requirements of CAA section 110(l). Thus, EPA is proposing to approve the February 13, 2013, SIP submittal into the federally-approved SIP. This area is, as noted above, in compliance with the ozone NAAQS and there is no indication that this proposed action will cause interference with compliance with the fine particulate matter or nitrogen dioxide NAAQS.

III. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the KY DAQ source-specific provision entitled ''Air Pollution Control Board of Jefferson County Board Order—Amendment 2,'' approved by LMAPCD on July 18, 2012. EPA has made, and will continue to make, these documents generally available electronically through *www.regulations.gov* and/or in hard copy at the EPA Region 4 office (see the **ADDRESSES** section of this preamble for more information).

IV. Proposed Action

EPA is proposing to approve the February 13, 2013, Kentucky SIP revision which adds LG & E Cane Run Generating Station NO_X RACT Plan Amendment 2 to the federally-approved Kentucky SIP. This SIP includes emission requirements for the changeover from coal-fired units to natural gas-fired combined cycle EGUs and associated equipment.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: June 1, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

[FR Doc. 2016–14032 Filed 6–14–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 5

RIN 0991–AC04

Freedom of Information Regulations

AGENCY: Office of the Secretary, Department of Health and Human Services (HHS).

ACTION: Proposed rule.

SUMMARY: The Department of Health and Human Services (HHS) is proposing to revise and republish its regulations implementing the Freedom of Information Act (FOIA). The regulations are being revised in order to incorporate changes made to the FOIA by the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act) and the Electronic FOIA Act of 1996 (E–FOIA Act). Additionally, the regulations are being updated to reflect changes to the organization, to make the FOIA process easier for the public to navigate, to update HHS's fee schedule, and to make provisions clearer. Because of the numerous changes to the organization and to the headings, the regulations are being republished in their entirety.

DATES: Submit comments on or before August 15, 2016.

ADDRESSES: You may submit comments via the Federal eRulemaking Portal at *www.regulations.gov*. In addition, please include the Docket ID at the top of your comments.

FOR FURTHER INFORMATION CONTACT: Michael Marquis, Michael Bell, Deborah Peters, and/or Brandon Lancey by email to: *HHS.ACFO@hhs.gov*. These individuals also can be reached by telephone at 202–690–7453.

SUPPLEMENTARY INFORMATION: This rule proposes revisions to the Department's regulations implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Department's FOIA regulations were last revised on November 23, 1988. Since that time, there have been major changes to the FOIA through the passage of the Openness Promotes Effectiveness in our National Government Act of 2007 (OPEN Government Act) (Pub. L. 110–175, 121 Stat. 2524) and the Electronic Freedom of Information Act Amendments of 1996 (E–FOIA Act) (Pub. L. 104–231, 110 Stat. 3048). This revision proposes to update the regulations to make them consistent with the OPEN Government Act and the E–FOIA Act. In addition, these regulations are being updated to

reflect changes to the organization, to make the FOIA process easier for the public to navigate, to update HHS's fee schedule, and to make provisions clearer.

The OPEN Government Act

The OPEN Government Act was enacted into law on December 31, 2007. Changes resulting from the enactment of the OPEN Government Act are found throughout this proposed rule. New provisions implementing the OPEN Government Act have been included in the following sections addressing the following subjects: § 5.3 (Chief FOIA Officer); § 5.3, § 5.23(c), and § 5.29(a) (FOIA Public Liaisons); § 5.3 (definition of ''representative of the news media''); § 5.3, § 5.25(c), and § 5.41(f) (tolling of time limits); § 5.23(b) (receipt of requests); § 5.25(a) (tracking numbers for all requests); § 5.28(c) (indicate exemption under which redaction is made); § 5.29(b) and § 5.54(b) (references to the Office of Government Information Services (OGIS)); and § 5.44(d) (ability to charge fees when a time limit is missed).

The E–FOIA ACT

This revision proposes to update the regulations to make them consistent with the E–FOIA Act. New provisions implementing the E–FOIA Act have been included in the following sections addressing the following subjects: § 5.1(b)(3)(iv) and § 5.1(b)(3)(v) (additional category of reading room records and indexing of this category); § 5.3 and § 5.22(e) (electronic posting of reading room records); § 5.3 (definition of ''record'' to include material stored electronically); § 5.3 (definition of ''search'' to include electronic form or format); § 5.25(e) (number of days to make disclosure decision increased from 10 working days to 20); § 5.25(e) and (f) (adoption of multi-track system for processing FOIA requests); § 5.25(e), (f), (g), and (h) (FOIA requests involving ''unusual circumstances''); § 5.27 (expedited processing); § 5.28(b) (informing requesters about the amount of information redacted); and § 5.28(f) (form and format of response).

Additional Changes

The proposed rule revises the FOIA regulations in order to reflect the current organizational structure of the Department. Since the regulations were last revised, the following Operating Divisions and Staff Divisions were created: The Administration for Children and Families in 1991, the Administration for Community Living in 2012, the Agency for Healthcare Research & Quality in 1989, the Program Support Center in 1995, and the Substance Abuse and Mental Health Services Administration in 1992. In addition, the Health Care Financing Administration was renamed the Centers for Medicare & Medicaid Services in 2001 and the Social Security Administration became an independent agency, leaving the organization in 1995. Sections 5.3 and 5.23 have been updated to reflect these changes.

The proposed rule establishes and defines the role of the Deputy Chief FOIA Officer at § 5.3. The proposed rule also more clearly defines the role of the HHS Freedom of Information Officer in the Office of the Secretary and details this individual's responsibility for Department-wide administration and coordination of the Freedom of Information Act at § 5.3. Finally, in § 5.3, the departmental regulations have been amended to specify that each HHS Freedom of Information Officer has the authority to task agency organizational components to search for records in response to a FOIA request and provide records located to the cognizant FOIA office.

The proposed rule makes a number of changes to assist the public in navigating the FOIA process. The new § 5.2 asserts the Department's commitment to provide access to public records and increase openness and transparency. Section 5.22 has been further clarified to better inform requesters of the type of information they should include in a FOIA request. Sections 5.23 and 5.24 provide requesters with the information needed to submit a FOIA request electronically. Section 5.25(a) creates procedures for acknowledging FOIA requests. Section 5.25(c) describes how the FOIA Service Centers will attempt to seek clarification from requesters before closing ambiguous requests. Section 5.28(e) establishes a policy that encourages interim responses for requests that involve a voluminous amount of material or searches in multiple locations. Section 5.31(d)(4)(ii) increases the number of days to respond to a submitter notice from 5 working days to 10 working days and gives the Department and its Operating Divisions and Staff Divisions the option to extend this timeframe as necessary; this will allow submitters the opportunity to make more clearly articulated disclosure objections rather than seeking to broadly designate information as exempt. Section 5.52(a) provides the contact information for submitting an appeal and increases the number of calendar days within which an appeal must be received from 30 to 45. Finally, § 5.61 informs requesters of how long the Department retains records created in administering the Department's Freedom of Information Program.

The proposed rule includes changes to the HHS fee schedule and other fee-related items. Revisions to the HHS fee schedule can be found at § 5.43. The proposed rule also provides updated procedures for handling of advanced payments (§ 5.41(b)); negotiating fees (§ 5.41(e)); and costs for reproducing electronic records (§ 5.43(c)(2) and (3)), using special delivery (§ 5.43(d)), and certifying records (§ 5.43(e)). The proposed rule provides the Department the ability to waive fees as a matter of administrative discretion in § 5.45(e). Finally, § 5.42(b) increases the minimum threshold for fee charges.

Regulatory Analysis

Executive Order 12866

The proposed rule has been drafted and reviewed in accordance with Executive Order 12866, 58 FR 51735 (Sept. 30, 1993), section 1(b), Principles of Regulation, and Executive Order 13563, 76 FR 3821 (January 18, 2011), Improving Regulation and Regulatory Review. The proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the rulemaking has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

The Department certifies under 5 U.S.C. 605(b) that the proposed rule will not have a significant economic impact on a substantial number of small entities because the proposed revisions do not impose any burdens upon FOIA requesters, including those that might be small entities. Therefore, a regulatory flexibility analysis is not required by the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

The proposed rule will not result in the expenditure by State, local, or tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 12612

This proposal has been reviewed under Executive Order 12612, Federalism, and it has been determined that it does not have sufficient implications for federalism to warrant preparation of a Federalism Assessment.

Paperwork Reduction Act

The proposed rule contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 45 CFR Part 5

Freedom of information.

In consideration of the foregoing, HHS proposes to revise part 5 of title 45, Code of Federal Regulations, to read as follows:

PART 5—FREEDOM OF INFORMATION REGULATIONS

Subpart A—General Information About Freedom of Information Act Requests

Subpart B—How To Request Records Under FOIA

Subpart C—Exemptions to Disclosure

Subpart D—Fees

Subpart E—Appeals

Subpart F—Records Retention

Authority: 5 U.S.C. 552, 18 U.S.C. 1905, 31 U.S.C. 9701, 42 U.S.C. 1306(c), E.O. 12600, E.O. 13392.

Subpart A—General Information About Freedom of Information Act Requests

§ 5.1 Purpose.

This part implements the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, for Department of Health and Human Services (HHS) records that are subject to the FOIA. This part contains the rules that we follow to process FOIA requests, such as the amount of time we have to make a determination regarding the release of records, who can decide to release records and who can decide not to release them, the fees we may charge, if applicable, the reasons why some records are exempt from disclosure under the FOIA, and the administrative and legal remedies available should a requester disagree with our initial disclosure determination.

(a) The FOIA provides a right of access to agency records, except to the extent that any portions of the records are protected from public disclosure by an exemption or exclusion in the statute. The FOIA does not require us to perform research for you or to answer your questions. The FOIA does not require agencies to create new records or to perform analysis of existing records; for example, by extrapolating information from existing agency records, reformatting publicly available information, preparing new electronic programs or databases, or creating data through calculations of ratios, proportions, percentages, trends, frequency distributions, correlations, or comparisons. However, at our discretion and if it would conserve government resources, we may decide to supply requested information by consolidating information from various records.

(b) This part does not apply to:

(1) Records that are currently available, either from HHS or from another Federal government agency, under a statute that provides for charging fees for those records;

(2) Records that have been made publicly available by an HHS Staff Division or Operating Division or other Federal agency, as part of its regular program activity;

(3) Records that have been affirmatively and continuously posted online as required by subsection (a)(2) of the FOIA, which includes the following categories of records:

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

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

(iii) Administrative staff manuals and instructions to staff that affect a member of the public;

(iv) Frequently requested records; and

(v) A general index of the records referred to under paragraph (b)(3)(iv) of this section;

(4) Data generated by an agency grant recipient under the provisions of 45 CFR part 75 to the extent the requirements of 45 CFR 75.322(e) do not apply to the data. We will not process your request under the FOIA or these regulations if that data is already available to the public through an archive or other source. In that situation, we will refer you to that other source; and

(5) Records requested from the System Manager of a Privacy Act system of records, pursuant to access provisions contained in the system's System of Records Notice (as described in 5 U.S.C. 552a(e)(4)), if the access request is fully granted by the System Manager under the Privacy Act, so that it is unnecessary to process the request under the FOIA. For information pertaining to the Privacy Act, please refer to 5 U.S.C. 552a, and the Department's Privacy Act regulations at 45 CFR part 5b. Privacy Act exemptions are not addressed in this regulation; they are addressed at 45 CFR 5b.11, and in the Privacy Act at 5 U.S.C. 552a(d)(5), (j), and (k).

§ 5.2 Presumption of openness and proactive disclosures.

In administering the FOIA, we are committed to providing access to public records as part of the Department's efforts to increase openness and transparency, but with due regard for protecting the legitimate interests of entities that have submitted records to the Department, the privacy interests of individuals who would be affected by release of records, and the interests of the agency in creating policy, making operating decisions and carrying out its mission.

(a) It is our policy to respond to all requests for records, irrespective of whether those requests conform to the requirements of these regulations. However, in order to preserve rights given to you by the FOIA and by this regulation (for example, the right to appeal if we deny your request and the right to have our appeal decision reviewed by a court), your request must be in writing and make reference to the FOIA. In certain exceptional circumstances, a Freedom of Information Office may, at its discretion,

accept an oral request from you and reduce it to writing for you.

(b) [Reserved]

§ 5.3 Definitions.

The following definitions apply to this part:

Agency is defined at 5 U.S.C. 551(1). HHS is an agency. Private entities performing work under a contractual agreement with the government are not agencies for the purpose of this definition. However, information maintained for an agency under Government contract, for the purposes of records management, is considered an agency record.

Chief FOIA Officer means a senior official of HHS, at the Assistant Secretary or equivalent level, who has agency-wide responsibility for ensuring efficient and appropriate compliance with the FOIA, monitoring implementation of the FOIA throughout the agency, and making recommendations to the head of the agency to improve the agency's implementation of the FOIA. The Secretary of HHS has designated the Assistant Secretary, Office of the Assistant Secretary for Public Affairs (ASPA), as the Agency Chief FOIA Officer (ACFO); that official may be contacted at *HHS.ACFO@hhs.gov.*

Commercial use means a use or purpose that furthers a commercial, trade, or profit interest of the requester or the person or entity on whose behalf the request is made.

Department or HHS means the U.S. Department of Health and Human Services.

Deputy Agency Chief FOIA Officer (DACFO) means a designated official within the Office of the Assistant Secretary for Public Affairs, who has been authorized by the Chief FOIA Officer to act upon their behalf to implement compliance with the FOIA, as described above. This official is also the approving review authority for FOIA administrative appeals.

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

Duplication means the process of making a copy of a record and sending it to the requester, to the extent necessary to respond to the request. Such copies include both paper copies and electronic records. Fees for duplication are further explained within § 5.43.

Educational institution means a school, university, or other entity of learning that operates a program of scholarly research. To qualify for this category, a requester must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are sought to further a scholarly research goal of the institution, and not for a commercial use or purpose, or for individual use or benefit.

Expedited processing means the process set forth in the FOIA that allows requesters to request faster processing of their FOIA request, if they can demonstrate a specific compelling need.

Fee category means one of the four categories established by the FOIA to determine whether a requester will be charged fees for search, review, and duplication. The categories are: Commercial use requests; non-commercial scientific or educational institutions requests; news media requests; and all other requests. Fee categories are further explained within § 5.44.

Fee waiver means the waiver or reduction of fees if a requester is able to demonstrate that certain standards set forth in the FOIA and this part are satisfied, including that disclosure of the records is in the public interest and that the records are not requested to further a commercial interest.

First-party request means a request by an individual for records pertaining to that individual, or an authorized representative acting upon an individual's behalf.

FOIA Public Liaison means an agency official who reports to the agency Chief FOIA Officer and serves as a supervisory official to whom a requester can raise concerns about the service the requester has received from the FOIA Service Center. This individual is responsible for assisting in reducing delays, increasing transparency, and understanding of the status of requests, and assisting in the resolution of disputes.

FOIA request means a written request, which reasonably describes the records sought. We may contact a requester to clarify the records that are sought or to discuss the scope of the request.

Freedom of Information Act (FOIA) means the law codified at 5 U.S.C. 552 that provides the public with the right to request agency records from Federal executive branch agencies. A link to the text of the FOIA is at *http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/amended-foia-redlined-2010.pdf.*

Freedom of Information Officer means an HHS official who has been delegated the authority to release or withhold records; to assess, waive, or reduce fees in response to FOIA requests; and to determine whether to grant expedited processing. In that capacity, the Freedom of Information Officer has the authority to task agency organizational components to search for records in response to a FOIA request, and to provide records located in their office. Apart from records subject to proactive disclosure pursuant to subsection (a)(2) of the FOIA, only Freedom of Information Officers have the authority to release or withhold records or to waive fees in response to a FOIA request. Our FOIA operations are decentralized, and each FOIA Service Center listed in § 5.23 has a designated official with this authority; the contact information for each FOIA Service Center is also listed in § 5.23.

(1) The *HHS Freedom of Information Officer in the Office of the Secretary* means the HHS official who in addition to overseeing the daily operations of the FOIA program in that office and having the authority of a *Freedom of Information Officer,* is also responsible for the Department-wide administration and coordination of the FOIA and its implementing regulations and policies as they pertain to the programs and activities of the Department. This individual serves as the principal resource with respect to the articulation of procedures designed to implement and ensure compliance with the FOIA and its implementing regulations and policies as they pertain to the Department. This individual reports through the DACFO to the ACFO to support oversight and compliance with the OPEN Government Act.

(2) *Operating Division and Staff Division Freedom of Information Officers* means the officials who are responsible for overseeing the daily operations of their FOIA programs in their respective Operating Divisions or Staff Divisions of the Department, with the full authority as described in the definition of *Freedom of Information Officer* in this section. These individuals serve as the principal resource and authority for FOIA operations and implementation within their respective Operating Divisions or Staff Divisions.

Frequently requested records means records, regardless of form or format,

that have been released to any person under the FOIA and that, 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.

Immediate Office of the Secretary (IOS) means the Office of the Secretary, responsible for operations and work of the Secretary. It includes the Office of the Deputy Secretary, Office of the Chief of Staff, Secretary's Counselors, the Executive Secretariat, the Office of Health Reform, and the Office of Intergovernmental and External Affairs.

Non-commercial scientific institution means an institution that is operated for the purpose of conducting scientific research and not at all on a basis that furthers the commercial, trade, or profit interests of any person or organization. We decide whether to grant a requester non-commercial status on a case-by-case basis, based on the requester's intended use of the requested records.

Office of the Inspector General (OIG) means the Staff Division within the Office of the Secretary (OS), which is responsible for protecting the integrity of HHS programs and the health and welfare of the beneficiaries of those programs. OIG is responsible for processing FOIA requests sent to its Office.

Office of the Secretary (OS) means the HHS's chief policy officer and general manager, who administers and oversees the organization, its programs and activities. The Deputy Secretary and a number of Assistant Secretaries and Staff Divisions support OS. The HHS FOIA Office within ASPA processes FOIA requests for records maintained by OS Staff Divisions other than the OIG and the Program Support Center (PSC). In certain circumstances and at the HHS FOIA Office's discretion, the HHS FOIA office may also process FOIA requests involving other HHS OpDivs, as further described in § 5.28(a).

Operating Divisions (OpDivs) means any of the following divisions within HHS which are subject to this regulation:

Office of the Secretary (OS)
Administration for Children and Families (ACF)
Administration for Community Living (ACL)
Agency for Healthcare Research and Quality (AHRQ)
Agency for Toxic Substances and Disease Registry (ATSDR)
Centers for Disease Control and Prevention (CDC)
Centers for Medicare & Medicaid Services (CMS)
Food and Drug Administration (FDA)
Health Resources and Services Administration (HRSA)
Indian Health Service (IHS)
National Institutes of Health (NIH)
Substance Abuse and Mental Health Services Administration (SAMHSA).

Other requester means any individual or organization whose request does not qualify as a commercial-use request, representative of the news media request (including a request made by a freelance journalist), or an educational or non-commercial scientific institution request.

Program Support Center (PSC) means the Program Support Center. The PSC FOIA Office is located within the Office of Assistant Secretary for Administration (ASA) (*i.e.,* within an OS Staff Division) and processes FOIA requests for certain OS records and FOIA requests and FOIA appeals for certain HHS OpDivs, as further described in § 5.23.

Reading room records are records that are required to be made available to the public without a specific request under 5 U.S.C. 552(a)(2). As referenced in § 5.1(b)(3), we make reading room records available to the public electronically through our Web pages (*http://www.hhs.gov/foia/reading/index.html*) and at the physical locations identified in § 5.23. Other records may also be made available at our discretion through our Web pages (*http://www.hhs.gov*).

Record means any information that would be an agency record when maintained by an agency in any format, including an electronic format; and any information that is maintained for an agency by an entity under Government contract, for the purposes of records management. This definition does not include materials available from the agency's libraries and reading rooms.

Redact means delete or mark over.

Representative of the news media means any person or entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast news to the public at large and publishers of periodicals, including print and online publications that disseminate news and make their products available through a variety of means to the general public. We do not consider requests for records that support the news-dissemination function of the requester to be a commercial use. We consider ''freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity as working for that entity. A publishing contract provides the clearest evidence that a journalist expects publication; however, we also consider a requester's past publication record. We decide whether to grant a requester media status on a case-by-case basis, based on the requester's intended use of the requested records.

Review means examining records responsive to a request to determine whether any portions are exempt from disclosure. Review time includes processing a record for disclosure (*i.e.,* doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions.

Search means the process of identifying, locating, and retrieving records to find records responsive to a request, whether in hard copy or in electronic form or format.

Staff Divisions (StaffDivs) means an organization component that provides leadership, direction, and policy and management guidance to the Office of the Secretary and the Department. The following StaffDivs are subject to the regulations in this part:

Immediate Office of the Secretary (IOS)
Assistant Secretary for Administration (ASA)
Assistant Secretary for Financial Resources (ASFR)
Assistant Secretary for Health (OASH)
Assistant Secretary for Legislation (ASL)
Assistant Secretary for Planning and Evaluation (ASPE)
Assistant Secretary for Public Affairs (ASPA)
Assistant Secretary for Preparedness and Response (ASPR)
Departmental Appeals Board (DAB)
Office of Civil Rights (OCR)
Office of the General Counsel (OGC)
Office of Global Affairs (OGA)
Office of the Inspector General (OIG)
Office of Medicare Hearings and Appeals (OMHA)
Office of the National Coordinator for Health Information Technology (ONC)

Submitter means any person or entity that provides commercial information to the agency, and includes individuals, corporations, other organizational entities, and state and foreign governments.

Tolling means temporarily stopping the running of a time limit. We may toll a request to seek clarification or to address fee issues, as further described in § 5.25.

§ 5.4 Regulatory scope.

The requirements in this part apply to all OpDivs and StaffDivs of HHS. Some OpDivs and StaffDivs may establish or continue to maintain additional rules because of unique program requirements, but such rules must be consistent with this part, the FOIA and the precedential case law which interprets it. If additional rules are issued, they must be published in the **Federal Register** and you may get copies online at *https://www.federalregister.gov/, http://www.regulations.gov/* or by contacting one of our FOIA Service Centers.

§ 5.5 Interrelationship between the FOIA and the Privacy Act of 1974.

The FOIA allows any person (whether an individual or entity) to request access to any Federal agency record. The Privacy Act, at 5 U.S.C. 552a(d), provides an additional right of access, allowing individuals to request records about themselves, if the records are maintained in a system of records (defined in 5 U.S.C. 552a(a)(5)).

(a) *Requesting your own records:* If you request records about yourself that are maintained within a system of records as defined by the Privacy Act, you should make your request in accordance with the Privacy Act and the Department's implementing regulations at 45 CFR part 5b. This includes requirements to verify your identity. If you request records about someone other than yourself, you may receive greater access if you submit appropriate documentation signed by the other person that certifies their identity and confirms that they have given their consent for you to have access to their records. If any of the FOIA Service Centers receive a Privacy Act request, they will forward it to the appropriate Privacy Act Officer. If you are an individual requesting your own records as described in this section, your request will be processed under the Privacy Act in coordination with the appropriate Privacy Act Officer. If an exemption under the Privacy Act applies, you may still be able to access your records, or a portion thereof, under the FOIA.

(b) *Requesting another individual's record.* If you request records that are about an individual other than yourself and do not have that individual's written consent (including authentication of that individual's identity), we will process your request under the FOIA.

Subpart B—How To Request Records Under FOIA

§ 5.21 Who can file a FOIA request?

Any individual, partnership, corporation, association, or public or private organization other than a Federal agency, regardless of nationality, may submit a FOIA request to us. The FOIA excludes Federal agencies from filing FOIA requests. However, state and local governments may file FOIA requests.

§ 5.22 What do I include in my FOIA request?

In your FOIA request:

(a) Describe the records you seek in sufficient detail to enable our staff to locate them with a reasonable amount of effort. The more information you provide, the better possibility we have of finding the records you are seeking. Information that will help us find the records would include:

(1) The agencies, offices, or individuals involved;

(2) The approximate date(s) when the records were created;

(3) The subject, title, or description of the records sought; and

(4) Author, recipient, case number, file designation, or other reference number, if available.

(b) Include your name, full mailing address, and phone number and if available, your email address. This information allows us to reach you faster if we have any questions about your request. It is your responsibility to keep your current mailing address up to date with the office where you have filed the FOIA request.

(c) If you are requesting the medical records of an individual other than yourself and you are not that individual's legally authorized representative, you should submit a Health Insurance Portability and Accountability Act (HIPAA) compliant release authorization form signed by the subject of records or the individual's legally authorized representative. The HIPAA Privacy Rule requires that an authorization form contain certain core elements and statements which are described in the Privacy Rule's requirements at 45 CFR 164.508. If you are submitting a request for Medicare records to CMS, CMS has a release authorization form at the following link: *https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS10106.pdf.*

(d) Mark both your letter and envelope, or the subject line of your email, with the words ''FOIA Request.''

(e) Before filing your request, you may find it helpful to consult the HHS FOIA Service Centers online at *http://www.hhs.gov/foia/contacts/index.html,* which provides additional guidance to assist in submitting a FOIA request to a specific HHS OpDiv or StaffDiv or to regional offices or divisions within an OpDiv or StaffDiv. You may also wish to check in the agency's electronic reading rooms available online at *http://www.hhs.gov/foia/reading/index.html,* to see if the information you wish to obtain is already available.

§ 5.23 Where do I send my FOIA request?

We have several FOIA Service Centers (FOIA offices) that process FOIA requests. You should send your FOIA request to the appropriate FOIA Service Center that you believe would have the records you seek. An up-to-date listing is maintained online at *http://www.hhs.gov/foia/contacts/index.html.*

(a) If you are requesting research data made available under the provisions of 45 CFR 75.322(e), requests for such data should be addressed to the HHS OpDiv that made the award under which the data were first produced. That OpDiv will process your request in accordance with established procedures consistent with the FOIA and 45 CFR 75.322(e).

(b) We officially receive your request when it reaches the FOIA Service Center with responsibility for the HHS OpDiv or StaffDiv where requested records are likely to be located, but no later than 10 working days after the request first arrives at any of our FOIA Service Centers.

(c) If you have questions concerning the processing of your FOIA request, you may contact the FOIA Service Center processing your request. If that initial contact does not resolve your concerns, you may wish to contact the designated FOIA Public Liaison for the OpDiv or StaffDiv processing your request. You can find a list of our FOIA Service Centers and Public Liaisons at *http://www.hhs.gov/foia/contacts/index.html.*

§ 5.24 Does HHS accept electronic FOIA requests?

Yes. The body of the message should contain all of the information listed in § 5.22. You also may file a FOIA request by emailing your request to the appropriate FOIA Service Center, as listed in the table provided in § 5.23. If an OpDiv or StaffDiv does not have a separate email or electronic link to submit a FOIA request, you may submit a FOIA request at the Department's main link at *https://requests.publiclink.hhs.gov/palMain.aspx.*

§ 5.25 How does HHS process my FOIA request?

(a) *Acknowledgement.* We acknowledge all FOIA requests in writing within 10 working days after receipt by the appropriate office. The acknowledgement letter or email informs you of your request tracking number, provides contact information, and informs you of any complexity we are aware of in processing that may lengthen the time required to reach a final decision on the release of the records. The acknowledgement letter or email or a subsequent communication may also seek additional information to clarify your request or to ask you to narrow the scope of a very large or broad request. Should we ascertain at any time while processing your request that another agency may possess the requested records, we will either refer your request to that agency and notify you of that referral, or advise you how to contact that agency.

(b) *Perfected requests.* (1) A request is considered to be perfected (*i.e.,* the 20 working day statutory response time begins to run) when—

(i) The request is received by the responsible FOIA office;

(ii) The requested records are reasonably described;

(iii) The request contains sufficient information to enable the FOIA office to contact the requestor and transmit records to the requestor; and

(iv) The requester has agreed to pay all or an established amount of applicable fees or requested a fee waiver.

(2) We provide at least 10 working days for you to respond to a request to perfect your request, after notification. Should you not answer any correspondence, or should the correspondence be returned as undeliverable, we reserve the right to administratively close the FOIA request.

(c) *Stops in processing time (tolling).* We may stop the processing of your request one time if we require additional information regarding the specifics of the request. Requests must reasonably describe the records sought and not be overly broad. If we determine that a request does not reasonably describe the records sought, we will attempt to contact you using the contact information you have provided. The processing time resumes upon our receipt of your response. We also may stop the processing of your request if we require clarification regarding fee assessments. If additional information or clarification is required, we will attempt to contact you using the contact information you have provided. The processing time will resume upon our receipt of your response. We will provide at least 10 working days after notification for you to respond to a request for additional information or clarification regarding the specifics of your request or fee assessment. Should you not answer any correspondence, or should the correspondence be returned as undeliverable, we reserve the right to administratively close the FOIA request.

(d) *Search cut-off date.* As the end or cut-off date for a records search, we use the date on which we first begin our search for documents responsive to your request, unless you specify an earlier cut-off date, or a specific date range for the records search. We will use the date of the first search in those cases when you request records ''through the present,'' ''through today,'' or similar language. The FOIA allows you to request existing agency records. The FOIA cannot be used to request records which the agency may create in the future in the course of carrying out its mission.

(e) *Processing queues.* We place FOIA requests in simple or complex processing queues to be processed in the order received, on a first-in, first-out basis, absent approval for expedited processing based upon a compelling need, as further explained and defined in § 5.27. For most non-expedited requests, we make a determination about release of the records you requested within 20 working days from when the appropriate office receives your request (simple queue processing). However, if unusual circumstances prevent us from making a decision within 20 working days, we will place your request into a complex processing queue, so that such cases do not delay the processing of simpler requests. We will notify you of potential complicating factors in our acknowledgement letter or email, or in subsequent communications regarding your request, and you may choose to limit the scope of your request to reduce the processing time for your request.

(f) *Complex processing queue factors.* We will place into a complex processing queue any request that cannot be completed within 20 working days due to unusual circumstances. You will be notified if it is necessary for us to take an additional ten working days to process your request. Unusual circumstances include the need to:

(1) Search for and collect the records from one or more offices or field locations that are separate from the office processing the request;

(2) Search for, collect, and review a voluminous number of records that are part of a single request;

(3) Consult with another OpDiv, StaffDiv or another agency having a substantial interest in the request before releasing records.

(g) *Aggregating requests.* For the purposes of satisfying unusual circumstances, we may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request, involving clearly related matters, that would otherwise involve unusual circumstances. In the event that requests are aggregated, they will be treated as one request for the purposes of calculating both response time and fees.

(h) *Complex processing schedule.* If we need to extend the deadline for more than an additional 10 working days as a result of unusual circumstances, we will ask if you wish to modify your request so that we can answer the request more quickly. If you do not wish to modify your request, we will provide you with an estimated date by which we expect to provide a response to your request.

§ 5.26 How does HHS determine estimated completion dates for FOIA requests?

(a) When you ask for an estimated completion date for the processing of records that do not require consultation with another agency, we estimate the completion date on the basis of our reasonable judgment as to how long it will take to complete the request. Given the uncertainty inherent in establishing any estimate, the estimated completion date is subject to change at any time.

(b) When you ask for an estimated completion date for records that must be reviewed by another agency, our estimate may also be based on information from the other agency.

§ 5.27 How do I request expedited processing?

(a) We can expedite requests, or segments of requests, only for records over which we have control. If we must refer a request to another agency, we will inform you and suggest that you seek expedited review from that agency.

(b) To request expedited processing, you must submit a statement, certified to be true and correct, explaining the basis for your need for expedited processing. You must send the request to the appropriate FOIA Officer at the address listed in § 5.23. You may request expedited processing when you first request records or at any time during our processing of your request or appeal.

(c) We process requests on an expedited basis whenever we determine

that one or more of the following criteria exist:

(1) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) There is an urgent need to inform the public about an actual or alleged Federal Government activity (this criterion applies only to those requests made by a person primarily engaged in disseminating information to the public).

(d) We will respond to your request for expedited processing within 10 calendar days of our receipt of your request to expedite. If we grant your request, the HHS OpDiv or StaffDiv responsible for the review of the requested records will process your request as a priority, and it will be processed as soon as practicable. We will inform you if we deny your request for expedited processing and provide you with appeal rights. If you decide to appeal that denial, we will expedite our review of your appeal.

§ 5.28 How does HHS respond to my request?

(a) The appropriate FOIA Officer will send you a response informing you of our release determination, including whether any responsive records were located, how much responsive material was located, whether the records are being released in full or withheld in full or in part, and any fees you must pay for processing of the request. The HHS FOIA Officer may, at their discretion, respond to similar requests or requests involving a common subject matter that have been submitted to multiple HHS OpDivs or StaffDivs, or to other FOIA requests which are deemed appropriate for a Departmental response.

(b) If we deny any part of your request, our response will explain the reasons for the denial, which FOIA exemptions apply to withheld records, and your right to appeal that determination. We will advise you of the number of pages withheld or the estimated volume of withheld records, unless providing such information would harm an interest protected by an applicable FOIA exemption. In order to exhaust your administrative remedies, you must file an administrative appeal in accordance with § 5.52, before initiating judicial review.

(c) Records may be withheld in full or in part if any of the nine FOIA exemptions apply. If we determine to withhold part of a record pursuant to an exemption, we will provide access to reasonably segregable non-exempt information contained in the record. On the released portion of the record, we indicate where the information has been redacted and the exemption(s) we applied, unless including that indication would harm an interest the exemption protects. In Subpart C of this part, we describe the scope of the exemptions to disclosure that may apply to agency records.

(d) We also may determine that a request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested records do not exist, cannot be located, or have been destroyed; or that the requested records are not readily reproducible in the form or format requested.

(e) If a request involves a voluminous amount of material or searches in multiple locations, we may provide you with interim responses if feasible and reasonably possible, releasing the records on a rolling basis.

(f) Copies of records in the format you request will be provided if the records already exist in that format or if they are reasonably and readily reproducible in the format you request.

§ 5.29 How may I request assistance with the FOIA process?

(a) If you have questions concerning the processing of your FOIA request, you should first contact the FOIA Service Center processing your request. Additionally, for assistance at any point in the FOIA process, you may contact the FOIA Public Liaison at the FOIA Service Center processing your request. The FOIA Public Liaison is responsible for assisting you to reduce delays, increasing transparency and understanding of the status of requests, and assisting to resolve any FOIA disputes. Some FOIA Service Centers allow you to check the status of your request online. You can find a list of our FOIA Service Centers and Public Liaisons at *http://www.hhs.gov/foia/contacts/index.html*.

(b) The Office of Government Information Services (OGIS), which is part of the National Archives and Records Administration, serves as the Federal FOIA ombudsman and assists requesters and agencies to prevent and resolve FOIA disputes. You may contact OGIS at the following address: National Archives and Records Administration, Office of Government Information Services, 8601 Adelphi Road—OGIS, College Park, MD 20740–6001, or by email at *ogis@nara.gov,* or by telephone at 202–741–5770 or 1–877–684–6448 (toll free).

Subpart C—Exemptions to Disclosure

§ 5.31 What are the reasons records may be withheld?

While we are committed to providing public access to as many of our records as possible, there are instances in which information falls within one or more of the FOIA's nine exemptions to disclosure. We review all records and weigh and assess all legal and policy requirements prior to making a final disclosure determination. A description of the scope of the nine FOIA exemptions is provided in paragraphs (a) through (i) of this section.

(a) *Exemption 1.* Exemption 1 requires our agency to withhold records that, as provided by FOIA, are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order. When the release of certain records may adversely affect U.S. relations with foreign countries, we usually consult with officials of those countries or officials of the Department of State. Also, we may, on occasion, have in our possession records classified by some other agency. We will refer your request for such records to the agency that classified them and notify you that we have done so.

(b) *Exemption 2.* Exemption 2 authorizes our agency to withhold records that are solely related to the internal personnel rules and practices of an agency.

(c) *Exemption 3.* Exemption 3 requires our agency to withhold records which are specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, October 28, 2009, specifically cites to 5 U.S.C. 552(b)(3).

(d) *Exemption 4.* Exemption 4 requires our agency to withhold trade secrets and commercial or financial information that is obtained from a person and that is privileged or confidential.

(1) *Trade secrets.* A secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.

(2) *Commercial or financial information.* We will not disclose

records where the information is ''commercial or financial,'' is obtained from a person, and is ''privileged or confidential.''

(i) Information is ''commercial or financial'' if it relates to businesses, commerce, trade, employment, profits, or finances (including personal finances). We interpret this category broadly.

(ii) Information is ''obtained from a person'' if HHS or another agency has obtained it from someone who has a commercial or financial interest in the information. ''Person'' includes an individual, partnership, corporation, association, or public or private organization other than an agency. Information is not ''obtained from a person'' if it is generated by HHS or another Federal agency. Documents prepared by the government can still come within Exemption 4, however, if they simply contain summaries or reformulations of information supplied by a source outside the government, who retains a commercial or financial interest in the information.

(iii) Information is ''privileged'' if it would ordinarily be protected from disclosure in civil discovery by a recognized evidentiary privilege, such as the attorney-client privilege or the work product privilege. Information may be privileged for this purpose under a privilege belonging to a person outside the government, unless providing the information to the government rendered the information no longer protectable in civil discovery.

(iv) Information is ''confidential'' if it meets one of the following tests:

(A) Disclosure of information which was provided voluntarily to the Government may impair the government's ability to obtain necessary information in the future;

(B) Disclosure of information which was required to be provided to the Government will result in a diminution of quality and reliability of such information in the future;

(C) Disclosure would be likely to cause substantial harm to the competitive position of the person who submitted the information;

(D) Disclosure would impair other government interests, such as program effectiveness and compliance; or

(E) Disclosure would impair other private interests, such as an interest in controlling availability of intrinsically valuable records, which are sold in the market by their owner.

(3) *Designation of certain confidential information.* A person who submits records to the government may designate part or all of the information in such records as exempt from disclosure under Exemption 4 of the FOIA. The person may make this designation either at the time the records are submitted to the government or within a reasonable time thereafter. The designation must be in writing. Any such designation will expire ten years after the records were submitted to the government.

(4) *Predisclosure notification.* The procedures in this paragraph apply to records on which the submitter has designated information as provided in paragraph (d)(3) of this section. They also apply to records that were submitted to the government where we have substantial reason to believe that information in the records could reasonably be considered exempt under Exemption 4. Certain exceptions to these procedures are stated in paragraph (d)(5) of this section.

(i) When we receive a request for such records, and we determine that we may be required to disclose them, we will make reasonable efforts to notify the submitter about these facts. The notice will include a copy of the request, and it will inform the submitter about the procedures and time limits for submission and consideration of objections to disclosure. If we must notify a large number of submitters, we may do this by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it.

(ii) The submitter has 10 working days from receipt of the notice to object to disclosure of any part of the records and to state all bases for its objections. FOIA Offices in HHS and its organizational components may extend this period as appropriate and necessary.

(iii) We review and consider all objections to release that we receive within the time limit. Any information provided by a submitter under this provision may itself be subject to disclosure under the FOIA. If a submitter does not respond to our agency within the specified time period, we will process the FOIA request without the submitter's input. If we decide to release the records, we inform the submitter in writing, along with our reasons for the decision to release. We include with the notice a description of the information to be disclosed or copies of the records as we intend to release them. We also inform the submitter that we intend to release the records within 5 working days after the date of the notice, unless ordered to do otherwise by a court of competent jurisdiction. We do not consider any information we receive after the date of a disclosure decision.

(iv) When a requester files suit under the FOIA to obtain records covered by this paragraph, we will promptly notify the submitter.

(v) If the requester files a lawsuit under the FOIA for access to records submitted to HHS, we promptly notify the submitter.

(vi) We will notify the requester in these circumstances:

(A) When we notify a submitter that it may be required to disclose information under the FOIA, we will also notify the requester that notice and opportunity to comment are being provided to the submitter;

(B) When the agency notifies a submitter of a final disclosure decision under the FOIA, and;

(C) When a submitter files a lawsuit to prevent the disclosure of the information.

(5) *Exceptions to predisclosure notification.* The notice requirements in paragraph (d)(4) of this section do not apply in the following situations:

(i) We determine that we should withhold the information under a FOIA exemption;

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

(iii) We are required by a statute (other than the FOIA), or by a regulation issued in accordance with the requirements of Executive Order 12600, to disclose the information; or

(iv) The designation made by the submitter appears obviously frivolous. However, in such a case, the agency must provide the submitter with written notice of any final disclosure determination and intent to release, within five working days prior to the specified disclosure date. We will notify the submitter as referenced in § 5.31(d)(4)(iii).

(e) *Exemption 5.* Exemption 5 protects inter-agency or intraagency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. This exemption extends only those documents that are normally privileged in the civil discovery context. Some of the most commonly applicable privileges are described in the following paragraphs.

(1) *Deliberative process privilege.* This privilege protects predecisional deliberative communications. A document is predecisional if it is generated before the adoption of an agency policy, and does not necessarily have to point specifically to an agency final decision. The purpose of the privilege is to prevent injury to the quality of the agency decision making process by encouraging open and frank

internal policy discussions, by avoiding premature disclosure of policies not yet adopted, and by avoiding the public confusion that might result from disclosing reasons that were not in fact the ultimate grounds for an agency's decision. Purely factual material in a deliberative document is within this privilege only if it is inextricably intertwined with the deliberative portions so that it cannot reasonably be segregated, if it would reveal the nature of the deliberative portions, or if its disclosure would in some other way make possible an intrusion into the decisionmaking process. The privilege continues to protect predecisional communications even after a decision is made; additionally, predecisional, deliberative communications will remain protected even if a final decision is not achieved.

(2) *Attorney work product privilege.* This privilege protects documents prepared by or for an agency, or by or for its legal representatives in anticipation of litigation or for trial. It includes documents prepared for purposes of administrative adjudications as well as court litigation. It includes documents prepared by program offices and may include documents prepared by agency contractors in the authorized performance of agency duties, if requested by an attorney in anticipation of litigation. It includes factual material in such documents as well as material revealing opinions and tactics. Finally, the privilege continues to protect the documents even after the litigation is closed.

(3) *Attorney-client privilege.* This privilege protects confidential communications between a lawyer and an employee or agent of the government where there is an attorney-client relationship between them (typically, where the lawyer is acting as attorney for the agency and the employee is communicating on behalf of the agency) and where the employee has communicated information to the attorney in confidence in order to obtain legal advice or assistance.

(f) *Exemption 6.* Exemption 6 protects information about individuals in personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. This exemption authorizes us to withhold records about individuals if disclosure would constitute a clearly unwarranted invasion of their personal privacy. We utilize a balancing test in deciding whether to release records to you that contain personal or private information about someone else; that is, we weigh the foreseeable harm of invading that person's privacy against the public benefit that would result from the release.

(g) *Exemption 7.* Exemption 7 authorizes our agency to withhold records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information would cause the following harm(s):

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

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

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting lawful national security intelligence investigation, information furnished by a confidential source;

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

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

(h) *Exemption 8.* Exemption 8 authorizes the withholding of records that are 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.

(i) *Exemption 9.* Exemption 9 permits the withholding of geological and geophysical information and data, including maps, concerning wells.

§ 5.32 Records not subject to the requirements of the FOIA—law enforcement exclusions.

Under the FOIA, there is special protection for three narrow categories of law enforcement and national security records. The provisions protecting those records are known as ''exclusions.'' These exclusions expressly authorize Federal law enforcement agencies, under these exceptional circumstances, to treat the records as not subject to the requirements of the FOIA, and are further described as follows:

(a) The first exclusion protects the existence of an ongoing criminal law enforcement investigation when there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency and disclosure of the existence of records could reasonably be expected to interfere with enforcement proceedings.

(b) The second exclusion is limited to criminal law enforcement agencies and protects the existence of informant records when the informant's status has not been officially confirmed.

(c) The third exclusion is limited to the Federal Bureau of Investigation and protects the existence of foreign intelligence or counterintelligence, or international terrorism records when the existence of such records is classified.

(d) Should an HHS OpDiv or StaffDiv maintain records which are subject to a FOIA exclusion, and consider employing an exclusion or have a question as to the implementation of an exclusion, the OpDiv or StaffDiv will consult with the Office of Information Policy, U.S. Department of Justice.

(e) Because records falling within an exclusion are not subject to the requirements of the FOIA, should any HHS OpDiv or StaffDiv maintain such excluded records, the OpDiv or StaffDiv will limit its response to those records that are subject to the FOIA.

Subpart D—Fees

§ 5.41 General information on fees for all FOIA requests.

(a) We generally assume that when you request records you are willing to pay the fees we charge for services associated with your request. As referenced in § 5.42(c), you may specify a limit on the amount you are willing to spend. We will notify you if it appears that the fees will exceed the limit and ask whether you nevertheless want us to proceed with the search.

(b) If you have failed to pay FOIA fees in the past, we will require you to pay your past due bill and we may also require you to pay the anticipated fee before we begin processing your current request. If we estimate that your fees may be greater than $250, we also may require advance payment or a deposit before we begin processing your request. If you fail to make an advance payment within 10 working days after the date of our fee letter, we will close the request.

(c) We may charge interest on unpaid bills beginning on the 31st calendar day following the day the FOIA fee invoice was sent. We may assess interest, administrative costs, and penalties for overdue FOIA fee costs.

(d) If we determine that you (either acting alone or with a group of requesters) are breaking down a single request into a series of requests in order to avoid or reduce fees, we may aggregate all of these requests when calculating the fees. In aggregating requests, we may consider the subject matter of the requests and whether the requests were filed close in time to one another.

(e) If, in the course of negotiating fees, you do not respond to the agency within 10 working days of our last communication, your request will be closed.

(f) We may stop the processing of your request, if necessary, to clarify fee issues with you, and to confirm your willingness to pay applicable fees. Fee related issues may arise sequentially over the course of processing a request, and the FOIA allows agencies to stop the processing time as many times as necessary in order to clarify issues regarding fee assessment and willingness to pay fees.

§ 5.42 What fee policies apply to HHS records?

(a) We may charge search fees even if the records are exempt from disclosure, or if we do not find any responsive records during our search.

(b) We do not send an invoice to requesters if processing fees are less than $25.

(c) If estimated search or review fees exceed $250, we will contact you. If you have specified a different limit that you are willing to spend, we will contact you only if we estimate the fees will exceed that specified amount.

§ 5.43 What is the FOIA fee schedule for obtaining records?

In responding to FOIA requests for records, we charge the following fees, where applicable, unless we have given you a reduction or waiver of fees. Under the FOIA, fees are three-tiered, and the hourly charge is determined by the classification and grade level of the employee performing the search and review. The current FOIA fee schedules can be found on the *HHS.gov* Web site at *http://www.hhs.gov/foia/fees/index.html.*

(a) *Search fees*—(1) *Manual searches.* Fees will be assessed to search agency files and records in both hardcopy and electronic format. Such fees will be at the rate or rates for the classification of the employee(s) performing the search, as established in this section.

(2) *Computer searches.* We base the fees for computer searches on the actual cost to our agency of operating the computer and the salary of the operator.

(b) *Review fees.* (1) We charge review fees for time we spend examining documents that are responsive to a request to determine whether we must apply any FOIA exemptions to withhold information. Review time includes processing any record for disclosure (*i.e.,* doing all that is necessary to prepare the record for disclosure), including redacting the record and marking the appropriate FOIA exemptions. We charge review fees even if we ultimately are unable to disclose a record.

(2) We do not charge review fees for time we spend resolving general legal or policy issues regarding the application of exemptions. However, we do charge review fees for time we spend obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter.

(c) *Duplication fees*—(1) *Photocopying standard-sized pages.* The current charge for photocopying records can be found on the *HHS.gov* Web site at *http://www.hhs.gov/foia/fees/index.html.*

(2) *Reproduction of electronic records.* We charge you for our direct costs for staff time and to organize, convert, and format data for release, per requester instructions, and for printouts or electronic media necessary to reproduce electronic records requested under the FOIA. We will attempt to provide records in the format you sought, if the records are reasonably and readily reproducible in the requested format.

(3) *Copying other media.* We will charge you the direct cost of copying other media.

(d) *Mailing and special delivery fees.* We release records by United States Postal Service or, when appropriate, by electronic means, such as electronic mail or web portal. If a requester seeks special delivery, such as overnight shipping, we reserve the right to pass on the actual costs of special delivery to the requester. Requesters may provide their mailing account and billing information to the agency, so that they may pay directly for special delivery options.

(e) *Certification of records.* The FOIA does not require agencies to certify records as true copies. We may elect, as a matter of administrative discretion, to certify records upon request; however, such a request must be submitted in writing. Further, we will only certify as true copies records that have not left the agency's chain of custody. The charge for certification is $25.00 per record certified.

§ 5.44 How does HHS calculate FOIA fees for different categories of requesters?

(a) If you are a commercial use requester, we charge you fees for searching, reviewing, and duplicating responsive records.

(b) If you are an educational or noncommercial scientific institution requester, or a member of the news media, you are entitled to search time, review time, and up to 100 pages of duplication (or the cost equivalent for other media) without charge. We charge duplication fees after the first 100 pages (or its cost equivalent).

(c) If you do not fall into either of the categories in paragraphs (a) and (b) of this section, and are an ''other requester,'' you are entitled to two hours of free search time, up to 100 pages of duplication (or the cost equivalent of other media) without charge, and you will not be charged for review time. We may charge for search time beyond the first two hours and for duplication beyond the first 100 pages (or its cost equivalent).

(d) We shall not assess search fees (or duplication fees for educational, scientific and media requesters) if the agency fails to comply with any time limit under 5 U.S.C. 552(a)(6) in processing that request; unless unusual or exceptional circumstances apply.

§ 5.45 How may I request a fee waiver?

(a) We will waive or reduce your fees for HHS records only if your request meets both of the following criteria:

(1) The request is in the public interest (*i.e.,* the information is likely to contribute significantly to public understanding of the operations or activities of the Government); and

(2) The request is not primarily in your commercial interest.

(b) To be eligible for a fee waiver or reduction you must explain:

(1) How the records you are requesting pertain to the operations and activities of the Federal Government. There must be a clear connection between the identifiable operations or activities of the Federal Government and the subject of your request;

(2) How the release will reveal meaningful information that the public does not already know about Federal Government activities. Disclosing information that is already in the public domain, in either the same or a substantially identical form, does not add anything new to the public's understanding of Government activities;

(3) How disclosure to you will advance public understanding of the issue;

(4) How your expertise or understanding of the requested records

as well as your ability and intention will effectively convey information to the public. We ordinarily presume that a representative of the news media satisfies this consideration;

(5) How you intend to disseminate the requested information to a broad spectrum of the public; and

(6) How disclosure will lead to a significantly greater understanding of the Government by the public.

(c) After reviewing your request and determining that there is a substantial public interest in release, we also determine if the request primarily furthers your commercial interests. If it does, you are not eligible for a fee waiver.

(d) You should ask for waiver or reduction of fees when you first submit your request to HHS, and should address the criteria referenced in this section.

(e) We may waive (either partially or in full) or reduce fees for records in additional circumstances as a matter of administrative discretion.

Subpart E—Appeals

§ 5.51 When may I appeal HHS's FOIA determination?

In order to fully exhaust all of your administrative remedies, you must file an appeal of an adverse agency determination. You may appeal when there is an adverse determination, including:

(a) Refusal to release a record, either in whole or in part;

(b) Determination that a record does not exist or cannot be found;

(c) Determination that the record you sought was not subject to the FOIA;

(d) Denial of a request for expedited processing;

(e) Denial of a fee waiver request; or

(f) Fee category determination.

§ 5.52 How do I file an appeal?

(a) You have the right to appeal an adverse agency determination of your FOIA request.

(b) You may submit your appeal via mail or electronically. All appeals must be in writing and received by HHS within 45 calendar days from the date of our final determination letter.

(1) Please send your appeal to the review official at the address provided in your denial letter. If you are unsure who is the appropriate review official, please contact the FOIA Service Center that processed your request to obtain that information.

(2) The addresses to mail FOIA appeals for CMS, the PSC and OS are, respectively: Centers for Medicare & Medicaid Services, Attn: Principal Deputy Administrator, Room C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244; U.S. Department of Health and Human Services (PSC), Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, 5600 Fishers Lane, Room 19–01, Rockville, MD 20857; U.S. Department of Health and Human Services, Deputy Agency Chief FOIA Officer, Office of the Assistant Secretary for Public Affairs, Room 729H, 200 Independence Avenue SW., Washington, DC 20201. Additionally, information can be found at the following online locations for CMS, PSC, and OS: *https://www.cms.gov/Regulations-and-Guidance/Legislation/FOIA/filehow.html; http://www.psc.gov/psc_foia/guide.html;* and *http://www.hhs.gov/foia/FOIA%20Appeals/index.html.*

(3) For appeals submitted via mail, you should mark both your letter and envelope with the words ''FOIA Appeal'' and include your FOIA request tracking number, a copy of your initial request, and our final determination letter.

(c) Your appeal should clearly identify the agency determination that is being appealed. It would be helpful if you provide specific reasons explaining why you believe the agency's adverse determination should be reconsidered.

§ 5.53 How does HHS process appeals?

(a) We respond to your appeal within 20 working days after the appeal official designated in your appeal letter receives it. If, however, your appeal is based on a denial of a request for expedited processing, we will act on your appeal of that decision expeditiously. Before making a decision on an appeal of an adverse determination, the designated review official will consult with the Office of the General Counsel. Also, the concurrence of the Office of the Assistant Secretary for Public Affairs is required in all appeal decisions, including those on fees. When the review official responds to an appeal, that constitutes the Department's final action on the request.

(b) If we reverse or modify the initial decision, we will inform you in writing and, if applicable, reprocess your request. If we do not change our initial decision, we will respond in writing to you, explain the reasons for the decision, set out any FOIA exemptions that apply, and inform you of the provisions for judicial review. If a requester files a FOIA lawsuit in reference to an appeal, we will cease processing the appeal.

§ 5.54 What avenues are available to me if I disagree with HHS's appeal decision?

(a) In our response letter, we notify you of your right to seek judicial review of an adverse determination as set forth in the FOIA at 5 U.S.C. 552(a)(4)(B). If you wish to seek judicial review of any adverse determination, you must first appeal it administratively as described in this subpart.

(b) We also inform you that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. As referenced in § 5.29(b) you may contact OGIS via mail, email, or telephone for assistance.

Subpart F—Records Retention

§ 5.61 How does HHS retain FOIA records?

We will preserve records created in administering the Department's Freedom of Information program until disposition is authorized under an applicable General Records Schedule or other records schedule duly approved by the Archivist of the United States.

Dated: June 7, 2016.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2016–13994 Filed 6–14–16; 8:45 am]

BILLING CODE 4150–25–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 218

[Docket No. FRA–2014–0033, Notice No. 3]

RIN 2130–AC48

Train Crew Staffing

AGENCY: Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

ACTION: Proposed rule; notice of public hearing and reopening of comment period.

SUMMARY: On March 15, 2016, FRA published a Notice of Proposed Rulemaking (NPRM) that would require establishing minimum requirements for the size of train crew staffs depending on the type of operation. FRA is announcing a public hearing to provide interested persons an opportunity to provide oral comments on the proposal. FRA is also announcing a reopening of the comment period for this proceeding to allow time for interested parties to submit written comments in response to