be forwarded a reasonable number of days prior to the date on which disclosure is to be made and shall include:

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

(ii) A specification of the portions of the record to be disclosed, if the submitter's objections were sustained in part; and

(iii) A specified disclosure date.

(3) If a claim of confidentiality has been found frivolous in accordance with § 2.15(d)(4)(vi) and a determination is made to release the information without consultation with the submitter, the submitter of the information shall be notified of the decision and the reasons therefor a reasonable number of days prior to the date on which disclosure is to be made.

(c) *Form of denial.* (1) A decision withholding a requested record shall be in writing and shall include:

(i) A reference to the specific exemption or exemptions authorizing the withholding;

(ii) If neither a statute or an Executive order requires withholding, the sound ground for withholding;

(iii) A listing of the names and titles or positions of each person responsible for the denial; and

(iv) A statement that the denial may be appealed to the Assistant Secretary—Policy, Budget and Administration and a description of the procedures in § 2.18 for appeal.

(2) A decision denying a request for failure to reasonably describe requested records or for other procedural deficiency or because requested records cannot be located shall be in writing and shall include:

(i) A description of the basis of the decision;

(ii) A list of the names and titles or positions of each person responsible; and

(iii) A statement that the matter may be appealed to the Assistant Secretary—Policy, Budget and Administration and a description of the procedures in § 2.18 for appeal.

§ 2.17 Time limits for processing initial requests.

(a) *Basic limit.* Requests for records shall be processed promptly. A determination whether to grant or deny a request shall be made within no more than 10 working days after receipt of a request. This determination shall be communicated immediately to the requester.

(b) *Running of basic time limit.* (1) The 10 working day time limit begins to run when a request meeting the requirements of § 2.14(b) is received at a field installation or bureau headquarters designated in § 2.14(a) to receive the request.

(2) The running of the basic time limit may be delayed or tolled as explained in § 2.20 (f), (g) and (h) if a requester—

(i) Has not stated a willingnes to pay fees as high as are anticipated and has not sought and been granted a full fee waiver, or

(ii) Has not made a required advance payment.

(c) *Extensions of time.* In the following unusual circumstances, the time limit for acting on an initial request may be extended to the extent reasonably necessary to the proper processing of the request, but in no case may the time limit be extended for more than 10 working days:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the installation processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request; or

(3) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the Department having substantial subject-matter interest therein.

(d) *Notice of extension.* A requester shall be notified in writing of an extension under paragraph (c) of this section. The notice shall state the reason for the extension and the date on which a determination on the request is expected to be made.

(e) *Treatment of delay as denial.* If no determination has been reached at the end of the 10 working day period for deciding an initial request, or an extension thereof under paragraph (c) of this section, the requester may deem the request denied and may exercise a right of appeal in accordance with § 2.18.

(f) *Notice of delay.* When a determination cannot be reached within the time limit, or extension thereof, the requester shall be notified of the reason for the delay, of the date on which a determination may be expected, and of the right to treat the delay as a denial for purposes of appeal to the Assistant Secretary—Policy, Budget and Administration, including a description of the procedures for filing an appeal in § 2.18.

§ 2.18 Appeals.

(a) *Right of appeal.* A requester may appeal to the Assistant Secretary—Policy, Budget and Administration when—

(1) Records have been withheld,

(2) A request has been denied for failure to describe requested records or for other procedural deficiency or because requested records cannot be located,

(3) A fee waiver has been denied, or

(4) A request has not been decided within the time limits provided in § 2.17.

(b) *Time for appeal.* An appeal must be received no later than 20 working days after the date of the initial denial, in the case of a denial of an entire request, or 20 working days after records have been made available, in the case of a partial denial.

(c) *Form of appeal.* (1) An appeal shall be initiated by filing a written notice of appeal. The notice shall be accompanied by copies of the original request and the initial denial and should, in order to expedite the appellate process and give the requester an opportunity to present his or her arguments, contain a brief statement of the reasons why the requester believes the initial denial to have been in error.

(2) The appeal shall be addressed to the Freedom of Information Act Appeals Officer, Office of the Assistant Secretary—Policy, Budget and Administration, U.S. Department of the Interior, Washington, DC 20240.

(3) To expedite processing, both the envelope containing a notice of appeal and the face of the notice should bear the legend "FREEDOM OF INFORMATION APPEAL."

§ 2.19 Action on appeals.

(a) *Authority.* Appeals shall be decided by the Assistant Secretary—Policy, Budget and Administration, or the Assistant Secretary's designee, after consultation with the Solicitor, the Director of Public Affairs and the appropriate program Assistant Secretary.

(b) *Time limit.* A final determination shall be made within 20 working days after receipt of an appeal meeting the requirements of § 2.18(c).

(c) *Extensions of time.* (1) If the time limit for responding to the initial request for a record was not extended under the provisions of § 2.17(c) or was extended for fewer than 10 working days, the time for processing of the appeal may be extended to the extent reasonably necessary to the proper processing of the appeal, but in no event may the extension, when taken together with any extension made during processing of the initial request, result in an aggregate extension with respect to any one request of more than 10 working days. The time for processing of an appeal may be extended only if one or more of the unusual circumstances listed in § 2.17(c) requires an extension.

(2) The appellant shall be advised in writing of the reasons for the extension and the date on which a final determination on the appeal is expected to be dispatched.

(3) If no determination on the appeal has been reached at the end of the 20 working day period, or the extension thereof, the requester is deemed to have exhausted his administrative remedies, giving rise to a right of review in a district court of the United States, as specified in 5 U.S.C. 552(a)(4). When no determination can be reached within the applicable time limit, the appeal will nevertheless continue to be processed. On expiration of the time limit, the requester shall be informed of the reason for the delay, of the date on which a determination may be reached to be dispatched and of the right to seek judicial review.

(d) *Form of decision.* (1) The final determination on an appeal shall be in writing and shall state the basis for the determination. If the determination is to release the requested records or portions thereof, the Assistant Secretary—Policy, Budget and Administration shall immediately make the records available or instruct the appropriate bureau to make them immediately available. If the determination upholds in whole or part the initial denial of a request for records, the determination shall advise the requester of the right to obtain judicial review in the United States District Court for the district in which the withheld records are located, or in which the requester resides or has his or her principal place of business or in the United States District Court for the District of Columbia, and shall set forth the names and titles or positions of each person responsible for the denial.

(2) If a requested record (or portion thereof) is being made available over the objections of a submitter made in accordance with § 2.15(d), the submitter shall be provided notice as described in § 2.16(b)(2).

§ 2.20 Fees.

(a) *Policy.* (1) Unless waived pursuant to the provisions of § 2.21, fees for responding to FOIA requests shall be charged in accordance with the provisions of this section and the schedule of charges contained in Appendix A to this part.

(2) Fees shall not be charged if the total amount chargeable does not exceed $15.00.

(3) Where there is a reasonable basis to conclude that a requester or group of requesters acting in concert has divided a request into a series of requests on a single subject or related subjects to avoid assessment of fees, the requests may be aggregated and fees charged accordingly.

(b) *Commercial use requests.* (1) A requester seeking records for commercial use shall be charged fees for costs incurred in document search, duplication and review.

(2) A commercial use requester may not be charged fees for time spent resolving legal and policy issues affecting access to requested records.

(3) A commercial use request is a request from or on behalf of a person who seeks information for a use or purpose that further the commercial, trade or profit interests of the requester or the person on whose behalf the request is made. The intended use of records may be determined on the basis of information submitted by a requester and from reasonable inferences based on the identity of the requester and any other available information.

(c) *Educational and noncommercial scientific institution requests.* (1) A requester seeking records under the auspices of an educational institution in furtherance of scholarly research or a noncommercial scientific institution in furtherance of scientific research shall be charged for document duplication, except that the first 100 pages of paper copies (or the equivalent cost thereof if the records are in some other form) shall be provided without charge.

(2) Such requesters may not be charged fees for costs incurred in—

(i) Searching for requested records,

(ii) Examining requested records to determine whether they are exempt from mandatory disclosure,

(iii) Deleting reasonably segregable exempt matter,

(iv) Monitoring the requesters' inspection of agency records, or

(v) Resolving legal and policy issues affecting access to requested records.

(3) An "educational institution" is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, which operates a program or programs of scholarly research.

(4) A "noncommercial scientific institution" is an institution that is not operated for commerce, trade or profit 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.

(d) *News media requests.* (1) A representative of the new media shall be charged for document duplication, except that the first 100 pages of paper copies (or the equivalent cost thereof if the records are in some other form) shall be provided without charge.

(2) Representatives of the news media may not be charged fees for costs incurred in—

(i) Searching for requested records,

(ii) Examining requested records to determine whether they are exempt from mandatory disclosure,

(iii) Deleting reasonably segregable exempt matter,

(iv) Monitoring the requester's inspection of agency records, or

(v) Resolving legal and policy issues affecting access to requested records.

(3)(i) A "representative of the news media" is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that is (or would be) of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category.

(ii) Free-lance journalists may be considered "representatives of the news media" if they demonstrate a solid basis for expecting publication through a news organization, even though not actually employed by it. A publication contract or past record of publication, or evidence of a specific free-lance assignment from a news organization may indicate a solid basis for expecting publication.

(e) *Other requests.* (1) A requester not covered by paragraphs (b), (c) or (d) of this section shall be charged fees for document search and duplication, except that the first two hours of search time and the first 100 pages of paper copies (or the equivalent cost thereof if the records are in some other form) shall be provided without charge.

(2) Such requesters may not be charged for costs incurred in—

(i) Examining requested records to determine whether they are exempt from disclosure,

(ii) Deleting reasonably segregable exempt matter,

(iii) Monitoring the requester's inspection of agency records, or

(iv) Resolving legal and policy issues affecting access to requested records.

(f) *Requests for clarification.* Where a request does not provide sufficient information to determine whether it is covered by paragraph (b), (c), (d) or (e) of this section, the requester should be asked to provide additional clarification. If it is necessary to seek such clarification, the request may be deemed to have not been received for purposes of the time limits established in § 2.17 until the clarification is received. Requests to requesters for clarification shall be made promptly.

(g) *Notice of anticipated fees.* Where a request does not state a willingness to pay fees as high as anticipated by the Department, and the requester has not sought and been granted a full waiver of fees under § 2.21, the request may be deemed to have not been received for purposes of the time limits established in § 2.17 until the requester has been notified of and agrees to pay the anticipated fee. Advice to requesters with respect to anticipated fees shall be provided promptly.

(h) *Advance payment.* (1) Where it is anticipated that allowable fees are likely to exceed $250.00 and the requester does not have a history of prompt payment of FOIA fees, the requester may be required to make an advance payment of the entire fee before processing of his or her request.

(2) Where a requester has previously failed to pay a fee within 30 calendar days of the date of billing, processing of any new request from that requester shall ordinarily be suspended until the requester pays any amount still owed, including applicable interest, and makes advance payment of allowable fees anticipated in connection with the new request.

(3) Advance payment of fees may not be required except as described in paragraphs (h) (1) and (2) of this section.

(4) Issuance of a notice requiring payment of overdue fees or advance payment shall toll the time limit in § 2.17 until receipt of payment.

(i) *Form of payment.* Payment of fees should be made by check or money order payable to the Department of the Interior or the bureau furnishing the information. The term United States or the initials "U.S." should not be included on the check or money order. Where appropriate, the official responsible for handling a request may require that payment by check be made in the form of a certified check.

(j) *Billing procedures.* A bill for collection, Form DI–1040, shall be prepared for each request that requires collection of fees. The requester shall be provided the first sheet of the DI–1040. This Accounting Copy of the Form shall be transmitted to the agency's finance office for entry into accounts receivable records. Upon receipt of payment from the requester, the recipient shall forward the payment along with a copy of the DI–1040 to the finance office.

(k) *Collection of fees.* The bill for collection or an accompanying letter to the requester shall include a statement that interest will be charged in accordance with the Debt Collection Act of 1982, 31 U.S.C. 3717, and implementing regulations, 4 CFR 102.13, if the fees are not paid within 30 calendar days of the date of the bill for collection is mailed or hand-delivered to the requester. This requirement does not apply if the requester is a unit of state or local government. Other authorities of the Debt Collection Act of 1982 shall be used, as appropriate, to collect the fees (see 4 CFR Parts 101–105).

§ 2.21 Waiver of fees.

(a) *Statutory fee waiver.* (1) Documents shall be furnished without charge or at a charge reduced below the fees chargeable under § 2.20 and Appendix A if disclosure of the information is in the public interest because it—

(i) Is likely to contribute significantly to public understanding of the operations or activities of the government and

(ii) Is not primarily in the commercial interest of the requester.

(2) Factors to be considered in determining whether disclosure of information "is likely to contribute significantly to public understanding of the operations or activities of the government" are the following:

(i) Does the record concern *the operations or activities of the government?* Records concern the operations or activities of the government if they relate to or will illuminate the manner in which the Department or a bureau is carrying out identifiable operations or activities or the manner in which an operation or activity affects the public. The connection between the records and the operations and activities to which they are said to relate should be clear and direct, not remote and attenuated. Records developed outside of the government and submitted to or obtained by the Department may relate to the operations and activities of the government if they are informative on how an agency is carrying out its regulatory, enforcement, procurement or other activities that involve private entities.

(ii) If a record concerns the operations or activities of the government, is its disclosure *likely to contribute to public understanding* of these operations and activities? The likelihood of a contribution to public understanding will depend on consideration of the content of the record, the identity of the requester, and the interrelationship between the two. Is there a logical connection between the content of the requested record and the operations or activities in which the requester is interested? Are the disclosable contents of the record meaningfully informative on the operations or activities? Is the focus of the requester on contribution to public understanding, rather than on the individual understanding of the requester or a narrow segment of interested persons? Does the requester have expertise in the subject area and the ability and intention to disseminate the information to the general public or otherwise use the information in a manner that will contribute to public understanding of government operations or activities? Is the requested information sought by the requester because it may be informative on government operations or activities or because of the intrinsic value of the information independent of the light that it may shed on government operations or activities?

(iii) If there is likely to be a contribution to public understanding, will that contribution be *significant?* A contribution to public understanding will be significant if the information disclosed is new, clearly supports public oversight of Department operations, including the quality of Department activities and the effect of policy and regulations on public health and safety, or otherwise confirms or clarifies data on past or present operations of the Department. A contribution will not be significant if disclosure will not have a positive impact on the level of public understanding of the operations or activities involved that existed prior to the disclosure. In particular, a significant contribution is not likely to arise from disclosure of information already in the public domain because it has, for example, previously been published or is routinely available to the general public in a public reading room.

(3) Factors to be considered in determining whether disclosure "is primarily in the commercial interest of the requester" are the following:

(i) Does the requester have a *commercial interest* that would be furthered by the requested disclosure? A commercial interest is a commercial, trade or profit interest as these terms are commonly understood. An entity's status is not determinative. Not only profit-making corporations, but also individuals or other organizations, may have a commercial interest to be served by disclosure, depending on the circumstances involved.

(ii) If the requester has a commercial interest, will disclosure be *primarily* in that interest? The requester's commercial interest is the primary interest if the magnitude of that interest is greater than the public interest to be served by disclosure. Where a requester is a representative of a news media organization seeking information as part of the news gathering process, it may be presumed that the public interest outweighs the organization's commercial interest.

(4) *Notice of denial.* If a requested statutory fee waiver or reduction is denied, the requester shall be notified in writing. The notice shall include:

(i) A statement of the basis on which the waiver or reduction has been denied.

(ii) A listing of the names and titles or positions of each person responsible for the denial.

(iii) A statement that the denial may be appealed to the Assistant Secretary—Policy, Budget and Administration and a description of the procedures in § 2.18 for appeal.

(b) *Discretionary waivers.* Fees otherwise chargeable may be waived at the discretion of a bureau if a request involves:

(1) Furnishing unauthenticated copies of documents reproduced for gratuitous distribution;

(2) Furnishing one copy of a personal document (e.g., a birth certificate) to a person who has been required to furnish it for retention by the Department;

(3) Furnishing one copy of the transcript of a hearing before a hearing officer in a grievance or similar proceeding to the employee for whom the hearing was held.

(4) Furnishing records to donors with respect to their gifts;

(5) Furnishing records to individuals or private non-profit organizations

having an official voluntary or cooperative relationship with the Department to assist the individual or organization in its work with the Department;

(6) Furnishing records to state, local and foreign governments, public international organizations, and Indian tribes, when to do so without charge is an appropriate courtesy, or when the recipient is carrying on a function related to that of the Department and to do so will help to accomplish the work of the Department;

(7) Furnishing a record when to do so saves costs and yields income equal to the direct cost of providing the records (e.g., where the Department's fee for the service would be included in a billing against the Department);

(8) Furnishing records when to do so is in conformance with generally established business custom (e.g., furnishing personal reference data to prospective employers of former Department employees);

(9) Furnishing one copy of a record in order to assist the requester to obtain financial benefits to which he or she is entitled (e.g., veterans or their dependents, employees with Government employee compensation claims or persons insured by the Government).

§ 2.22 Special rules governing certain information concerning coal obtained under the Mineral Leasing Act.

(a) *Definitions.* As used in the section:

(1) "Act" means the Mineral Leasing Act of February 25, 1920, as amended by the Act of August 4, 1976, Pub. L. 94-377, 90 Stat. 1083 (30 U.S.C. 181 *et seq.*), and the Mineral Leasing Act for Acquired Lands, as amended (30 U.S.C. 351 *et seq.*)

(2) "Exploration license" means a license issued by the Secretary of the Interior to conduct coal exploration operations on land subject to the Act pursuant to the authority in section 2(b) of the Act, as amended (30 U.S.C. 201(b)).

(3) "Fair-market value of coal to be leased" means the minimum amount of a bid the Secretary has determined he is willing to accept in leasing coal within leasing tracts offered in general lease sales or reserved and offered for lease to public bodies, including Federal agencies, rural electric cooperatives, or non-profit corporations, controlled by any of such entities pursuant to section 2(a) of the Act (30 U.S.C. 201(a)(1)).

(4) "Information" means data, statistics, samples and other facts, whether analyzed or processed or not, pertaining to Federal coal resources, which fit within an exemption to the Freedom of Information Act, 5 U.S.C. 552(b).

(b) *Applicability.* This section applies to the following categories of information:

(1) *Category A.* Information provided to or obtained by a bureau under section 2(b)(3) of the Act from the holder of an exploration license;

(2) *Category B.* Information acquired from commercial or other sources under service contract with Geological Survey pursuant to section 8A(b) of the Act, and information developed by the Geological Survey under an exploratory program authorized by section 8A of the Act;

(3) *Category C.* Information obtained from commercial sources which the commercial source acquired while not under contract with the United States Government;

(4) *Category D.* Information provided to the Secretary by a federal department or agency pursuant to section 8A(e) of the Act; and

(5) *Category E.* The fair-market value of coal to be leased and comments received by the Secretary with respect to such value.

(c) *Availability of information.* Information obtained by the Department from various sources will be made available to the public as follows:

(1) *Category A—Information.* Category A information shall not be disclosed to the public until after the areas to which the information pertains have been leased by the Department, or until the Secretary determines that release of the information to the public would not damage the competitive position of the holder of the exploration license, whichever comes first.

(2) *Category B—Information.* Category B information shall not be withheld from the public; it will be made available by means of and at the time of open filing or publication by Geological Survey.

(3) *Category C—Information.* Category C information shall not be made available to the public until after the areas to which the information pertains have been leased by the Department.

(4) *Category D—Information.* Category D information shall be made available to the public under the terms and conditions to which, at the time he or she acquired it, the head of the department or agency from whom the Secretary later obtained the information agreed.

(5) *Category E—Information.* Category E information shall not be made public until the lands to which the information pertains have been leased, or until the Secretary has determined that its release prior to the issuance of a lease is in the public interest.

4. Appendices A and B to 43 CFR Part 2 are revised as follows:

Appendix A—Fees

The following uniform fee schedule is applicable to all constituent units of the Department. It states the fees to be charged to members of the public for services performed in searching for, reviewing and duplicating requested records in connection with FOIA requests made under Subpart B of this part and to services performed in making documents available for inspection and copying under Subpart A of this part. The duplicating fees stated in the schedule are also applicable to duplicating of records in response to requests made under the Privacy Act. The schedule also states the fee to be charged for certification of documents.

(1) *Copies, basic fee.* For copies of documents reproduced on a standard office copying machine in sizes to 8½" x 14", the charge will be $0.13 per page.

Examples: For one copy of a three-page document, the fee would be $0.39. For two copies of a three-page document, the fee would be $0.78. For one copy of a 60-page document, the fee would be $7.80.

(2) *Copies, documents requiring special handling.* For copies of documents which require special handling because of their age, size, etc., cost will be based on direct costs of reproducting the materials.

(3)-(4) [Reserved]

(5) *Searches.* For each quarter hour, or portion thereof, spent by clerical personnel in manual searches to locate requested records: $2.30. For each quarter hour, or portion thereof, spent by professional or managerial personnel in manual searches to locate requested records because the search cannot be performed by clerical personnel: $4.65.

Search time for which fees may be charged includes all time spent looking for material that is responsive to a request, including line-by-line or page-by-page search to determine whether a record is responsive, even if the search fails to locate records or the records located are determined to be exempt from disclosure. Searches will be conducted in the most efficient and least expensive manner, so as to minimize costs for both the agency and the requester. Line-by-line or page-by-page identification should not be necessary if it is clear on the face of a document that it is covered by a request.

(6) *Review of records.* For each quarter hour, or portion thereof, spent by clerical personnel in reviewing records: $2.30. For each quarter hour, or portion thereof, spent by professional or managerial personnel in reviewing records: $4.65.

Review is the examination of documents located in response to a commercial use request to determine whether any portion of any document located is permitted to be withheld and the subsequent processing of documents for disclosure by excising exempt material or otherwise preparing them for release. Review does not include time spent in resolving general legal or policy issues regarding the application of exemptions.

(7) [Reserved]