

FOIA MANUAL APPENDIX
(SUBSTANTIVE PORTION)

FOIA MANUAL (SUBSTANTIVE PORTION) APPENDIX (“SA”)

CONTENTS:	<u>Page (s)</u>
A. Freedom of Information Act, 5 U.S.C. 552	SA 1
B. Overview of the FOIA.....	SA 9
C. Executive Order No. 12600, 52 F.R. 23781 (June 23, 1987)	SA 13
D. OMB Fee Schedule and Guidelines, 52 Federal Register 10012 (1987)	SA 15

(These guidelines are mentioned in both the FOIA Manual (Procedural Portion) and the FOIA Manual (Substantive Portion). However, the guidelines are attached only to the FOIA Manual (Substantive Portion).

E. Administrative Bulletin AB 97-28: Agency E-mail Policy dated March 19, 1997.....	SA 24
F. Office of Personnel Management Regulation § 293.311	SA 28
G. Proposed Board Rule and Regulation, 29 C.F.R. 102.117	SA 29

(This proposed Board Rule and Regulation is mentioned in both the FOIA Manual (Procedural Portion) and the FOIA Manual (Substantive Portion). However, it is attached only to the FOIA Manual (Substantive Portion).

THE FREEDOM OF INFORMATION ACT
5 U.S.C. § 552, As Amended by Public Law
Newly enacted provisions that became effective
on March 31, 1997 are in boldface type;
New provisions that became effective
on October 2, 1997 are in bold italics

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case or a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules or general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected

No.104-231, 110 Stat. 2422

thereby is deemed published in the Federal Register when incorporated by reference therein with the approval or the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject or subsequent requests for substantially the same records; and

(E) a general index of the records referred to under subparagraph (D);

(F)

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement or policy, interpretation, or staff manual or instruction, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion

is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of an index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member or the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

- (i) it has been indexed and either made available or published as provided by this paragraph; or
 - (ii) the party has actual and timely notice of the terms thereof.
- (3) (A) Except with respect to the records made available under paragraphs (1) and (2) or this subsection, each agency, upon request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
- (B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes or this section
- (C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would

significantly interfere with the operation or the agency's automated information system.

- (D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose or locating those records which are responsive to a request.

- (4) (A) (i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing or requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

- (ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative or the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

- (iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in

the commercial interest of the requester.

- (iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in the course of processing a request under this section. No fee may be charged by any agency under this section--
 - (I) if the costs or routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or
 - (II) for any request described in clause (ii)(II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.
 - (v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.
 - (vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types or records.
 - (vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter; de novo, provided that the court's review of the matter shall be limited to the record before the agency.
- (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to

enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

- (C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

[(D) Repealed by Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.]

- (E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

- (F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The

Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) (i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person

making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C).

(iii) As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular requests--

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

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

(III) 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 agency having substantial subject matter interest therein.

(iv) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for the aggregation of certain requests by the same requestor, or by a group of requestors acting in concert, if the agency reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances specified in this subparagraph, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(C) (i) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(ii) For purposes of this subparagraph, the term “exceptional circumstances” does not include a delay that results from a predictable agency workload of requests under this section, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

(iii) Refusal by a person to reasonably modify the scope of a request or arrange an alternative time frame for processing the request (or a modified request) under clause (ii) after being given an opportunity to do so by the agency to whom the person made the request shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this subparagraph.

(D) (i) Each agency may promulgate regulations, pursuant to notice and receipt of public comment, providing for multitrack processing of requests for records based on the amount of work or time (or both) involved in processing requests.

(ii) Regulations under this subparagraph may provide a person making a request that does not qualify for the fastest multitrack processing an opportunity to limit the scope of the request in order to qualify for faster processing.

(iii) This subparagraph shall not be considered to affect the requirement under subparagraph (C) to exercise due diligence.

(E) (i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment providing for expedited processing of requests for records--

(I) In cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure-

(I) that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request within, 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

(iii) An agency shall process as soon as practicable any request for records to which the agency has granted expedited processing under this subparagraph. Agency action to deny or affirm denial of a request for expedited processing pursuant to this subparagraph, and failure by an agency to respond in a timely manner to such a request shall be subject to judicial review under paragraph (4), except that the judicial review shall be based on the record before the agency at the time of the determination.

(iv) A district court of the United States shall not have jurisdiction to review any agency denial of expedited processing of a request for records after the agency has provided a complete response to the request.

(v) For purposes of this subparagraph, the term “compelling need” means-

(I) that a failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.

(vi) A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person’s knowledge and belief.

(F) In denying a request for records, in whole or in part, any agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person

making the request, unless providing such estimate would harm an interest protected by such the exemption in subsection (b0 pursuant to which the denial is made.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order,

(2) related solely to the internal personnel rules and practices of any agency,

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter 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 (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) 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 investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecution, would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expect 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.

Any reasonably segregable portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

- (c) (1) Whenever a request is made which involves access to records described in subsection (b) (7) (A) and-
 - (A) the investigation or proceeding involves a possible violation of criminal law, and
 - (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
- (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed

- (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.
- (d) This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.
- (e) (1) On or before February 1 of each year, each agency shall submit to the Attorney General of the United States a report which shall cover the preceding fiscal year and which shall include--
 - (A) the number of determinations made by the agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;
 - (B) (i) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information; and
 - (ii) a complete list or all statutes that the agency relies upon to authorize the agency to withhold information under subsection (b)(3), a description of whether a court has upheld the decision of the agency to withhold information under each such statute, and a concise description of the scope of any information withheld;
 - (C) the number or requests for records pending before the agency as of September 30 of the preceding year, and the median number or days that such requests had been pending before the agency as of that date;
 - (D) the number of requests for records received by the agency and the number

of requests which the agency processed;

(E) the median number or days taken by the agency to process different types or requests;

(F) the total amount of fees collected by the agency for processing requests; and

(G) the number or full-time staff of the agency devoted to processing requests for records under this section, and the total amount expected by the agency for processing such requests.

(2) Each agency shall make each such report available to the public including by computer telecommunications, or if computer telecommunications means have not been established by the agency, by other electronic means.

(3) The Attorney General of the United States shall make each report which has been made available by electronic means available at a single electronic access point. The Attorney General of the United States shall notify the Chairman and ranking minority member or the Committee on Government Reform and Oversight or the House or Representatives and the Chairman and ranking minority member or the Committees on Governmental Affairs and the Judiciary of the Senate, no later than April 1 of the year in which each such report is issued, that such reports are available by electronic means.

(4) The Attorney General of the United States, in consultation with the Director of the Office of Management and Budget, shall develop reporting and performance guidelines in connection with reports required by this subsection by October 1, 1997, and may establish additional requirements for such reports as the Attorney General determines may be useful.

(5) The Attorney General of the United States

shall submit an annual report on or before April 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subparagraphs (E), (F), and (G) of subsection (a)(4). Such report shall include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(f) For purposes of this section, the term--

(1) "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

(2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements or this section when maintained by an agency in any format, including an electronic format.

(g) The head or each agency shall prepare and make publicly available upon request, reference material or a guide for requesting records or information from the agency, subject to the exemptions in subsection (b), including--

(1) an index of all major information systems of the agency;

(2) a description of major information and record locator systems maintained by the agency; and

(3) a handbook for obtaining various types and categories of public information from the agency pursuant to chapter 35 or title 44, and under this section.

Overview of the FOIA

The FOIA is an Act of Congress, originally passed in 1966, and substantially amended in 1974, 1986 and 1996. The purpose of the FOIA, since its inception, has been “... to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”¹ The disclosure of “[o]fficial information that sheds light on any agency’s performance of its statutory duties falls squarely within that statutory purpose.”² FOIA disclosure is the rule rather than the exception. The task of employees in processing FOIA requests is to strike a balance between the public’s right of access to requested information and the Agency’s legitimate need to maintain the confidentiality of certain types of information. Thus, Congress coupled FOIA’s liberal disclosure provisions with nine specific exemptions that allow some types of information to be withheld, to the minimum extent necessary to safeguard the Agency’s effectiveness by preserving the confidentiality of certain personal, commercial and other governmental information.

Following is a brief summary highlighting the provisions of the FOIA statute:

The FOIA has two automatic disclosure provisions—(a)(1) and (a)(2). The first automatic disclosure provision requires the publication in the Federal Register of basic information regarding how the agency transacts its business, including its rules and regulations, statements of procedure and its organization and functions.³ The second automatic disclosure provision requires the creation of conventional and electronic reading rooms, where certain categories of documents are routinely made available for public inspection and copying, unless the materials are promptly published and copies offered for sale.⁴ Reading room documents consist of: final opinions and orders made in the adjudication of cases, agency statements of policy and interpretations which

¹ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

² U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 773 (1989).

³ 5 U.S.C. 552(a)(1).

⁴ 5 U.S.C. 552(a)(2). Further, the FOIA (5 U.S.C.552(a)(5)), requires that a record of each member’s final votes in every agency proceeding be made available for public inspection. While not technically within the FOIA, Agency records consisting of “the formal documents constituting the record in a case or proceeding are matters of official record” (e.g. docketed pleadings, transcripts and Board and General Counsel Exhibits put into the record at a hearing) and are available to the public for inspection and copying during normal business hours at the Board’s office in Washington, D.C. or at the appropriate Regional office. See 29 C.F.R. 102.117(b)(1).

are not published in the Federal Register, administrative staff manuals and instructions that affect the public, and copies of records which have become or are likely to become the subject of subsequent FOIA requests.⁵ All of these documents must be indexed to facilitate public inspection.⁶

Subsection (a)(3) is the most commonly utilized portion of the FOIA,⁷ covering proper access requests from any person for those records which are not automatically disclosed, as just discussed, or which are not exempt under one of the nine specific exemptions or exclusions.⁸ These requests require search, including by electronic means, and review by Agency personnel prior to disclosure to the requester in his preferred form or format, including electronic format. This subsection also requires that each agency promulgate administrative regulations regarding the time,⁹ place, fees and procedures to be followed in making FOIA request.

⁵ 5 U.S.C. 552 (a)(2)(A)-(D). While regions may maintain a "reading room" which generally refers to its library and files (such as charges, petitions and complaints) which are subject to public inspection and copying, it is NOT required that each region or resident office maintain a reading room or a dedicated computer for access to reading room material. The Agency's home page (<http://www.nlr.gov>) contains most of the reading room documents. Access to a computer and the website does not have to be provided by the regional office.

⁶ 5 U.S.C. 552 (a)(2) & 2(E). The Legal Research and Policy Planning Branch publishes indexes of Board, General Counsel and final decisions. These include the "Classified Index of NLRB Decisions and Related Court Decisions," "Classified Index of Decisions of the Regional Directors of the NLRB in Representation Proceedings" and the "Classified Index of Dispositions of ULP Charges by the General Counsel of the NLRB (RD Dismissal Letters, Advice Memoranda, Appeals Memoranda and Dispositions)." A general index of the frequently requested material (552(a)(2)(D)) must also be published and be available online by December 31, 1999.

⁷ 5 U.S.C. 552(a)(3).

⁸ 5 U.S.C. 552 (b)(1)-(9). The legal principles to be utilized in the application of these exemptions are the focus of this Substantive Manual.

⁹ The FOIA itself (552 (a)(6)(A) sets forth an initial response time of 20 days and an appeal determination within 20 days after receipt (excluding Saturdays, Sundays and legal public holidays). Further, the FOIA sets forth detailed procedures which impact the timing of a response. These include: 552(a)(6)(B)(extension based on "unusual circumstances" and "aggregation" of related requests), (a)(6)(C)(Agency failure to comply with time limits constitutes exhaustion unless "exceptional circumstances" exist for delay), (a)(6)(D)("multitrack processing" for faster processing), and (a)(6)(E)(expedited processing where demonstrated "compelling need"). The Agency is in the process of promulgating regulations regarding expedited processing under 552(a)(6)(E).

In Subsection (a)(4), each agency is required to promulgate regulations specifying the schedule of fees applicable to processing requests, including fee category placement and the applicability of fee waivers or reductions.¹⁰ These schedules are to conform to the Office of Management and Budget's uniform schedule of fees. The OMB policy memorandum on "FOIA Uniform Fee Schedules and Guidelines" (52 Fed. Reg. 10,012 (1987), see Appendix SA 15-23), sets forth the underlying rationale, binding on all agencies, for fee category placement and fee waivers.¹¹

Further, this subsection provides that upon complaint,¹² with an answer required within 30 days¹³, United States District Courts have jurisdiction, with de novo review, to enjoin an agency from withholding agency records. If a requester substantially prevails, reasonable attorneys fees and costs may be awarded.¹⁴ If such occurs and there is a written finding that the agency personnel acted "arbitrarily or capriciously" in withholding the records, the Special Counsel initiates a proceeding to determine whether disciplinary action is warranted for the employee "primarily responsible" for the withholding.¹⁵ The Special Counsel's recommendations are submitted to the agency, which takes the recommended corrective action. *Id.* Further, in the event a court order is not complied with, the district court may "punish for contempt" the "responsible employee."¹⁶

In Subsection (d), the FOIA further provides that the Act was not intended to authorize any new withholding of information, including from Congress.¹⁷ In Subsection (e), the FOIA also requires a detailed annual FOIA report to Congress on a fiscal year basis. Beginning with 1998 fiscal year, this report will be electronically transmitted to the Attorney General for submission to Congress and will be made available on the World Wide Web.¹⁸

¹⁰ 5 U.S.C. 552 (a)(4)(A). See Board Rules & Regulations, 29 C.F.R. 102.117(d).

¹¹ For a more complete discussion, see FOIA Manual (Substantive Section) on "Fees and Fee Waivers under the FOIA."

¹² 5 U.S.C. 552(a)(4)(B).

¹³ 5 U.S.C. 552(a)(4)(C).

¹⁴ 5 U.S.C. 552(a)(4)(E).

¹⁵ 5 U.S.C. 552(a)(4)(F).

¹⁶ 5 U.S.C. 552(a)(4)(G).

¹⁷ 5 U.S.C. 552(d). This refers to the body of Congress or its committees. Individual members have the same status as "any person" under 5 U.S.C. 552 (a)(3).

¹⁸ 5 U.S.C. 552(e).

In Subsection (f), the FOIA includes limited definitions. The term “agency” includes nearly all executive branch entities.¹⁹ The term “record” is expanded to include information maintained in an electronic format.²⁰ Finally, in Subsection (g), the Act requires each agency to prepare and make available a reference guide for requesting records or information from the agency.²¹ The reference guide is required to contain an index of the agency’s major information systems, a description of major information and record locator systems maintained by the agency, and a handbook for obtaining various types and categories of public information from the agency. When available, the guide will be distributed to all FOIA officers and be made available in the agency’s reading room and at the agency’s web site.

The NLRB has promulgated Subpart K, Section 102.117 of its *Rules and Regulations*, 29 C.F.R. 102.117, which sets forth the Agency’s administrative FOIA procedures. Subparagraphs (c) and (d) set forth the administrative procedures that a FOIA requester must follow in making a FOIA request to the Agency, filing an administrative appeal, and exhausting administrative remedies within given time constraints. They also provide for fee category placement, assessment of costs and the standards for determining whether a fee waiver will be granted. Subparagraph (e) incorporates the nine FOIA exemptions by reference and grants to the General Counsel and the Board the right to make discretionary FOIA disclosures.

¹⁹ 5 U.S.C. 552(f)(1).

²⁰ “Agency records,” however, is a judicial construct not precisely defined in the FOIA. For a complete discussion of what is an “agency record,” see FOIA Manual (Substantive Portion) “Agency Records and Electronic FOIA.”

²¹ 5 U.S.C. 552(g)

EXECUTIVE ORDER NO. 12600

June 23, 1987, 52 F.R. 23781

PREDISCLOSURE NOTIFICATION PROCEDURES FOR
CONFIDENTIAL COMMERCIAL INFORMATION

By the authority vested in me as President by the Constitution and statutes of the United States of America, and in order to provide predisclosure notification procedures under the Freedom of Information Act [this section] concerning confidential commercial information, and to make existing agency notification provisions more uniform, it is hereby ordered as follows:

Section 1. The head or each Executive department and agency subject to the Freedom of Information Act [5 U.S.C.A. § 552] shall, to the extent permitted by law, establish procedures to notify submitters of records containing confidential commercial information as described in section 3 of this Order, when those records are requested under the Freedom Information Act [FOIA], 5 U.S.C. 552, as amended, if after reviewing the request, the responsive records, and any appeal the requester, the department or agency determines that it may be required to disclose the records. Such notice requires that an agency use good-faith efforts to advise submitters of confidential commercial information of the procedures established under this Order. Further, 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.

Sec. 2. For purposes of this Order following definitions apply:

(a) "Confidential commercial information" means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4) [subsec. (b)(4) of this

section], because disclosure could reasonably be expected to cause substantial competitive harm.

(b) "Submitter" means any person or entity who provides confidential commercial information to the government the term "submitter" includes, but is not limited to corporations, state governments, and foreign governments.

Sec. 3. (a) For confidential commercial information submitted prior to January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, provide a submitter with notice pursuant to section 1 whenever:

(i) records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) the department or agency has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(b) For confidential commercial information submitted on or after January 1, 1988, the head of each Executive department or agency shall, to the extent permitted by law, establish procedures to permit submitters of confidential commercial information to designate, at the time the information is submitted to the Federal government or a reasonable time thereafter, any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. Such agency procedures may provide for the expiration, after a specified period of time or changes in circumstances, of designations of competitive harm made by submitters. Additionally, such procedures may permit the agency to designate specific classes of information that will be treated by the agency as if the information had been so designated by the submitter. The head of each Executive department or agency shall, to the extent permitted by law, provide the submitter notice in

accordance with section 1 of this Order whenever the department or agency determines that it may be required to disclose records:

(i) designated pursuant to this subsection; or

(ii) the disclosure of which the department or agency has reason to believe could reasonably be expected to cause substantial competitive harm.

Sec. 4. When notification is pursuant to section 1, each agency's procedures shall, to the extent permitted by law, afford the submitter a reasonable period of time in which the submitter or its designee may object to the disclosure or any specified portion of the information and to state all grounds upon which disclosure is opposed.

Sec. 5. Each agency shall give careful consideration to all such specified grounds for nondisclosure prior to making an administrative determination of the issue. In all instances when the agency determines to disclose the requested records, its procedures shall provide that the agency give the submitter a written statement briefly explaining why the submitter's objections are not sustained. Such statement shall, to the extent permitted by law, be provided a reasonable number of days prior to a specified disclosure date.

Sec. 6. Whenever a FOIA requester brings suit seeking to compel disclosure or confidential commercial information, each agency's procedures shall require that the submitter be promptly notified.

Sec. 7. The designation and notification procedures required by this Order shall be established by regulations, after notice and public comment. If similar procedures or regulations already exist, they should be reviewed for conformity and revised where necessary. Existing procedures or regulations need not be modified if they are in compliance with this Order.

Sec. 8. The notice requirements of this Order need not be followed if:

(a) The agency determines that the information should not be disclosed;

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

(c) Disclosure of the information is required by law (other than 5 U.S.C. 552);

(d) The disclosure is required by an agency rule that (1) was adopted pursuant to notice and public comment, (2) specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act [5 U.S.C.A. § 552],

and (3) provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(e) The information requested is not designated by the submitter as exempt from disclosure in accordance With agency regulations promulgated pursuant to section 7, when the submitter had an opportunity to do so at the time or submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(f) The designation made by the submitter in accordance with agency regulations promulgated pursuant to section 7 appears obviously frivolous; except that, in such case, the agency must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date.

Sec. 9. Whenever an agency notifies a submitter that it may be required to disclose information pursuant to section 1 or this Order, the agency shall also notify the requester that notice and an opportunity to comment are being provided the submitter. Whenever an agency notifies a submitter of a final decision pursuant to section 5 of this Order, the agency shall also notify the requester.

Sec. 10. This Order is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines

AGENCY: Office of Management and Budget.

ACTION: Final publication of Fee Schedule and Guidelines implementing certain provisions of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570).

SUMMARY: These Guidelines implement certain provisions of the Freedom of Information Reform Act of 1986 which require the Office of Management and Budget (OMB) to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA.

EFFECTIVE DATE: April 27, 1987. Agencies are required to promulgate regulations pursuant to notice and comment implementing the provisions of this schedule and guidelines by April 25, 1987. They should develop and publish proposed rules as soon as possible after publication of this OMB Fee Schedule and Guidelines. Agencies will have met the statutory deadline if they promulgate final versions of such implementing regulations in the Federal Register on or before that date, even though their regulations will not be effective until 30 days after the date of publication.

FOR FURTHER INFORMATION

CONTACT: Robert N. Veeder, Office of Management and Budget, Office of Information and Regulatory Affairs, Information Policy Branch, Telephone (202) 395-4814.

SUPPLEMENTARY INFORMATION:

The Freedom of Information Reform Act of 1986 (Pub. L. 99-570) amended the Freedom of Information Act (5 U.S.C. 552) by modifying the terms of exemption 7 and by supplying new provisions relating to the charging and waiving of fees. The Reform Act specifically required the Office of Management and Budget to develop and issue a schedule of fees and guidelines, pursuant to notice and comment.

On January 16, 1987, OMB published a proposed fee schedule and guidelines explaining how to implement the schedule. The notice invited public comment especially on the definitions of "commercial," "representative of the news media," "educational institution," "non-commercial scientific institution," "search," and "review."

March 27, 1987 / Notices

At the end of the comment period, February 17, 1987, OMB had received 80 comments from 6 identifiable categories of commentator:

- The Congress (1)
- The Federal Agencies (11)
- Publishers of Newsletters (41)
- Public interest groups affiliated with the news media (11)
- Other public interest groups (12)
- Individual members of the public (4)

Although many of the commentators focused exclusively on OMB's proposed definition of "representative of the news media," a significant number provided substantive comments on other aspects of the guidelines and schedule. These comments are discussed in the sectional analysis that follows.

Several commentators urged OMB to publish a revised schedule and guidance for a second round of public comment, while acknowledging the problems presented by the statutory deadline requiring agencies to promulgate their own fee regulations by April 25, 1987. OMB has carefully considered this suggestion, but declines to adopt it. Since agencies' regulations must be published not only pursuant to (and thus following) OMB's issuance and also for notice and comment, a second round of comment would make it impossible for agencies to meet the statutory deadline. It should be noted, however, that OMB intends to follow agencies' implementation of the schedule and guidelines closely and will issue clarifications when needed.

Section-by-Section Analysis

Section 1. Purpose.

Many commentators suggested that OMB's emphasis on collecting FOIA fees was contrary to the intent of the FOIA amendment which they insisted was to make information more widely and cheaply available, and they urged that we emphasize this intention. While it is true that many of the provisions of the FOIA amendments will have this effect, OMB's role in this process is limited

to that of providing guidance on charging fees under the FOIA. Moreover, given OMB's budgetary responsibilities, it is quite appropriate for it to require agencies to develop and diligently carry out programs that charge, collect and deposit fees for FOIA services where such activities are clearly permitted by statute. Accordingly, no changes were made to this section.

Section 5. Authorities.

One commentator objected to the citation of statutory authorities other than the Freedom of Information Reform Act: specifically, the Paperwork Reduction Act of 1980 and the Budget and Accounting Act and Budget and Accounting Procedures Act. It was not OMB's intention to enlarge the scope of its authority or responsibilities in developing FOIA fee guidance by citing these Acts. Nevertheless, these Acts do provide a framework for the development and issuance of OMB policies relating to information access and dissemination policies and the collecting and disposition of fees. The Paperwork Reduction Act, for example, makes the Director of OMB responsible for developing and implementing "Federal information policies, principles, standards, and guidelines" (44 U.S.C. 3504(a)). Among these responsibilities are those for issuing guidance on the Privacy Act of 1974. These FOIA fee guidelines rely on that authority to remind agencies that the fee schedule provided herein does not apply to individuals seeking access to their own records which are filed in Privacy Act systems of records. Similarly, the budgetary authorities cited mandate that funds agencies receive for providing FOIA services are to be deposited in the general revenues of the United States rather than individual agency accounts. OMB has made one change to this section and that is to add a reference to the Privacy Act of 1974.

Section 6. Definitions:

Section 6b. "Statute Specifically Providing for Setting the level of fees for particular types of records."

A few commentators addressed this definition and suggested that it was too broad and general and could permit agencies, on a discretionary basis, to "circumvent the general FOIA policy of minimal fees for statutory access to agency records." The commentators urged that we include in the definition that a qualifying statute would have to specifically establish a level of fees and specifically identify a particular type of records for which the fees could be charged.

It was not OMB's intention to have this provision read broadly, since the legislative history relating to this provision is

unambiguous in stating that it is not intended to change existing law. We have therefore revised the section to meet the concerns of the commentators. We would note only, however, that a number of commentators misquoted the plain wording of the provision by insisting that a qualifying statute must set a specific level of fees rather than specifically providing for the setting of fees by an agency. Our guidance makes it clear that a qualifying statute must require, not merely permit, an agency to establish fees for particular documents.

The commentators also objected to the first subparagraph in the definition which refers to statutes that "serve both the general public and private sector organizations by conveniently making available government information . . . ," and urged its elimination on the basis that it is "so vague and meaningless that it could probably be applied to any statute allowing disclosure of information." The objectionable paragraph is taken from the legislation establishing the National Technical Information Service (albeit somewhat condensed) and we have left it unchanged, but note that it is to be read in conjunction with the other subparagraphs in providing a generic description of such fee statutes.

Section 6c. "Direct Costs."

Two categories of commentators addressed the issue of charging a percentage of an employee's salary to cover benefits. Non-federal commentators thought that such charges were improper because they represented agency overhead costs rather than direct costs. Federal agency commentators, on the other hand, pointed out that the 16 percent rate the guidance attributed to benefits was inconsistent with OMB's own guidance in Circular No. A-76 which uses a much higher percentage.

As to the first point, the Freedom of Information Act permits agencies to charge only for allowable reasonable direct costs of providing certain FOIA services. Employee salaries are clearly a direct cost of providing FOIA services. The cost to the agency of conducting, for example, a search for a document is the salary that must be paid to the employee performing the search multiplied by the time he or she spends searching.

The elements used to calculate an employee's total salary are the pay grade of the employee and any fringe benefits. Because the agency is permitted to charge only "reasonable" direct costs, the inclusion of some kinds of fringe benefits would be clearly unreasonable. For example, an agency that maintains recreational facilities for employees

and their families could not count the cost of operating the facility as a reasonable direct cost for FOIA fee purposes. But, an employer's contribution to a retirement system and to health and life insurance programs are concrete identifiable costs directly associated with the salary of the employee and should be counted as part of the direct costs of providing FOIA services.

As to the second point, the figure cited in OMB Circular No. A-76 was developed for a different purpose and on a different basis. The circular uses a figure, for example, of 27.9 percent as a cost factor in determining agency costs for employee retirement. The figure includes not only the direct 7 percent agency contribution, but other governmental sources of funds for the Civil Service Retirement System. While 27.9 percent may be an appropriate figure for purposes of Circular No. A-76, the "direct reasonable cost" restriction of the Freedom of Information Act precludes using more than the 7 percent agency contribution. OMB arrived at the 16 percent figure in consultation with the Office of Personnel Management, and it is retained in the final version of our guidance.

Some readers noted that the 16 percent figure was rendered 16.1 in Section 7a of the guidelines. That was a typographical error.

Section 6d. "Search."

Several commentators objected to the inclusion of line-by-line searches as an example of search. It is not often that an agency would need to read a document line-by-line to locate records responsive to a request, and agencies should not artificially raise search costs by unnecessarily spending time reading a document for responsive records when it would be cheaper and faster simply to reproduce the entire document. Our intention was to provide guidance on the scope of what constitutes FOIA search and we were careful to distinguish line-by-line search from review. We have accordingly modified the section to make it clear that agencies should not conduct line-

by-line searches when whole document reproduction would be cheaper and faster.

Section 6f. "Review."

Several Federal agency commentators suggested that we provide greater detail on what constitutes review of documents for which agencies may charge commercial use requesters. We have therefore expanded the explanation.

Section 6g. "Commercial Use Request."

Although the legislative history is in conflict on the precise meaning of this provision, it seems clear that the Congress intended to distinguish between requesters whose use of the information was for a use that furthered their business interests, as opposed to a use that in some way benefited the public. The amendment shifts some of the burden of paying for the FOIA to the former group and lessens it for the latter.

As opposed to the other fee categories created by the amendment, inclusion in this one is determined not by the identity of the requester, but the use to which he or she will put the information obtained. Because "use" is the exclusive determining criterion, it is possible to envision a commercial enterprise making a request that is not for a commercial use. It is also possible that a non-profit organization could make a request that is for a commercial use. Moreover, because "use," not identity, controls, agencies will have to spend more time than they do now in determining what the requester intends to do with the records sought.

Both the legislative history and the comments on OMB's proposed fee guidance contain suggestions that agencies can look to the identities of requesters and automatically assign them to or exclude them from this category. Indeed, the original OMB proposal instructed agencies that a request, without further explanation, submitted on corporate letterhead could be presumed to be for a commercial use. Commentators urged that we also include a presumption that requests submitted on the letterhead of a non-profit organization be for a non-commercial purpose. We no longer think either presumption should be made automatically since both would be based upon the identity of the requester as opposed to the use to which he or she intended to put the records sought. We have therefore revised the definition to eliminate the example.

Many commentators were troubled by the breadth of OMB's proposed definition of "commercial use," arguing that by defining

such a use as one which is "related to" commerce, OMB was providing too tenuous a connection to be meaningful. OMB has revised the definition to attempt to provide a more meaningful linkage. "Commercial use" is therefore defined as a use that "furthers the commercial, trade or profit interests of the requester or person on whose behalf the request is made."

Section 6h. "Educational Institution."

Many commentators were concerned about our definition of "educational institution." One Federal agency, for example, pointed out that it would exclude high schools from this category of FOIA requesters. The legislative history is unhelpful on this point, nowhere defining the term. One commentator recommended the definition found in Webster's New Twentieth Century Dictionary of the English Language (2nd. ed. 1968) in which the word "education" means providing instruction or information; an "educational institution" is an entity organized to provide instruction or information. The problem with this suggestion is that it is not sufficiently discriminating. There are very few organizations that do not in some way "provide information" and who would not qualify as "an entity organized to provide information."

Other commentators recommended the definition of educational institution used by the Internal Revenue Service in its regulations implementing Section 501(c)(3) of the Tax Code. Institutions meeting this definition qualify for tax exempt treatment. The commentators pointed out that since the task the FOIA Reform Act set OMB was to develop a uniform fee schedule, looking to an existing definition would be consistent with the statutory intent. After some consideration, OMB agrees that while it would be appropriate to incorporate an existing and well understood definition, neither the Tax Code nor the IRS regulations implementing the Code serve that purpose well. The statute merely provides that "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes . . .," qualify for exemption from taxation. The IRS regulations interpreting this somewhat vague statutory provision are themselves too general to be useful to the agencies in determining an institution's eligibility under the FOIA fee schedule. Moreover, OMB does not think it is appropriate to tie eligibility for inclusion in the "educational institution" fee category to an IRS interpretation of the institution's eligibility for tax exempt status.

Rather than using the IRS definition, OMB thinks it more appropriate to look to the Department of Education definition found in 20 U.S.C. 1681(c). Accordingly, the terms of that statutory definition have been adapted for use in a revised definition, but it is intended that they be given their plain meaning in the FOIA context. Moreover, these terms must be applied in conjunction with the FOIA's "scholarly research" requirement. Thus, the definition has been revised to read " 'educational institution' refers to 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 and an institution of vocational education, which operates a program or programs of scholarly research."

As a practical matter, it is unlikely that a preschool or elementary or secondary school would be able to qualify for treatment as an "educational" institution since few preschools, for example, could be said to conduct programs of scholarly research. But, agencies should be prepared to evaluate requests on an individual basis when requesters can demonstrate that the request is from an institution that is within the category, that the institution has a program of scholarly research, and that the documents sought are in furtherance of the institution's program of scholarly research and not for a commercial use.

Agencies should ensure that it is apparent from the nature of the request that it serves a scholarly research goal of the institution, rather than an individual goal. Thus, for example, a request from a professor of geology at a State university for records relating to soil erosion, written on letterhead of the Department of Geology, could be presumed to be from an educational institution. A request from the same person for drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request,

regardless of whether it was written on institutional stationery. Indeed, such a request could reasonably be construed to be a request that is for a commercial use.

The institutional versus individual test would apply to student requests as well. A student who makes a request in furtherance of the completion of a course of instruction is carrying out an individual research goal and the request would not qualify, although the student in this case would certainly have the opportunity to apply to the agency for a reduction or waiver of fees.

One commentator suggested that OMB should read the phrase "scholarly or scientific research" conjunctively in association with the term "educational institution" so that a request from an educational institution in furtherance of either scholarly or scientific research would qualify. OMB rejected this suggestion; the statute and the legislative history recite the formula "educational or scientific institution/scholarly or scientific research," and it seems clear that the phrase was meant to be read disjunctively so that scholarly applies to educational institution and scientific applies to non- commercial scientific institution.

Section 6i. "Non-Commercial Scientific Institution."

A number of Federal agencies commented on this definition. Several suggested that qualifying institutions be limited to those conducting research in the natural sciences. OMB rejected this suggestion; there is no support in either the statute, the legislative history, or the plain meaning of the term to permit such a narrow reading.

Other agency commentators suggested that the word "non-commercial" be more fully defined so that an institution whose purpose was to further a specific product or industry would be excluded from this category. OMB has accepted this suggestion and modified the definition accordingly.

OMB has also revised the definition to ensure consistency with the definition of "commercial" in Section 6g.

Section 6j. "Representative of the News Media."

This definition drew the most comments of any section. Commentators generally fell into two classes. The first consisted of newsletter publishers and their representatives who were concerned that the guidelines could be read to exclude them from qualifying as "representatives of the news media." The second class had broader concerns about the

definition, and were especially concerned about its perceived narrowness.

Many of the newsletter commentators pointed to their accreditation to the House and Senate press galleries as evidence of their membership in the new media category. It was not OMB's intention to exclude the publishers of newsletters from this category. The examples provided in the definition were not intended to be all-inclusive. Certainly newsletters, if they meet all of the other criteria, would qualify as "representatives of the news media" for purposes of this definition. To avoid implying any such limitation, OMB has replaced the references to "newspaper" and "magazine" in the definition with the word "periodical."

The other class of commentators criticized the narrowness of OMB's proposed definition, pointing to the words of Senator Leahy in the legislative history that "[i]t is critical that the phrase 'representative of the news media' be broadly interpreted if the Act is to work as expected." Cong. Rec. S.14298 (daily ed. September 30, 1986). They asserted that including the words "established," "general circulation," "working for," and "regularly," all served to unnecessarily limit what they perceived to be the breadth of the definition's coverage.

OMB has carefully considered these comments. Our intention in this section was to provide the agencies and the public with a workable definition. We used the word "established" not to limit eligibility only to those organizations in being at the time of the issuance of the guidance, but simply to indicate that a qualifying organization must be able to show some evidence of its identity beyond the mere assertion that it is a member of the news media. Press accreditation, guild membership, a history of continuing publication, business registration, Federal Communications Commission licensing, for example, would suffice. The word "regularly" which the legislative history shows Senator Leahy using in precisely this context, was meant to indicate that a qualifying organization would have to show that it was a continuing venture that was publishing or broadcasting news to the public. Thus, a newly established newspaper would be able to do so by demonstrating that it had held itself out for subscription and had in fact enrolled subscribers.

The phrase "general circulation" was misinterpreted by many commentators: members of the public and Federal agencies as well. OMB intended the phrase to refer to a newsworthy product that was broadcast or published in a manner that made it available to the general public, not that it had to have an

exclusively general content or that it had to be circulated exclusively to a general audience.

In any case, OMB has sought to address these concerns by redrafting the section so that "news media" is defined generically as "an entity that is organized and operated to publish or broadcast news to the public." The American Heritage Dictionary (Second College Edition, 1982) defines the word "news" as ". . . Recent events and happenings, esp. those that are unusual or notable. . . . Information about recent events of general interest, esp. as reported by newspapers, periodicals, radio or television. . . . A presentation or broadcast of such information: newscast. . . . Newsworthy material."

Thus, "news media" is further limited to purveyors of information that is current or would be of current interest. The Congress could easily have drafted the section to read "representative of the media" rather than "news media," but it did not; therefore, OMB thinks it is reasonable to give some weight to the term "news" when constructing a definition. The examples given cite the traditional models--radio and television stations as well as publishers of periodicals that disseminate "news,"--but also look to evolving non-traditional distributors, such as videotext. While these examples are not meant to be all-inclusive, they are meant to be limiting, and to give meaning to the phrase "publish or broadcast news" so that it implies something more than merely "make information available." The news media perform an active rather than passive role in dissemination. Thus, they can be distinguished, for example, from an entity such as a library which stores information and makes it available on demand.

The provision for freelancer eligibility, especially the term "solid basis for expecting publication" also drew comments. OMB's aim was to incorporate legitimate freelance representatives of the news media into the categorical definition without opening the door to anyone merely calling himself or herself a freelance journalist. Many commentators noted that while it

was quite reasonable to require freelancers to show some evidence that they could expect their work to be published before granting them access to this category of requester, they were troubled by the use of the phrase "solid basis." OMB has attempted to address these concerns by adding to this section examples amplifying what solid basis means, e.g., a publication contract would be the clearest basis, but freelancer's past publication history could also be considered. In any case, freelancers who do not qualify for inclusion in the "representatives of the news media" category because they cannot demonstrate a solid basis for expecting publication could be eligible to seek a reduction or waiver of fees if they meet the statutory waiver criteria.

Section 7. "Fees to be Charged."

A number of commentators expressed frustration that OMB was not issuing a unitary schedule of fees which would establish one government-wide charge for each FOIA service performed. OMB is sympathetic to this position, but does not believe that the FOIA Reform Act gives it the authority to do so. Because the FOIA Reform Act requires each agency's fees to be based upon its direct reasonable operating costs of providing FOIA services, OMB is precluded from establishing a government-wide fee schedule.

Commentators urged OMB to emphasize in this section that the effect of the FOIA amendment was to minimize costs by creating categorical limitations on what fees could be charged. They asserted that OMB's direction to the agencies to "charge fees that recoup the full direct costs they incur . . .," was at the least misleading, given the statutory limitations. OMB agrees and has revised the sentence to read "full allowable direct costs" to make it clear that agencies must look to the categorical limitations in the statute and charge fees accordingly.

Commentators pointed out that OMB's encouragement of agencies to use private sector services to locate, reproduce and disseminate records in response to FOIA requests, while consistent with the policy articulated in OMB Circular No. A-130, needed some limitations. Commentator specifically wanted OMB to make it clear that the ultimate costs for requesters serviced by private sector contractors should be no different than if serviced by an agency. They also suggested that OMB clarify that there are some services that agencies may not contract out: e.g., records for the application of an exemption or the waiving of a fee OMB has accordingly redrafted the section to accommodate these concerns.

Section 7b. "Computer Searches for Records."

At the suggestion of a Federal agency commentator, OMB has added a provision permitting agencies to establish agency-wide average computer processing unit operating costs and operator/programmer salaries for purposes of determining fees for computer searches where they can reasonably do so because these costs are relatively uniform across the agency. This provision is meant to encourage agencies to minimize FOIA costs by reducing the administrative steps necessary to establish a fee for a particular search. It is not meant to allow agencies to raise the prices of such searches by including in the average expensive but seldom-used equipment.

OMB has also revised this section to make it clear that agencies may only charge search costs for that portion of the operation of the central processing unit (CPU) and operator salary that is directly attributable to the FOIA search.

Section 7c. "Review of Records."

Several Federal agency commentators requested additional clarification of when review costs could be charged, i.e., at what point in the processing of a request were review charges permitted and could charges be made for subsequent review of materials. OMB has revised this section to address these concerns and clarify that charges may only be assessed the first time an agency reviews a record for the application of an exemption and not at the administrative appeal level of an exemption already applied.

At the suggestion of a Federal agency commentator, OMB has added a provision permitting agencies to establish an agency-wide average cost for review when review is performed by a single class of employee. The intent is to minimize agency administrative costs.

Section 7d. "Duplication of Records."

One commentator objected to the salary of the employee operating the duplicating machinery being included as a reasonable direct cost of duplication. Since the operation of a duplicating machine is necessary to produce a copy of a document, OMB considers this a reasonable direct cost and has not changed the section.

Section 7e. "Other Charges."

Several commentators objected to the inclusion of fees for normal packaging and mailing of records in this section, arguing that mailing records was a reasonable interpretation of the FOIA requirement that agencies "make . . . records promptly available . . ." They argued that an agency requiring a requester to come from Alaska to Washington, D.C. to obtain records responsible to his request could hardly be said to be making records available. Upon reflection, OMB concurs and has deleted charges for ordinary packaging and mailing as examples of allowable other charges.

Section 7f. "Restrictions on Assessing Fees."

OMB has revised this section to provide greater detail on how agencies should develop costs relating to the 100 free pages of reproduction and two hours of free search time the FOIA Reform Act permits certain classes of requesters. The revision also reminds agencies of the consequences of these restrictions for the use of contractors to perform search and duplication services: specifically, that contracts must incorporate free search and reproduction services when appropriate OMB also added an explanation of how agencies should determine what constitutes two hours of free computer search time. Since most computer searches are accomplished in seconds and fractions of seconds, it would be unreasonable to interpret the statutory free search time to mean that an individual would be entitled to require an agency to operate a computer for two hours. The cost and the disruption of an agency's normal ADP activities would be prohibitively expensive. OMB has therefore developed a formula based upon the concept of manual search, i.e., search done by an agency employee who examines records to find those that are responsive to a request. The employee performing the computer search who is most nearly like the clerical searcher is the operator. The guidance, therefore, tells agencies that a requester is entitled to two hours of

operator salary translated into computer search costs (computer search consists of operator salary plus CPU operating time cost for the duration of the search).

Section 7g. "Waiving or Reducing Fees."

OMB has dropped this section. A number of commentators pointed out that OMB's role is limited by the plain wording of the statute to developing guidelines and a fee schedule. In looking carefully at this requirement, OMB has determined that developing a schedule providing for the charging of fees and issuing guidance on when fees should be reduced or waived are separate issues and that OMB's role does not involve the latter consideration. In developing a fee schedule and guidance on its implementation that the statute clearly contemplates, it was necessary for OMB to carefully define the categories or classes of requester and explain to the agencies what fees to charge them. Thus, for example, OMB discussed the exclusion of search fees for educational/scientific institutional requesters and representatives of the news media. This discussion was about the establishment and limitation of fees for a particular category of requester. It was not about waiving search fees since the statute gives agencies no discretion about what search fees to charge this class of requester. OMB considers the development of such definitions as required by the statute and thus squarely within its proper responsibilities.

Section 8. "Fees to be Charged."

OMB has added the phrase "requesters must reasonably describe the records sought" to all categories of requesters to accommodate some commentators' concerns that OMB was creating a new requirement for a particular class of requester by applying this requirement to educational/scientific institutional requesters and representatives of the news media alone.

Section 8d. "All Other Requesters."

OMB has revised this section to explain that the requests of record subjects asking for copies of records about themselves filed in agencies' systems of records must be processed under the Privacy Act's fee schedule.

Section 8a. "Commercial Use Requesters."

OMB has removed the reference to fee waivers, based upon the discussion in Section 7g. above.

Section 9a. "Charging Interest."

OMB has revised this section to specify that interest will accrue from the date the bill was mailed if fees are not paid by the 30th day following the billing date. To ensure that agencies do not bill interest because of defects in their own administrative procedures, the section has been revised to provide that agencies should ensure their accounting procedures are adequate to properly credit a requester who has remitted the fee within the time period. To guard against inadequate processing procedures, the guidelines require that receipt of a fee by the agency, whether processed or not, will stay the accrual of interest.

Section 9b. "Charges for Unsuccessful Search."

Many requesters urged OMB to delete this section. Some argued that it could be used by an agency to surprise and unwary requester with an unexpected and potentially ruinous bill. OMB thinks that an agency should be entitled to charge for unsuccessful search, but agrees that it should be done with the knowledge and consent of the requester. Thus the section has been revised to require agencies to notify requesters who have not agreed to pay fees as high as those anticipated when charges are likely to exceed \$25.

Section 9c. "Aggregating Requests."

Requesters generally agreed that agencies should not permit a requester to make multiple requests merely to avoid paying fees. There was disagreement about what standard to use in such cases and many requesters urged that OMB adopt a 30-day limit.

The 30-day limit, while providing certainty for both the requester and the agency, does not achieve the goal of allowing an agency to identify requesters who are attempting to circumvent the fee provisions of the statute and charge accordingly. Therefore, OMB has declined to change its original proposal, a "reasonable belief" standard, but has provided examples to help agencies understand what "reasonable" means in this context. Thus, agencies could presume that multiple requests for documents that could reasonably have been the subject of a single request and which occur within a 30-day period are made to avoid paying fees. Agencies may make that presumption for requests occurring over a longer period, but should have a solid basis for doing so.

Commentators also suggested that agencies should not be able to aggregate requests from a single requester for records on unrelated subjects nor from different requesters for records about the same subject. As to the first, OMB agrees and has revised this section to reflect this concern. As to the second, OMB does not agree that agencies should in no circumstances be able to aggregate requests from multiple users. However, such aggregation should occur rarely and only when the agency has solid evidence that multiple requesters are colluding to avoid paying FOIA fees. OMB has included cautions to this effect in the section.

Section 9d. "Advance Payments."

The Amendments clearly permit agencies to charge and collect advance payments in two specific circumstances: (1) When fees will exceed \$250; or when a requester has previously failed to pay fees in a timely fashion. Non-federal commentators generally argued that this provision should be read as a limitation rather than an authorization: i.e., "agencies may only charge advance fees when. . . ." OMB has accordingly revised this section to incorporate the fee limitation concept and also to ensure that agencies use this provision fairly. Thus, when agencies determine the estimated fee is likely to exceed \$250, they should seek satisfactory assurances of payment if the requester has a record of prompt payment. If the requester has no history of payment, they may ask for an advance payment of an amount up to the estimated cost. For requesters who have failed to pay in a timely fashion in the past, however, or who are currently delinquent, agencies are encouraged to require full prepayment of the estimated amount.

Uniform Freedom of Information Act Fee Schedule and Guidelines

To the Heads of Executive Departments and Establishments

1. Purpose--This Fee Schedule and Guidelines implement certain provisions of the Freedom of Information Reform Act of 1986 (P. L. 99-570) which require the Office of Management and Budget to promulgate guidelines containing a uniform schedule of FOIA fees applicable to all agencies that are subject to the FOIA.

Data from agencies' annual FOIA reports to the Congress as well as studies by the General Accounting Office and others indicate that inconsistent application of the Act's fee provisions has sometimes resulted in inequitable treatment of users of the Act as well as substantial loss of revenues to the Treasury. While the legislative history of the 1974 amendments to the Freedom of Information Act shows that the Congress did not intend that fees be erected as barriers to citizen access, it is quite clear that the Congress did intend that agencies recover of their costs. The 1986 Amendments to the Act clarify that congressional intention further by creating specific categories of requesters and prescribing fees for each category. Therefore, these Guidelines provide a schedule of fees and related administrative procedures in order to establish a consistent government-wide framework for assessing and collecting FOIA fees.

2. Scope--This Fee Schedule and Guidelines apply to all agencies subject to the Freedom of Information Act (see 5 U.S.C. 552(f)).

3. Effective Date--This Fee Schedule and Guidelines are effective upon issuance--April 27, 1987.

4. Inquires--Inquiries should be directed to Robert N. Veeder at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Telephone: (202) 395-4814.

5. Authorities--The Freedom of Information Act (5 U.S.C. 552), as amended; the Paperwork Reduction Act (44 U.S.C. 35); the Privacy Act of 1974 (5 U.S.C. 552a); the Budget and Accounting Act of 1921 (31 U.S.C. 1 et. seq.); the Budget and Accounting Procedures Act (31 U.S.C. 67 et seq.).

6. Definitions--For the purpose of these Guidelines:

- a. All the terms defined in the Freedom of Information Act apply.
- b. A "statute specifically providing for setting the level of fees for particular types of records" (5 U.S.C. 552(a)(4)(A)(vi)) means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

Statutes, such as the User Fee Statute, which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supersede the Freedom of Information Act under section (a)(4)(A)(vi) of that statute.

c. The term "direct costs" means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

d. The term "search" includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Agencies should ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, agencies should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. "Search" should be distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure (see subparagraph 6f below). Searches may be done manually or by computer using existing programming.

e. The term "duplication" refers to the process of making a copy of a document necessary to respond to an FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

f. The term "review" refers to the process of examining documents located in response to a request that is for a commercial use (see subparagraph 6g below) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

g. The term "'commercial use' request" refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, agencies must determine the use to which a requester will put the documents requested. Moreover, where an agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, agencies should seek additional clarification before assigning the request to a specific category.

h. The term "educational institution" refers to 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, and an institution of vocational education, which operates a program or programs of scholarly research.

i. The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as that term is referenced in 6g above, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

j. The term "representative of the news media" refers to 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 would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, 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. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but agencies may also look to the past publication record of a requester in making this determination.

7. Fees To Be Charged--General. Agencies should charge fees that recoup the full allowable direct costs they incur. Moreover, they shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA.

Agencies are encouraged to contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, agencies should ensure that the ultimate cost to the requester is no greater than it would be if the agency itself had performed these tasks. In no case may an agency contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees.

In addition, agencies should ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in paragraph 6b above), such as the NTIS, they inform requesters of the steps necessary to obtain records from those sources.

a. Manual Searches for Records--Whenever feasible, agencies should charge at the salary rate(s) (i.e. basic pay plus 16 percent) of the employee(s) making the search. However, where a homogeneous class of personnel is used exclusively (e.g., all administrative/clerical, or all professional/executive), agencies may

establish an average rate for the range of grades typically involved.

b. Computer Searches for Records--Agencies should charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. When agencies can establish a reasonable agency-wide average rate for CPU operating costs and operator/programmer salaries involved in FOIA searches, they may do so and charge accordingly.

c. Review of Records--Only requesters who are seeking documents for commercial use may be charged for time agencies spend reviewing records to determine whether they are exempt from mandatory disclosure. It should be noted that charges may be assessed only for the initial review; i.e., the review undertaken the first time an agency analyzes the applicability of a specific exemption to a particular record or portion of a record. Agencies may not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable. Where a single class of reviewers is typically involved in the review process, agencies may establish a reasonable agency-wide average and charge accordingly.

d. Duplication of Records--Agencies shall establish an average agency-wide, per-page charge for paper copy reproduction of documents. This charge shall represent the reasonable direct costs of making such copies, taking into account the salary of the operators as well as the cost of the reproduction machinery. For copies prepared by computer, such as tapes or printouts, agencies shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, agencies should charge the actual direct costs of producing the document(s). In practice, if the agency estimates that duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

e. Other Charges--It should be noted that complying with requests for special services such as those listed below is entirely at the discretion of the agency. Neither the FOIA nor its fee structure cover these kinds of services. Agencies should recover the full costs of providing services such as those enumerated below to the extent that they elect to provide them:

(1) Certifying that records are true copies;

(2) Sending records by special methods such as express mail, etc.

f. Restrictions on Assessing Fees--With the exception of requesters seeking documents for a commercial use, Section (4)(A)(iv) of the Freedom of Information Act, as amended, requires agencies to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits agencies from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, agencies would not begin to assess fees until after they had provided the free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, an agency would determine the cost of only 10 minutes of search time and only five pages of reproduction. If this cost was equal to or less than the cost to the agency of billing the requester and processing the fee collected, no charges would result.

The elements to be considered in determining the "cost of collecting a fee," are the administrative costs to the agency of receiving and recording a requester's remittance, and processing the fee for deposit in the Treasury Department's special account (or the agency's account if the agency is permitted to retain the fee). The per-transaction cost to the Treasury to handle such remittances is negligible and should not be considered in the agency's determination.

For purposes of these restrictions on assessment of fees, the word

"pages" refers to paper copies of a standard agency size which will normally be "8 1/2 x 11" or "11 by 14." Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction.

Similarly, the term "search time" in this context has as its basis, manual search. To apply this term to searches made by computer, agencies should determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, agencies should begin assessing charges for computer search.

8. Fees to be Charged--Categories of Requesters. There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each of these categories:

a. Commercial use requesters--When agencies receive a request for documents for commercial use, they should assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. Agencies are reminded that they may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see section 9b below).

b. Educational and Non-commercial Scientific Institution Requesters--Agencies shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters must reasonably describe the records sought.

c. Requesters who are Representatives of the News Media--Agencies shall provide documents to requesters in this category for

the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in Section 6j above, and his or her request must not be made for a commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use. Thus, for example, a document request to the Department of Justice by a newspaper for records relating to the investigation of a defendant in a current criminal trial of public interest could be presumed to be request from an entity eligible for inclusion in this category and entitled to records for the cost of reproduction alone. Requesters must reasonably describe the records sought.

d. All Other Requesters--Agencies shall charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Moreover, requests from record subjects for records about themselves filed in agencies' systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction. Requesters must reasonably describe the records sought.

9. Administrative Actions to Improve Assessment and Collection of Fees-- Agencies shall ensure that procedures for assessing and collecting fees are applied consistently and uniformly by all components. To do so, agencies should amend their agency-wide FOIA regulations to conform to the provisions of this Fee Schedule and Guidelines, especially including the following elements:

a. Charging Interest--Notice and Rate. Agencies may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. Agencies should ensure that their accounting procedures are adequate to properly credit a requester who has remitted the full amount within the time period. The fact that the fee has been received by the agency, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in Section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

b. Charges for Unsuccessful Search. Agencies should give notice in their regulations that they may assess charges for

time spent searching, even if the agency fails to locate the records or if records located are determined to be exempt from disclosure. In practice, if the agency estimates that search charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

c. Aggregating Requests. Except for requests that are for a commercial use, an agency may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When an agency reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the agency may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a 30-day period had been made to avoid fees. For requests made over a longer period, however, such a presumption becomes harder to sustain and agencies should have a solid basis for determining that aggregation is warranted in such cases.

Agencies are cautioned that before aggregating requests from more than one requester, they must have a concrete basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may agencies aggregate multiple requests on unrelated subjects from one requester.

d. Advance Payments. Agencies may not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The agency estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then, the agency should notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), the agency may require the requester to pay the full amount owed plus any applicable interest as provided above or demonstrate that he has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

When an agency acts under subparagraphs (1) or (2) above, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the agency has received fee payments described above.

e. Effect of the Debt Collection Act of 1982 (Pub. L. 97-365). Agencies' FOIA regulations should contain procedures for using the authorities of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

10. Agencies' Required Implementing Actions--Section 1804(b)(1) of the Freedom of Information Reform Act requires agencies to promulgate final regulations in conformance with OMB's schedule and guidelines no later than the 180th day following enactment: April 25, 1987.

James C. Miller III,

Director.

[FR Doc. 87-6951 Filed 3-26-87; 8:45 am]

BILLING CODE 3110-01-M

NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

ADMINISTRATIVE BULLETIN

AB 97-28

Date: March 19, 1997

To: The Board, General Counsel, Chief Administrative Law Judge, Chief Counsels, Division Heads, Office Heads, Regional Directors, Deputy Chief Administrative Law Judge (San Francisco), Associate Chief Administrative Law Judges (New York and Atlanta), Branch Chiefs, Officers-in-Charge, Resident Officers

Subject: Agency E-mail Policy

The following e-mail policy has been prepared for Agency use in response to National Archives and Records Administration regulations on e-mail, Federal Register, Vol. 60, No. 166, August 28, 1995, Rules and Regulations, p. 44634-44650.

I. Principles Governing E-Mail Communications

All Government employees and contractors are required by law to make and preserve adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the Agency (Federal Records Act (FRA), 44 U.S.C. 3101 et seq.). In addition, Federal regulations govern the life cycle of these records: they must be properly stored and preserved, available for retrieval, and subject to approved disposition schedules.

As the NLRB's information modernization program goes forward, new forms of electronic communications have become increasingly available. An important modern improvement is the ease of communications being afforded by the use of e-mail. Employees are encouraged to use e-mail because it is a cost effective communications tool. All employees must be aware that some types of messages being exchanged on e-mail are important to the Agency and must be preserved; such messages are considered Federal records under the law. The following guidance is designed to help employees determine which of their e-mail messages must be preserved as Federal records and which may be deleted without further authorization because they are not Federal record materials.

II. Which E-Mail Messages Are Records

E-mail messages are records when they meet the definition of records in the Federal Records Act. The definition states that documentary materials are Federal records when they:

- are made or received by an agency under Federal law or in connection with public business; and
- are preserved or appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government, or because of the informational value in them.

The intention of this guidance is not to require the preservation of every e-mail message. Its purpose is to direct the preservation of those messages that contain information that is necessary to ensure that Board policies, programs, and activities are adequately documented. E-mail message creators and recipients must decide whether a particular message is appropriate for preservation. In making these decisions, all personnel should use the same judgment they use when determining whether to retain and file paper records.

Under FRA regulations (36 CFR 1222.38), principle categories of materials, including e-mail, that are to be preserved are:

- records that document the formulation and execution of basic policies and decisions and the taking of necessary actions;
- records that document important meetings;
- records that facilitate actions by Agency officials and their successors in office;
- records that make possible a proper scrutiny by Congress or other duly authorized agencies of the Government; and
- records that protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.

For example, just like paper records, e-mail messages that may constitute Federal records include:

- e-mail providing key substantive comments on a draft action memorandum, if the e-mail message adds to a proper understanding of Agency action;
- e-mail providing documentation of significant Agency decisions and commitments reached orally (person to person, by telecommunications, or in conference) and not otherwise documented in Board files;
- e-mail conveying information of value on important Board activities, e.g., program files, case information, and Agency directives.

III. How to preserve E-Mail Records

For those e-mail messages and attachments that meet the statutory definition of records, it is essential to ensure that the record documentation includes the e-mail message itself, any attachments, and the essential transmission data (who sent the message, the addressees and any other recipients, and when it was sent -- the current cc:Mail "header" information is adequate). Until technology allowing archival capabilities for long-term electronic storage and retrieval of e-mail messages is available to us and to other Federal Agencies, those messages warranting preservation as records must be printed out and filed with related records.

IV. Records Management Reviews

The Agency's Records Management Section conducts periodic reviews of the records management practices at both Headquarters and in the Regions. These reviews ensure proper records creation, maintenance, and disposition by the NLRB. These periodic reviews will now include monitoring the implementation of the Agency's e-mail policy.

V. Points to Remember About E-Mail

- E-mail is an internal Agency work-related resource used for the accomplishment of the work/mission of the Agency and users need to exercise the same good judgment, common sense, and sensitivity in the use of e-mail as they do with Agency telephones, faxes, and copying machines.
- Agency information in the e-mail system is neither private nor confidential. The Agency will not monitor the NLRBU's and/or the NLRBPA's e-mail messages.
- Messages that are not records may be deleted when no longer needed.
- Certain e-mail messages that are not Federal records may still be subject to pending requests and demands under the Freedom of Information Act, the Privacy Act, and litigation and court orders, and should be retained in accordance with the NLRB records and retention schedules.
- When e-mail is retained as a record, the period of its retention is governed by NLRB records retention schedules, described in the NLRB Files Maintenance and Records Disposition Handbook, and individual office file plans which have been prepared for all Headquarters and Regional offices. Under these schedules, records are kept for defined periods of time pending destruction or transfer to the National Archives.
- Our experience with electronic bulletin boards generally has been successful in that official notices are disseminated more quickly to employees Agency-wide as well as locally. While the electronic bulletin boards have been established for the posting of official notices only, employees may contact their office heads if they have an

- appropriate notice to post. In addition, employees may use individual addresses to send messages and are also encouraged to use private mailing lists to send messages to a wider audience.

VI. Specific Instructions

- Before deleting any e-mail message, apply the guidelines above to determine if it meets the legal definition of a record and if so, print it.
- Be certain the printed message kept as a record contains essential transmission and receipt data; if not, print the data or annotate the printed copy.
- File the printed messages and essential transmission and receipt data (header information) with related files of the office.

VII. Future Technology

Various Federal agencies, including the State Department and DOD, are actively working to develop systems that will enable those e-mail messages that are records to be preserved electronically.

This notice will be reviewed and may be subject to change in light of future applicable rules and regulations promulgated by the National Archives and Records Administration, and any changes in the NLRB's recordkeeping systems.

Further, we are currently developing a concise listing of instructions and examples that will be a helpful resource for your use. If you have questions regarding this policy, call Nancy Miller, Chief, Records Management Section, on 273-2833.

Gloria Joseph
Director of Administration

Act (FOIA) request may disclose information as provided in this subpart. A current employee's request for access to his/her own OPF (also included are employee performance file system folders and files) that cites the FOIA, as with all sated Privacy Act requests made by current employees, shall be processed in accordance with agency Privacy Act procedures consistent with Office regulations in part 297 of this chapter. All requests for their OPFs from former employees, and FOIA requests for former employee OPFs, shall be referred to the Office's regional or area office nearest to the location of the requester.

§293.311 Availability of information.

(a) The following information from both the OPF and employee performance file system folders, their automated equivalent records, and from other personnel record files that constitute an agency record within the meaning of the FOIA and which are under the control of the Office, about most present and former Federal employees, is available to the public:

- (1) Name;
- (2) Present and past position titles and occupational series;
- (3) Present and past grades;
- (4) Present and past annual salary rates (including performance awards or bonuses, incentive awards, merit. pay amount, Meritorious or Distinguished Executive Ranks, and allowances and differentials);
- (5) Present and past duty stations (includes room numbers, shop designations, or other identifying information regarding buildings or places or employment); and
- (6) Position descriptions, identification or job elements, and those performance standards (but not actual performance appraisals) that the release of which would not interfere with law enforcement programs or severely inhibit agency effectiveness. Performance elements and standards (or work expectations) may be withheld when they are so intertwined with performance appraisals that their disclosure would reveal an individual's performance appraisal.

(b) The Office or agency will generally not disclose information where the data sought is a list or names, present or past position titles, grades, salaries, performance standard, and/or duty stations or Federal employees which, as

determined by the official responsible for custody or the information:

(1) Is selected in such a way that would reveal more about the employee on whom information is sought than the six enumerated items, the disclosure of which would constitute a clearly unwarranted invasion or personal privacy; or

(2) Would otherwise be protected from mandatory disclosure under an exemption of the FOIA.

(c) In addition to the information described in paragraph (a) or this section, a Government official may provide other information from these records (or automated equivalents) or an employee, to others outside or the agency, under a summons, warrant, subpoena, or other legal process as provided by the Privacy Act (5 U.S.C. 552a(b)(4) through (b)(11)), under those Privacy Act routine uses promulgated by the Office, and as required by the FOIA.

Subpart D-Employee Performance File System Records

AUTHORITY: 5 U.S.C. 552a and 5 U.S.C. 4305 and 4315; E.O. 12107 (December 28, 1978); 5 U.S.C. 1103, 1104, and 1302; CFR 1954-1958 Compilation; 5 CFR 7.2; E.O. 9830 3 CFR 1943-1948 Compilation.

SOURCE: 47 FR 3080, Jan. 22, 1982, unless otherwise noted.

§293.401 Applicability of regulations.

This subpart applies to Executive agencies as defined in sections 105, 3132(a)(1) and 4301(1) of title 5, U.S. Code, including Military Departments (but not non-appropriated fund employees) as defined in section 102 of title 5, U.S. Code, and independent establishments as defined in section 104 of title 5, U.S. Code. Within those agencies, the requirements of this subpart apply to all employees occupying positions subject to civil service rules and regulations, including Senior Executive Service positions as defined in 5 U.S.C. 3132(a)(2).

RESERVED FOR PROPOSED BOARD FOIA RULES AND REGULATIONS