

PART 2018 - GENERAL

Subpart F - Availability of Information

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PART 2018 - GENERAL

Subpart F - Availability of Information

§ 2018.251 General purpose and scope.

The Congressional policy behind the Freedom of Information Act (FOIA) (see Exhibit A of this subpart, which is available in any Rural Development office) was to encourage public access to Federal agency information, unless specifically exempted by the Act, and to provide an avenue for any person to pursue their statutory rights by eliminating administrative barriers, the removal of which would normally require expensive litigation. The FOIA, however, does not apply to the Congress, the Federal Courts, or units within the Executive Office of the President, whose sole function is to advise and assist the President. The FOIA is intended to provide access to documents or other information-bearing materials which: (1) were created or obtained by the Rural Development; (2) are, at the time of the request, within both the possession and control of the Rural Development; and (3) restricted only as set forth in §§2018.255 and 2018.258 of this subpart.

§ 2018.252 Delegation of authority and available assistance.

Subject to the provisions of § 2018.259 of this subpart, the Freedom of Information Officer (FOIO), Freedom of Information/Privacy Act Specialist, Management Analyst in the National Office, each State Director, each State Administrative Officer/State Administrative Program Chief, Rural Development Manager, and Community Development Manager are authorized to act, respectively, at the National, State, Area, and Local level on behalf of Rural Development on all requests for materials and records. State Administrative Management Program Directors in each State Office will provide administrative and technical support regarding FOIA and Privacy Act matters to field offices. All employees are advised that assistance is readily available upon request from their State Office and the National Office.

§ 2018.253 Denials.

Contact the FOIO, National Office, before making a written denial of any request for information if you are not familiar with the specific exemption to be cited as a basis for the denial. When information is denied from disclosure pursuant to the FOIA or Privacy Act, the following three criteria must be met when responding to the requester:

- (a) Identify the nature of the denied information.

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- (b) Cite an appropriate FOIA/Privacy Act exemption for its denial.
- (c) Provide for an appeal of the denial to the appropriate Agency Head.

§ 2018.254 Penalties and court review.

Upon receipt of a complaint based upon a final denial of information by the agency, a U.S. District Court can order the production of any agency records that were improperly withheld from the requester and may also award attorney's fees and costs. In the event the Rural Development employee fails to comply with the District Court's order to release records, the court may find the employee in contempt of court.

§ 2018.255 Fees.

The fees set forth are based upon guidelines prescribed by the Office of Management and Budget (OMB), published at 52 FR 10012 (March 27, 1987), and the fee waivers set forth are based upon guidelines prescribed by the Office of Legal Policy, U.S. Department of Justice, dated April 2, 1987. This section adopts the Fee Schedule and procedures prescribed by the Office of the Secretary, U.S. Department of Agriculture (USDA), Appendix A to 7 CFR, part 1, Subpart A, published at 52 FR 49386 (December 31, 1987), 62 FR 33980 and 64 FR 3395.

(a) Instances in which fees may not be charged.

- (1) No charge shall be made for the first 100 pages of duplicated information (8-1/2" x 14" or smaller-size paper), or the first two hours of manual search time, or the equivalent value of computer search time as defined in paragraph (d)(1)(ii) of this section, except on requests seeking documents for a commercial use, as specified in paragraph (b)(1) of this section.
- (2) No charge shall be made--even to commercial use requesters--if the cost of collecting a fee would be equal to or greater than the fee itself. For Rural Development, this figure has been calculated to be \$25.00.
- (3) Fees may not be charged for time spent by a Rural Development employee in resolving legal or policy issues, or in monitoring a requester's inspection of Rural Development records. No charge shall be made for normal postage costs.
- (4) No charge shall be made when filling requests from other Departments or Government agencies for official use, provided quantities requested are reasonable in number.

§ 2018.255(a) (Con.)

(5) When members of the public provide their own copying equipment, no copying fee will be charged (although search and review fees may still be assessed).

(6) Fees may not be charged when any notices, decisions, orders, or other materials are required by law to be served on a party in any proceeding or matter before any Department agency.

(b) Levels of fees for each category of requesters. Under the FOIA, as amended, there are four categories of 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 category:

(1) Commercial use requesters.

(i) For commercial use requesters, Rural Development shall assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to the free search time or duplication referenced in paragraph (a)(1) of this section. Rural Development may recover the cost of searching for and reviewing records for commercial use requesters even if there is ultimately no disclosure of records.

(ii) A commercial use requester is defined as 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, Rural Development must determine whether the requester will put the documents to a commercial use. Where there is 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, Rural Development may seek additional clarification from the requester.

(2) Educational and non-commercial scientific institution requesters.

(i) Fees for this category of requesters shall be limited to the cost of providing duplication service alone, minus the charge for the first 100 reproduced pages. No charge shall be made for search or review services. To qualify for this

category, requesters must show that the request is being made as authorized by and under the auspices of an eligible institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a non-commercial scientific institution).

(ii) 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.

(iii) The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" (see paragraph (b)(1) of this section) basis, 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.

(3) Requesters who are representatives of the news media.

(i) Fees for this category of requester shall also be limited to the cost of providing duplicating service alone, minus the charge for the first 100 reproduced pages. No charge shall be made for providing search or review services. Requests in this category must not be made for a commercial use.

(ii) 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 which disseminate news and who make their products available for purchase or subscription by the general public. "Freelance" journalists 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.

§ 2018.255(b) (Con.)

(4) All other requesters. Fees for requesters who do not fit into any of the above categories shall be assessed for the full reasonable direct cost of searching for and duplicating documents that are responsive to a request. No charge, however, shall be made to requesters in this category for the first 100 duplicated pages, or the first two hours of manual search time, or the equivalent value of computer search time as defined in paragraph (d)(1)(ii) of this section.

(c) Fee waivers and reductions. Rural Development shall waive or reduce fees on requests for information if disclosure of the information is deemed to be 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.

(1) In determining when fees shall be waived or reduced, the following six factors should be considered:

(i) The subject of the request, i.e., whether the subject of the requested records concerns "the operations or activities of the government."

(ii) The informative value of the information to be disclosed, i.e., whether the disclosure is "likely to contribute" to an understanding of Government operations or activities.

(iii) The contribution to public understanding of the subject by the general public is likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to "public understanding."

(iv) The significance of the contribution to public understanding. i.e., whether the disclosure is likely to contribute "significantly" to public understanding of Government operations or activities.

(v) The existence and magnitude of a commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so,

(vi) the primary interest in disclosure, i.e., whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester," in which case, Rural Development shall not waive or reduce the fee.

(2) Rural Development may, at its discretion, waive or reduce fees associated with a request for disclosure regardless of whether a waiver or reduction has been requested if the Agency determines that disclosure will primarily benefit the general public.

(3) Rural Development may also waive or reduce fees under the following conditions:

(i) Where the furnishing of information or a service without charge or at a reduced rate is an appropriate courtesy to a foreign country or international organization, or where comparable fees are set on a reciprocal basis with a foreign country or an international organization.

(ii) Where the recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

(iii) Where it is determined that payment of the full fee by a State or local government or nonprofit group would not be in the interest of the program involved.

(4) Fees shall be waived, however, without discretion in all circumstances where the amount of the fee is \$25.00 or less.

(d) Types of services for which fees may be charged.

(1) Search services. Search services are services of Agency personnel--clerical or professional--used in trying to find the records, that are responsive to a request. Search services includes both manual and electronic searches and time spent examining records for the purpose of finding information that is within the scope of the request. Search services also include services to transport personnel to places of record storage, or records to the location of personnel for the purpose of the search, if such services are reasonably necessary. (Revised 04-26-06, PN 397.)

§ 2018.255(d) (1) (Con.)

(i) Manual searches. Manual searches shall be charged for in one of the two following manners in the given order:

(A) When feasible, at the salary rate of the employee conducting the search, plus 16 percent of the employee's basic pay; or

(B) Where a homogeneous class of personnel is used exclusively, at the rate of \$10.00 per hour for clerical time, and \$20.00 per hour for supervisory or professional time. Charges should be computed to the nearest quarter hour required for the search.

(ii) Mainframe computer searches. Mainframe computer searches and services shall be charged for at the rate of \$27.00 per minute, or at the rates established in the Users Manual or Handbook published by the computer center at which the work will be performed. Searches using computers other than mainframes shall be charged for at the manual search rate.

(iii) Unsuccessful searches. Charges for unsuccessful searches, or searches which fail to locate records or which locate records which are exempt from disclosure, shall be assessed at the same fee rate as searches which result in disclosure of records.

(2) Review services. Review services are services performed by Agency personnel, clerical or supervisory/professional, in examining documents located in response to a request that is for a commercial use, as specified in paragraph (b) (1) of this section, to determine whether any portion of any document located is permitted to be withheld. Review services include processing any documents for disclosure, e.g., doing all that is necessary to excise exempt portions and otherwise prepare documents for release. "Review" does

not include time spent resolving general legal or policy issues regarding the application of exemptions. The fee for providing review services shall be the hourly salary rate (i.e., basic pay plus 16 percent) of the employee conducting the review to determine whether any information is exempt from mandatory disclosure.

(3) Other direct costs. Costs incurred, e.g., manually creating records by compiling information, computer programming, computer runs, shipping records from one office to another by commercial carrier in order to timely answer the request, will be assessed the requester based on actual cost to the Government.

(4) Authentication (with USDA seal affixed). An additional charge of \$10.00 for each document copy authenticated. When a request is received for an authenticated copy of a document which the Agency determines to make available to the requesting party, the Agency shall cause a correct copy to be prepared and sent to the Office of the General Counsel (OGC) which shall certify the same and cause the seal of the Department to be affixed, except that the Judicial Officer, or the Hearing Clerk when directed by the Judicial Officer, may authenticate copies of documents in the records of the Hearing Clerk.

(5) Certifications. An additional charge of \$5 for each certified document copy. The certification should read: "I certify this is a true copy of the original" (with signature and title affixed). The officials authorized to make this certification are the FOIO, State Directors, District Directors, and County Supervisors.

(6) Staff manual items. A charge of \$.20 for each sheet, if photocopied. Rural Development offices do not stock such materials for public sale, but should such extra materials will be available, they may be furnished without charge.

(7) [Reserved]

(8) [Reserved]

(9) [Reserved]

(10) Passive solar home plans. A charge of \$5 per set (8 sheets).

(11) [Reserved]

§ 2018.255(d) (Con.)

(12) Computer-generated reports. Several computer programs have been developed to provide reports containing releasable data that are frequently requested under the FOIA and are subject to fee charges for the reimbursement of Rural Development cost. The most common computer reports and their fee schedules are as follows:

(i) B&I Closed Active Loan Lender Report.

This report provides a listing of B&I closed loans in state sequence reflecting lender name, town, and tax identification number as well as total number and amount of loans by lender. The data is available from the Rural Community Facility Tracking System (RCFTS).

State Report - \$50.00

Nationwide Report - \$350.00

(ii) B&I Borrower and Lender Information Report.

This report provides a listing of B&I loans in state sequence reflecting borrower name, town, loan amount by type of assistance, interest rate, type of interest, maturity period and loan status, as well as lender name, type, town and state. The data is available from the RCFTS.

State Report - \$150.00

Nationwide Report - \$650.00 (Revised 04-26-06, PN 397.)

(iii) B&I Job Information Report.

This report provides an alphabetical listing of B&I loans by borrower name in state sequence, reflecting loan amounts, loan status, operational date, jobs created, jobs saved, total jobs, jobs verified, and date verified. The data is available from the RCFTS.

State Report - \$75.00

Nationwide Report - \$500.00

(iv) B&I Loan Status Summary Report.

This report provides a listing of B&I loans in state sequence reflecting borrower name and location, fund request, status code and date, amount of assistance, and lender name, town, and state. The data is available from the RCFTS Tracking System.
State Report - \$75.00
Nationwide Report - \$500.00

(v) B&I Loans Obligated By Year.

This report provides a listing of B&I loans obligated within a specified time frame within a fiscal year in state sequence, which reflects borrower name and location, amount of assistance, and lender name, town, and state. The data is available from the RCFTS Tracking System.
Nationwide Report - \$35.00

(vi) List of Obligated/Unclosed Accounts.

This report is a listing of obligated/unclosed accounts sorted by geographic state/county and may be limited to selected loan programs (fund code). The report includes information on interest rate, date of obligation, amount of obligation, and amount vouchered.

Note: Individual borrower data will no longer be released. Loan-related information without an individual borrower name, or other identifying information (e.g., social security number, home telephone number, home address), may be released when grouped by geographic or other statistical categories, unless the FOIA requester will be able to identify the name of the individual borrower from the information provided. Loan-related information retrieved by a commercial business name is not affected by this change.

County Report - \$75.00
State Report - \$125.00
Nationwide Report - \$400.00

(vii) Guaranteed Loans Lender Listing.

This report is a listing of all active lenders in loan type and State Office sequence. The report shows the lender's name and address and the total amount of the lender's active loans.
State Report - \$75.00
Nationwide Report - \$350.00

§ 2018.255(d) (12) (Con.)

(viii) Community Facilities Report by Applicant Type.

This report provides an alphabetical listing of Community Facility loans segregated by Public Body and Non-Profit Corporation in state sequence. The report shows borrower name, facility location, purpose of funds, funds borrower contributed, jobs created, jobs saved, population, median income, interest rate, and amount of funds and date obligated. The report also includes fund amounts contributed by the Environmental Protection Agency (EPA), private commercial, state/county, Regional Commission, and other sources. The data is available from the RCFTS.

State Report - \$50.00

Nationwide Report - \$500.00

(ix) Water and Waste Report by Applicant Type.

This report provides an alphabetical listing of Water and Waste loans segregated by Public Body and Non-Profit Corporation in state sequence. The report shows borrower name, facility location, purpose of funds, funds borrower contributed, user residential, user non-residential, user grant benefited, population, median income, interest rate, and amount of loan and grant funds and date obligated. The report also includes fund amounts contributed by the EPA, private commercial, state/county, Regional Commission, and other sources. The data is available from the RCFTS.

State Report - \$50.00

Nationwide Report - \$500.00

(x) List of Borrower Accounts.

This report is available with options to select all insured borrower accounts or specific program accounts, e.g., Farmer Program borrower accounts, Rural Housing borrower accounts or Community Program borrower accounts. Accounts may also be selected for the nation, state, or county. The report is sorted by geographic state/county and can be specified by a period of time based on date of loan. The report shows loan type, loan number, interest rate, and a date and amount of loan. (Revised 04-26-06, PN 397.)

Note: Individual borrower data will no longer be released. Loan-related information without an individual borrower name, or other identifying information (e.g., social security number, home telephone number, home address), may be released when grouped by geographic or other statistical categories, unless the FOIA requester will be able to identify the name of the individual borrower from the information provided. Loan-related information retrieved by a commercial business name is not affected by this change.

(A) Farm, Housing, or Community Program Borrower Accounts.

County Report:

Farm or Housing - \$100.00
Community Program - \$150.00

State Report:

Farm or Housing - \$200.00
Community Program - \$250.00

Nationwide Report:

Farm or Housing - \$1,000.00
Community Program - \$750.00

(B) All Borrower Accounts.

County Report - \$150.00
State Report - \$300.00
Nationwide Report - \$2,500.00

§ 2018.255(d) (Con.)

(13) Photocopies, 8 1/2" x 14" or smaller. A charge of \$.20 for a single page only if done for the convenience of the requester. No fee will be charged for photocopying done for the convenience of the Government or when the requester provides the copying equipment, materials, and services.

(14) Photocopies in excess of 8 1/2" x 14". A charge of \$.50 per linear foot of the longest side of the copy or portions thereof only if done for the convenience of the requester. No fee will be charged for photocopying done for the convenience of the Government or when the requester provides the copying equipment, materials, and services.

(15) Audio and videotape reproductions. For reproductions of audio or videotapes, requesters must supply their own recording tape, and will be assessed a fee of \$25.00 an hour for copying work requested. There is a one-hour minimum charge. Payment is required at the time videotapes or audiotapes are accepted by the requester.

(16) Photographic reproductions of Rural Development-owned microfiche. A charge of \$3.50 for the first fiche image and \$1.00 for each additional fiche image will be assessed for photographic reproductions of Rural Development-owned microfiche.

(e) Payments of fees and charges.

(1) Payments should be billed for the fullest extent possible at the time the requested materials are furnished. Payments should be made by requesters within 30 days of the date of the billing. Payments shall be made by check, draft, or money order made payable to the Treasury of the United States, although payments may be made in cash, particularly where services are performed in response to a visit to the office.

(2) Where the estimated fees to be charged exceed \$250.00. Rural Development may require an advance payment of an amount up to the full estimated charges (but not less than 50 percent) from the requester before any of the requested materials are reproduced. In instances where a requester has previously failed to pay a fee, Rural Development may require the requester to pay the full amount owed, as well as the full estimated fee associated with any new request, before the Agency begins to process that new or subsequent request.

(3) When the fee is collected, a receipt will be issued to the payer on Form RD 104-1, "Public Information Transmittal and/or Receipt." Collections received along with a transmittal explaining the proper disposition of the funds should be sent to:

United States Department of Agriculture
National Finance Center
Administrative Collections
Post Office Box 790342
St. Louis, Missouri 63179-0342

(4) Lock box personnel at the U.S. Bank, located in St. Louis, Missouri, will deposit the remittance and forward a photocopy of the check(s) with all supporting documentation via Express Mail to the USDA, National Finance Center. (Revised 04-26-06, PN 397.)

(f) Effect of the Debt Collection Act on Fees. In attempting to collect fees levied under the FOIA, Rural Development shall abide by the provisions of the Debt Collection Act of 1982 (P.L. 97-365) in disclosing information to consumer reporting agencies and in the use of collection agencies, where appropriate, to encourage payment.

§ 2018.255 (Con.)

(g) Deficiencies and refunds.

(1) When the amount covered by an advance payment is less than the final total cost of filling a request, the amount of the deficiency, if \$1 or more, will be collected not later than at the time the request is filled. Overpayment of \$1 or more will be refunded, but refunds of amounts less than \$1 will not be made unless specifically asked for in writing.

(2) When a check is passed for which there is to be a full or partial refund, explain the situation, state the check amount, how the check is to be made out, the address it is to be sent, and send to:

United States Department of Agriculture
National Finance Center
Administrative Collections
Post Office Box 790342
St. Louis, Missouri 63179-0342 (Revised 04-26-06, PN 397.)

§ 2018.256 Public inspection and copying.

(a) Facilities for inspection and copying by the public and for obtaining copies of materials will be provided by the FOIO in the National Office, the State Director in each State Office, the Rural Development Manager in each Area Office, and the Community Development Manager in each Local Office. Such facilities will usually consist of a table and chairs in a convenient location in an office which can be used without undue interference with normal office procedure.

(b) A person who has requested such materials will be promptly notified that he/she may inspect and copy such materials and, upon payment of applicable fees, obtain copies thereof on business days during regular business hours. If any of the Rural Development materials requested are not located at the office to which the request was made, the request will be forwarded to the office where such materials are available for a direct reply and the requester so notified. Personal inspection of documents in lieu of copying should be encouraged.

§ 2018.257 Requests for records.

(a) To speed processing, requests for information should be made by mail or fax to the appropriate Local, Area or State Office where the records are likely to be located, but requests may be mailed/faxed to the Freedom of Information Officer, Support Services Division, General Services Branch, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue, SW, MC 0742, Washington, D.C. 20250-0742. Requests for staff manual items, forms, and descriptive publications that are readily available need not be put in writing. The phrase "FOIA REQUEST" should be placed in capital letters on the front of the envelope for any written requests. The requester will be given the information promptly and in writing. When a determination to release has been made, but the information to be furnished cannot be given promptly, the requester will be given a written notice indicating when the information will be available. (Revised 06-13-07, PN 410.)

(b) All written requests will be date stamped upon their receipt.

(c) No provision in 5 U.S.C. 552 requires that an agency compile a new record in order to fulfill a request for records. Such compilation may be undertaken voluntarily if the agency determines this action to be in the public interest or in the interest of Rural Development.

(d) A request shall not be denied on the sole ground that the record has not been properly identified if the description, together with the knowledge Agency personnel have of the contents of their files, enables the record to be located.

(e) A request relating to a matter in pending litigation should indicate the name of the court and its address.

(f) Requests shall be reasonably specific. If they fall within reasonably specific categories, but constitute an undue burden, the Rural Development official making the determination may contact the requester to discuss the request and attempt to reduce it to manageable proportions. However, the fact that filling a request constitutes an undue burden is not grounds for denying a request.

§ 2018.257 (Con.)

(g) A single copy of any document or blank form will be supplied whenever possible. Copies of forms provided to the public shall also be limited to one copy per form. Persons requiring any large quantities should be encouraged to use other sources for reproduction. If photocopies must be made, the Rural Development employee will maintain control of partially exempt documents being copied to eliminate unauthorized disclosure of material.

(h) If data have been compiled and are available in the form of a record, the data shall be made available as provided herein. If administratively feasible, records may be created for the prescribed fee; however, records are not normally required to be created by compiling selected items from the files, and records are not normally required to be created to provide the requester with such data as ratios, proportions, percentages, per capita, frequency distributions, trends, correlations, comparisons, and forecasts.

(i) Copies of a requested record need not be furnished if the record is known to have been published in the Federal Register or is available for purchase from the Superintendent of Documents of GPO. The requester will be advised to order from GPO at the following address: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Such records may be furnished if an agency office has a copy. A requester may purchase a complete set of RD Instructions from GPO by asking for Title 7 CFR Parts 1500 to end.

(j) If the material requested is the primary concern of another agency, the requester may be informed of that fact and asked to contact the other agency. If the requester insists that Rural Development provide the information, Rural Development must process the request and can deny access only on the basis of the FOIA exemptions. If Rural Development has no knowledge concerning the requested records, it shall notify the requester of that fact.

(k) Records of specified form or character are required to be destroyed after the lapse of time specified in the Records Disposal Act of 1943, 44 U.S.C. 366-380, and in accordance with Rural Development disposal schedules approved by the General Services Administration. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA or the Privacy Act. When final action has been taken on these requests such materials may be destroyed in accordance with Schedule 14, General Records Schedule, FPMR 101-11.4.

§ 2018.258 Availability of identifiable material.

(a) Information subject to mandatory release.

(1) The FOIA authorizes agencies to disclose information that "is in the public interest because furnishing the information can be considered as primarily benefiting the general public." The applications of a public interest often requires a balancing of the individual's right of privacy against the preservation of the basic purpose of FOIA to open agency action to the light of public scrutiny. Thus, there is a sound basis in both logic and law for agencies to focus on any public interest served by nondisclosure, to determine the "net" public interest involved, and to determine whether perhaps any public interest factors favoring disclosure are outweighed by the very significant and tangible public interest factors favoring nondisclosure. Examples of public interest assertions by requesters to obtain Agency records are as follows:

(i) Public scrutiny of Agency records dealing with controversial political issues or to disclose the "Secret Law" of an agency.

(ii) Ensure Agency performance of statutory responsibilities or to expose possible Government wrongdoing.

(iii) Obtain Agency records for use of investigative reporters of the news media.

(iv) Obtain Agency records for use in historical work or academic studies.

(v) Obtain Agency records for use by public interest groups or for use in consumer group activities.

(vi) Discover evidence for use in adjudicatory proceedings before an Agency or to discover evidentiary basis for Agency rulemaking in order to challenge that rulemaking.

(2) The FOIA's broad disclosure mandate is subject to nine exemptions which are to be construed narrowly. The exemptions are permissive in nature and the Agency generally may disclose exempt information unless it is under a legal duty arising outside of FOIA not to disclose. Examples of information subject to mandatory release are as follows:

§ 2018.258(a)(2) (Con.)

(i) RD Instructions, AN's, unnumbered letters, blank copy of forms, descriptive publications, and the like.

(ii) Statistical data in any form.

(iii) Final Agency opinions, decisions and actions, including contract awards and bid abstracts, unless such opinions, decisions, and actions contain information which clearly constitutes an unwarranted invasion of personal privacy, in which case such materials must be redacted.

(iv) Pleadings, motions, orders, testimony, and other documentary evidence introduced in pending or closed litigation once such items are a matter of public record.

(v) Information available in public records, or customarily released by the applicant or recipient, or approved in writing for release by the applicant or recipient to whom the records pertain.

(vi) Names of past and present employees' position titles, occupational series, grades, duty stations, and salaries, including performance bonuses, awards, meritorious or distinguished executive ranks, and allowances and differentials.

(vii) Employees' position descriptions, 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

(viii) SF-278, "Executive Branch Personnel Public Financial Disclosure Report" of Agency employees in Executive Level, Schedule C, and SES positions.

(b) Information subject to consultation with the FOIO.

(1) The following information about an individual applicant or borrower requested by third parties will not be released until after consultation with the FOIO:

- (i) Applications, family budgets, and Farm and Home Plans containing personal and financial data such as an identity of an employer, education level, and detailed representation of income, debts, living expenses, and financial statements.
 - (ii) Credit reports and references.
 - (iii) Character reference letters.
 - (iv) Verification of income or employment.
 - (v) Appraisals and inspection reports.
 - (vi) Audits, OGC opinions, and investigatory or law enforcement records.
 - (vii) Inter-agency or intra-agency documents of a predecisional and deliberative nature containing opinions and recommendations prior to a final decision.
 - (viii) Solicited or unsolicited information given the Agency under an expressed "promise of confidentiality."
- (2) The following information about a business or public entity will not be released to third parties until after consultation with the FOIO:
- (i) Contract proposals and their evaluation.
 - (ii) RH 515 project market surveys performed by a private commercial business.
 - (iii) Personal financial statements of officers, stockholders, etc., or their personal history.
 - (iv) Business appraisals and liquidation plans.
 - (v) Acquisition offers to purchase business.
 - (vi) Dunn and Bradstreet financial reports.
 - (vii) Financial and market surveys, projections and operating budgets.

§ 2018.258(b)(2) (Con.)

(viii) Appraisals of personal property pledged by guarantors.

(ix) Inter-agency or intra-agency documents of a predecisional and deliberative nature containing opinions and recommendations prior to a final decision.

(x) Product pricing and unique manufacture processes, procedures, and techniques.

(xi) Solicited or unsolicited information given Rural Development under an expressed "promise of confidentiality."

(c) Legal basis for withholding information (exemptions from disclosure). The Agency cannot refuse to provide records to a requester because of the identity of the requester or the requester's purpose in seeking the records. It can refuse to make the requested records available only when the records sought fall within at least one of the nine statutory exemptions from the FOIA's disclosure provisions.

(1) General. There are six specific statutory exemptions most applicable to documents in the possession of Rural Development. These statutory exemptions, with their appropriate citations, are as follows:

(2) 5 U.S.C. 552 (b) (2). Records "related solely to the internal personnel rules and practices of an agency." This exemption covers:

(i) internal matters of a relatively trivial nature in which there is no genuine public interest; and

(ii) more substantial internal matters the disclosure of which would allow circumvention of a statute or regulation.
Exemption No. 2 of the FOIA 15 U.S.C. 552 (2)].

(3) 5 U.S.C. 552 (b) (3). Matters which are "specifically exempted from disclosure by statute, (other than section 552b of [Title 5]), 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 material to be withheld." Exemption No. 3 of the FOIA [5 U.S.C. 552 (b) (3)].

(i) It has been determined that the Privacy Act (5 U.S.C. 552a) and the Trade Secrets Act (18 U.S.C. 1905) are not appropriate 5 U.S.C. 552 (b) (3) statutes.

(ii) Internal Revenue Service tax code (26 U.S.C. 6103) "Confidentiality and disclosure of tax returns and tax return information" is an appropriate 5 U.S.C. 552 (b) (3) statute.

(4) 5 U.S.C. 552 (b) (4). "Trade secrets and commercial or financial information obtained from any person and privileged or confidential." This exemption does not itself preclude discretionary disclosure of business information unless, however, the Trade Secrets Act (18 U.S.C. 1905) prevents such discretionary disclosure. This exemption covers material which would not customarily be made public by the person from whom it was obtained. Requested records will be considered "confidential" within the meaning of this exemption if their disclosure is likely to either (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive business position of the person or the business on which the information was supplied. A pledge of confidentiality from the Agency, or the fact that the information at issue is not customarily available to the public, will not qualify requested materials as "confidential" under this exemption. Rural Development is responsible for making the final determination with regard to the disclosure or nondisclosure of information submitted by a business. If it cannot be readily determined whether the information obtained from a person is privileged or confidential business information, it is the policy of Rural Development to obtain and consider the views of the submitter of the information, and to provide the submitter an opportunity to object to any decision to disclose the information. Whenever a request (including any "demand" as defined in §2018.260 of this subpart) is received for information which has been submitted by a business, Rural Development shall:

(i) Provide the business information submitter with prompt notification of a request for that information (unless it is readily determined by the Agency that the information requested should not be disclosed or, on the other hand, that the information is not exempt by law from disclosure).

(ii) Notify the requester that Rural Development will inform the submitter of a request for submitted business information.

§ 2018.258(c)(4) (Con.)

(iii) Afford business information submitters time in which to object to the disclosure of, any specified portion of the information. The submitter must explain fully all grounds upon which disclosure is opposed. For example, if the submitter maintains that disclosure is likely to cause substantial harm to its competitive position, the submitter must explain document-by-document and item-by-item why disclosure would cause such harm. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under FOIA. The unique nature of this exemption applies particularly to contract proposals, market surveys, and business appraisals. The Agency rarely denies business information without first consulting the business information submitter and in most cases requires their justification for Rural Development to exercise this exemption. The following contains specific guidance from the Office of General Counsel (OGC) on what Rural Development should demand from the business regarding their justification for our assertion of this exemption:

(A) Please review your copies of the requested documents to determine whether any portion of them is covered by an exemption to the FOIA. If any information in these documents was supplied by others, please ascertain whether any third parties have an objection to the release of the documents. Absent advice to the contrary, the Rural Development will presume that such third parties have been informed of this FOIA request and/or have no objection to release.

(B) All objections to release must be stated in terms of exemptions from release of documents provided in the FOIA itself or Department of Agriculture regulations (7 CFR 1.1 - 1.23). Statements of objections must apply to specific documents and parts thereof. Statements of broad objection to release of all documents requested will not be viewed as appropriate.

(C) In general, where some portions of a document are exempt from mandatory release and some portions are not, all nonexempt portions are to be released. Those portions not released are to be identified according to the nature of the information contained and the specific applicable exemption or exemptions. You should indicate which portions of documents (if any) are considered exempt from mandatory release. If these are approved, the remainder of the document can then be released.

(D) The criteria for properly invoking an exemption under 5 U.S.C. 552 (b)(4) requires establishing that: (1) The information is confidential; (2) Actual competition exists; and (3) Substantial competitive harm is likely to result from disclosure. Any commercial or financial information considered privileged or confidential must be identified with particularity.

(E) To withhold information, Rural Development needs an affidavit(s) to support any claimed exemptions. Such an affidavit(s) should address in detail and nonconclusory terms, inter alia, the following series of questions. While some questions may not be applicable to the situation, they are provided for your general guidance and as an indication of the quality and type of information that must be received in support of a 5 U.S.C. 552(b)(4) exemption claim.

(1) Confidentiality.

(i) Does your firm continue in the same or substantially similar business to which the commercial or financial information is relevant?

(ii) How would divulging each item of commercial or financial information reveal the basis or method of operation of your business?

(iii) Due to the age of the information, what information remains to be of continued commercial vitality and value?

§ 2018.258(c)(4)(E) (iii) (1) (Con.)

(iv) Are any subcontractors listed in the subject documents currently associated with your business? Is all commercial or financial information associated with any such subcontractors current?

(v) How would disclosure of the information affect the Government's ability to obtain similar data from your firm in the future?

(2) Existence of competition.

(i) Describe the current market in which your business is involved.

(ii) Who are successful businesses involved in the market described above?

(iii) Please indicate the specifics of how the information will harm your competitive position as a result of disclosure to the requester.

(3) Substantial competitive injury.

(i) Describe the nature of your business and how particular commercial or financial information could be used by a competitor to your injury.

(ii) Would release of the information allow competitors advantageous insight into your firm's business operations? If so, in what way?

(iii) Could a competitor construct a theoretical model of your firm's cost and profit?

(F) The affidavit(s) should not be limited to a narrative response to the above questions. All information related to the issue of confidentiality and competition should be included. The responses should be precise, detailed, and address, so far as possible, each item of commercial or financial data individually. Any requests for which the remaining eight exemptions apply should be stated and expressed in a similar manner.

(G) The FOIA imposes strict time limits on Government agencies. In view of those limits, any objection to release of the above referenced documents is expected within fifteen days from the date of this letter. Failure to receive any objections within that time will be construed as an absence of objection to release to the requester. If there is no objection to release, a statement to that effect will be appreciated and will speed the response to the requester.

(iv) Provide business information submitters with notice of any determination to disclose such records prior to the disclosure date, in order that the matter may be considered for possible judicial intervention. Exemption 5 U.S.C. 552(b)(4) cases often give rise to so-called "Reverse FOIA" actions, in which the submitter of the requested materials seeks judicial intervention to prevent the Agency from releasing business information to the requester.

(v) Notify business information submitters promptly of all instances in which Rural Development FOIA requesters bring suit seeking to compel disclosure of submitted information. Exemption No. 4 of the FOIA [5 U.S.C. 552 (b)(4)].

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(5) 5 U.S.C. 552 (b) (5). "Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption protects internal memorandums and letters of a predecisional and deliberative nature, the release of which would inhibit the free exchange of ideas within Rural Development prior to a final decision. It cannot be used to withhold material merely because it is embarrassing or to withhold purely factual material or final decisions. Exemption No. 5 of the FOIA [5 U.S.C. 552 (b) (5)].

(i) Included within the scope of this exemption is the "executive" privilege (protecting advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of government), the attorney "work-product" privilege (protecting documents prepared by an attorney in anticipation of particular proceedings, where disclosure would reveal the attorney's litigation strategy or theory of the case), and the "attorney-client" privilege (protecting confidential communications between an attorney and his client).

(ii) The "executive" privilege, is the most frequently encountered application of this exemption by Rural Development. Predecisional versus post-decisional, and fact versus opinion are unique distinctions of this exemption. Courts have held that pre-decisional recommendations, which would ordinarily be exempt, lose the protection of the "executive, privilege if an agency, in making a final decision, chooses expressly to adopt them or incorporate them by reference. Conversely, facts that would ordinarily be available to the public have been withheld where they are selected or summarized in a way that reflects the deliberative process, or where their disclosure would impair the Agency's ability to obtain information which is essential to the Agency's decision-making process.

(iii) Rarely does this exemption apply to an entire document, requiring instead that the Agency delete only those parts which are exempt from mandatory disclosure. The FOIA states that an agency may not withhold an entire document because some portion of its contents is exempt from disclosure. This is particularly true of running case records, problem case reports, and the like.

(6) 5 U.S.C. 552 (b) (6). "Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption excludes from disclosure requirements all personnel and medical files and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of personal privacy. Rural Development interprets "person" to include only individuals and "files" to include personnel files and loan and grant files. This exemption does not include Rural Development personnel's grade, title, salary, and work location. Personal information which would not be available by law to a third party may be released if a written authorization to do so is granted by the first party waiving provisions of the Privacy Act of 1974. (Exhibit D of RD Instruction 2015-E may be used for this purpose). Exemption No. 6 of the FOIA [5 U.S.C. 552 (b) (6)].

(i) This exemption requires agencies and courts to balance individual privacy interests against the public's right to information. Although courts have noted that the language of the exemption appears to tilt the balance in favor of disclosure, information which reveals "intimate" or "personal" details concerning a living person can be withheld where the privacy interest is balanced against little or no public interest in disclosure.

(ii) Examples of less commonly known documents meeting the conditions of this exemption notwithstanding a public interest are as follows:

(A) Intimate or personal details about individuals beyond those described in §2018.258(a) (2) (vi) and (vii) of this subpart, regarding garnishment of wages on alimony orders and child support, except when requested by State and local government officials authorized to issue compulsory requests for information.

(B) Performance Appraisals--Performance elements and standards may also be withheld when they are so intertwined with performance appraisals that their disclosure would reveal an individual's performance appraisal.

§ 2018. 258(c)(6)(ii) (Con.)

(C) OGE Form 450, "Executive Branch Confidential Financial Disclosure Report" and the OGE Optional Form 450-A, Confidential Certificate of No New Interest" -- The Agency shall hold each form confidential. Only designated employees authorized to review and retain the forms are responsible for maintaining the forms in confidence, and shall not allow access to or allow information to be disclosed from a form.

(D) Segregated, selective, or discriminate list of individual borrowers such as delinquent loans, borrowers receiving servicing letters, borrowers names submitted to collection agencies, and borrowers facing foreclosure, bankruptcy, or the like. Such a request for information regarding individuals debt servicing relationship with the Agency must be denied on the basis that individual borrowers have legitimate expectations of privacy regarding their servicing relationship with the Agency, an expectation which the Agency is authorized to maintain under this exemption.

(7) 5 U.S.C. 552 (b) (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 prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual." For example, records which divulge Office of Inspector General (OIG) audits and investigative reports, which are to be released only by OIG, may be exempt. Requests for such records should be referred to OIG. Exemption No. 7 of the FOIA [5 U.S.C. 552 (b) (7)].

(d) Credit reports. Credit reports are to be released to the subject or the subject's designated representative, and to no other party, except for those portions which can be released without causing a clearly unwarranted invasion of personal privacy or under compulsory process.

(e) Availability of materials and records to other Government agencies.

(1) Other USDA agencies. Release of Information to other USDA agencies on a "need to know" basis may be made as it is not subject to the Privacy Act if such information will be used in the performance of official duties.

(2) Other Federal agencies. Rural Development desires the fullest cooperation with other Federal agencies. Accordingly, any information that is available to the public may be released to other Federal agencies. Information subject to the Privacy Act may be disclosed to Federal agencies in accordance with the act 5 U.S.C. 552a(b).

(3) State and local governmental agencies. State and local governmental agencies will be treated in the same manner as the general public. Also, any information may be made available to State and local governmental agencies only in accordance with the Privacy Act.

§ 2018.259 Determinations and appeals.

(a) Determinations. A determination to release or deny must be made within 20 working days after receipt of the request and, upon a determination to grant the request, if the requested data is not enclosed in the reply, the approximate date that compliance will be effected shall be indicated in the reply. If a denial is contemplated, the FOIO should be consulted, especially if the denial is for information with which you are not familiar. The names and titles or positions of each person responsible for the denial of a request must be set forth as a part of the written denial or they must sign the denial. A no records response should be handled as a denial. The notice of denial or no records response shall specify:

§ 2018.259(a) (Con.)

- (1) the nature of the information being withheld;
- (2) the reasons for the denial citing the applicable exemption(s) under the FOIA;
- (3) the right of the requester to appeal the denial or **no records** response to the appropriate agency from the following addresses:
Administrator, Rural Housing Service, Room 5014, MC 0701, 1400
Independence Avenue, SW, South Building, Washington, DC 20250-0701;
Rural Business-Cooperative Service, Room 5801, MC 3201, 1400
Independence Avenue, SW, South Building , Washington, DC 20250-3201;
and Administrator, Rural Utilities Service, Room 5135, MC 1510, 1400
Independence Avenue, SW, South Building, Washington, DC 20050-1510;
- (4) that appeal should be made in writing within 45 days from the date of the denial letter or **no records** response letter from the agency; and
- (5) that the phrase "FOIA APPEAL" is to be placed in capital letters on the front of the envelope containing the appeal.

(b) Appeals.

(1) The appropriate Agency Head will notify the requester in writing, within not more than 20 working days after receiving the written appeal, of the Rural Development's final determination. Upon a determination to grant the appeal, if requested data is not enclosed, the requester shall be informed of the approximate date compliance will be effected. Upon a determination to deny the appeal, the Administrator will send a copy of the records requested, when practical, and copies of all related correspondence to the OGC, Attention: General Law Division. When the volume of records is so large as to make sending a copy of the records requested impractical, the appropriate Agency Head will enclose a representative sample of those records. In accordance with 7 CFR 1.19, Rural Development may, in individual cases, except when disclosure is specifically prohibited by Executive Order, statute, or applicable regulations, make available records exempt from mandatory disclosure under 5 U.S.C. 552 (b) whenever it determines that such disclosure would be in the public interest.

(2) The appropriate Agency Head's notice of a final denial will include a statement that judicial review is available in accordance with 5 U.S.C. 552 (a) (4). The notice of final denial will also inform the requester of the reason(s) for the denial and names and titles or positions of each person responsible for the denial of the appeal.

(c) Extension of Administrative deadlines.

(1) In unusual circumstances administrative deadlines may be extended by an authorized Rural Development official pursuant to §2018.252 of this subpart. Written notice of the extension shall be sent to the requester within the applicable deadline setting forth the reasons for such extension and the date a determination is expected to be dispatched. In no event shall the extension exceed a total of 10 working days.

(2) Nothing in this instruction shall preclude Rural Development and the requester from agreeing on an extension of time. Any such agreement shall be confirmed in writing and shall specify clearly the total time agreed upon.

§ 2018.260 Compulsory process.

(a) When a subpoena or other compulsory process requires the production or disclosure of any records, materials, or information the employee will review and follow the regulations at 7 CFR 1.210 through 1.219 and consult with OGC and the State Director or Administrator for guidance. Generally, a subpoena for records should be handled as a FOIA request.

(b) No public statements or press releases relating to particular litigation being conducted by the Department of Justice are to be made or issued without prior consent of the FOIO who will obtain permission from the General Law Division, OGC.

§ 2018.261 Annual report.

(a) Each State Director shall submit a report on the following items to the FOIO, General Services Branch, National Office, by October 31 for the previous fiscal year. The report is to cover all activity within his or her jurisdiction. Items to be contained in the report are as follows:

§ 2018.261(a) (Con.)

(1) the number of requests for records received by the agency and the number of requests which the agency processed;

(2) the number of determinations made by the agency not to comply with requests for records made to such agency and the reasons for each such determination;

(3) a complete list of all statutes that Rural Development relied upon to authorize the agency to withhold information under 5 U.S.C. 552(b) (3), a description of whether a court has upheld the decision of the agency to withhold information under each statute, and a concise description of the scope of any information withheld;

(4) the number of requests for records pending before the agency as of September 30 of the preceding year, and the median number of days that such requests had been pending before the agency as of that date;

(5) the number of requests for records received by the agency and the number of requests which the agency processed;

(6) the median number of days taken by the agency to process different types of requests;

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

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

(b) The FOIO in the National Office will:

(1) Summarize all State Office FOIA fiscal year reports and include as a part thereof all activities described in paragraph (a) of this section which were confined solely to the National Office.

(2) Report the number of appeals made by requesters and the reason (exemptions or authority invoked) for the action taken upon each appeal that resulted in a denial of information. The report shall also indicate the number of appeals that were completely upheld, partially reversed, completely reversed, or pending.

RD Instruction 2018-F
§ 2018.261(b) (Con.)

(3) Submit the complete Rural Development FOIA fiscal year report to the Office of the Secretary, Attention: Office of Information, by November 30 of each year.

(4) The FOIA fiscal year report shall be made available to the public by computer telecommunications.

§§ 2018.262 - 2018.300 [Reserved]

ATTACHMENT: Exhibit A

The Freedom of Information Act
5 U.S.C. § 552, As Amended By
Public Law No. 104-231, 110 Stat. 3048

Below is the full text of the Freedom of Information Act in a form showing all amendments to the statute made by the "Electronic Freedom of Information Act Amendments of 1996."

§ 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 of 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 of 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 thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of 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;

(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 of subsequent requests for substantially the same records; and

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

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 of policy, interpretation, 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 of 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) of 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 of 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 of 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 of 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 of 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 of 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 of 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 of 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 mine 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. Repealed by Pub. L. 98-620, Title IV, 402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.]

(D) 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.

(E) 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.

(F) 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 with respect to any appeal 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 time 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 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 multi-track 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 multi-track 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 an 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--

(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, an 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 the exemption in subsection (b) 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 an 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 matters to be withheld;

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

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

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

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (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 prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

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

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

Any reasonably segregable portion of a record shall be provided to any person requesting such record 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 of 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 of requests for records pending before the agency as of September 30 of the preceding year, and the median number of 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 of days taken by the agency to process different types of requests;

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

(G) the number of full-time staff of the agency devoted to processing requests for records under this section, and the total amount expended 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 of the Committee on Government Reform and Oversight of the House of Representatives and the Chairman and ranking minority member of 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 also 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 of this section when maintained by an agency in any format, including an electronic format.

(g) The head of 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 of title 44, and under this section.

Section 12. Effective Date [not to be codified].

(a) Except as provided in subsection (b), this Act shall take effect 180 days after the date of the enactment of this Act [March 31, 1997].

(b) Sections 7 and 8 shall take effect one year after the date of the enactment of this Act [October 2, 1997].

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