

## Federal Register Format Changes

**EDITOR'S NOTE:** The Office of the Federal Register is printing the following document in a two-column format to illustrate proposed changes in the appearance of the daily Federal Register. The two-column format and other changes in fonts, headings, line spacing, and tables are intended to improve readability and public understanding of Federal regulations and notices, while minimizing increases in white space that affect printing costs charged to agencies. The format changes do not affect the legal status of the final rule issued by the National Archives and Records Administration.

We invite agencies and members of the public to comment on the proposed format by email at: [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov) or by U.S. mail at: National Archives and Records Administration, Office of the Federal Register (NF), Federal Register Format Changes, 700 Pennsylvania Ave., NW, Washington, DC 20408-0001. For more information on the proposed format change, go to the Federal Register web site at: <http://www.nara.gov/fedreg/plainlan.html#top>.

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### 36 CFR Parts 1250 and 1254

RIN 3095-AA72

#### NARA Freedom of Information Act Regulations

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Final rule.

**SUMMARY:** NARA is revising and reorganizing its regulations that govern access to NARA's archival holdings and NARA's own operational records through the Freedom of Information Act (FOIA). This rule combines FOIA procedures for NARA archival records currently in 36 CFR part 1254, with those for NARA operational records currently in 36 CFR part 1250. This rule also incorporates the changes resulting from the Electronic Freedom of Information Act Amendments of 1996 (EFOIA). This rule will affect individuals and organizations that file FOIA requests for NARA operational records and archival holdings.

**EFFECTIVE DATE:** April 23, 2001.

#### FOR FURTHER INFORMATION CONTACT:

Nancy Allard at 301-713-7360.

**SUPPLEMENTARY INFORMATION:** NARA published a notice of proposed rulemaking on August 23, 2000, in the Federal Register (65 FR 51270) for a 60-day public comment period.

NARA received two comments, one from the Public Citizen Litigation Group, a nonprofit consumer advocacy organization, and one from the National Coordinating Committee for the Promotion of History. Following is a summary of the comments and a discussion of the changes that we made to the proposed rule in response to those comments:

#### Section 1250.2(c)—Confidential commercial information

In our proposed rule, we define confidential commercial information "as records provided to NARA by a submitter that may contain material exempt from release under the FOIA...". Public Citizen believes that this is not the only way that such information may appear in NARA's records.

Public Citizen believes that such information may appear in records that were submitted to other agencies and trans-

ferred to NARA. In our definition we describe a "submitter" as one who provides NARA with information. We are deleting the phrase "to NARA" with § 1250.2 (c) so that the regulations will appropriately cover both the more common operational requests as well as the infrequent archival requests for commercial information still requiring protection. Thus, § 1250.2(c) will read, "confidential commercial information means records provided by a submitter that may contain material exempt from release under the FOIA because disclosure could reasonably be expected to cause the submitter substantial competitive harm."

#### Section 1250.2(d)—Definition of "educational"

Public Citizen comments that NARA's proposed definition of "educational institution request" as "a request that serves the scholarly research goals of an institution or school rather than the individual goals of the requester", is not supported by the statutory language. NARA agrees and has adopted the DOJ definition in § 1250.2(d), as suggested by Public Citizen.

#### Sections 1250.2(e) and 1250.6—Application of FOIA to all archival records

Public Citizen believes that all records in the custody of the Archivist should be governed by FOIA. They assert that the proposed rule language in the preamble, and at §§ 1250.2(e) and 1250.6, indicates that the FOIA applies only to archival records received from the executive branch of the Federal government, and does not apply to records of Congress or of the federal courts that have been transferred to the Archivist's custody because of their historical value. The submitter believes that all archival records received under 44 U.S.C. 2107, including the records of Congress and judicial branch records that have been deposited with NARA for preservation are subject to the FOIA. Public Citizen recommends that NARA not adopt 36 CFR. 1250.2(e) and 1250.6 in its final regulations.

We believe that 44 U.S.C. 2107 allows the Archivist to accept for deposit Congressional and court records of historical value and that accepting these records does not make them records of the executive branch for purposes of FOIA. In addition, the courts have carved out court and Congressional records from the FOIA statute coverage. (See *United States v. Spain*, No.82-60-N, slip op. At 1 (E.D. Va. June 19, 1998) and *Smith v. United States Congress*, No. 95-5281, 1996 WL 523800, at \*1(D.C.Cir. August 28, 1996)) All the provisions in the proposed § 1250.2 are unchanged.

#### Section 1250.8—Definition of operational records

Public Citizen suggests that the term "operational" be defined again at this point in the regulations. NARA believes that this term has been fully defined in § 1250.2(i), and that the use of the shortened "plain English" version is appropriate.

#### Section 1250.12(a)(4)—Types of records available in NARA's reading room

Public Citizen believes that NARA's proposed language in this section is narrower than the statutory mandate, which provides that the agency must place in its reading room copies of all records that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." NARA's proposed rule states that "copies of records requested 3 or more times under the FOIA" must be placed in NARA's FOIA reading room. Public Citizen asserts that records may have become subject to subsequent requests for substantially the

same records even if there have not been three or more identical requests. Thus, Public Citizen urges that NARA modify the description of records that will be made available in NARA's reading room to conform to the statutory language. While NARA believes that the proposed language defines how NARA makes this determination, we believe that expanding the description to include the phrase "other records that have become or are likely to become the subject of subsequent FOIA request" is a reasonable addition to the regulations. We have amended the proposed description of records available in NARA's reading room in § 1250.12(a)(4) to read: "copies of records requested 3 or more times under the FOIA; and other records that have become or are likely to become the subject of subsequent FOIA requests for substantially the same records. . .". The word FOIA has been added a second time to make sure that all will understand that these are FOIA requests.

### Section 1250.26—Extension of statutory deadlines

Public Citizen recommends that NARA modify the proposed language in § 1250.26 to tell the requester the length of the anticipated delay whenever we notify the requester that the 20 working day deadline cannot be met. Public Citizen suggests that the modification would enable the requesters to make informed decisions about whether to modify their request. NARA believes this to be appropriate in those instances where a modification of the request will enhance NARA's ability to make a more timely response. This situation is covered in § 1250.26(c).

In the cases where NARA notifies a requester that 20 working days is not a sufficient amount of time to make a final decision and adds fewer than 10 additional days to the response time, as described in § 1250.26(b), NARA believes that the statute does not require us to seek modification from the requester. The final response to the requester would be further delayed if we stopped processing the request in order to contact the requester and awaited the requester's decision on modifying the request.

Public Citizen also suggests that NARA inform the requester of the completion date of the request. NARA believes that this is an appropriate addition to any NARA response to the requester. However, in those instances when NARA must wait on another agency (§ 1250.26(d)) or follow an alternative time schedule (§§ 1250.26(e) and (f)), the date of completion can only be an estimate and modification of a request is unlikely to eliminate the need for outside consultation. We have added to this section a new sentence in order to keep requesters aware of the complexities in processing certain types of FOIA responses. Section 1250.26(a) reads "NARA will make an initial response to all FOIA requesters within 20 days. The initial response will inform requesters of any complexity in processing their request, which may lengthen the time required to reach a final decision on the release of the records."

The National Coordinating Committee for the Promotion of History (NCCPH) states that researchers sometimes request a specific document from NARA only to find that it is withheld in its entirety even though there is only a page in question. NCCPH suggests that NARA release part of a record before the record is referred. NARA believes that the situation that NCCPH is describing here only occurs when the requested material is classified. When material is classified, it is sent to another agency for review because we do not have the technical or the legal ability to determine whether a portion of a classified document is unclassified and could be released. Without this certainty, we do not

believe it appropriate to release any portion of the referred material.

### Section 1250.28—Expedited processing for records subject to multiple requests

Public Citizen suggests that NARA revise their two criteria on imminent danger to person or due process to include the concept of "reasonable expectation." The statute makes clear that expedited processing is required where delay in releasing the records could reasonably be expected to pose an imminent threat to life or physical safety of an individual. Public Citizen asserts that the expedited processing to address due process concerns is appropriate where the loss of due process rights is reasonably expected, not just where the loss is imminent. Following a review of this comment, NARA believes this revision is acceptable and amended the wording to read: § 1250.28(a)(1) "A reasonable expectation of an imminent threat to an individual's life or "physical safety;" and § 1250.28(a)(2) "A reasonable expectation of imminent loss of substantial due process rights."

With regard to Public Citizen's suggestion that NARA revise the criteria to add the receipt of multiple requests as a reason for expediting requests, NARA believes that Congress and the courts continue to agree that the fairest pattern for responding to FOIA requesters is on a first in/first out basis. In those special circumstances where delay could reasonably be expected to cause serious harm or where voluminous or complicated requests produce a bottleneck, NARA has established procedures for expedited processing and continues to use multiple queues.

### Section 1250.50—Fees

NCCPH believes that NARA's search and review fees are too high and that while it is reasonable to charge search fees for another agency's records, it is unreasonable for NARA to charge for a search of its own operational records. NARA does not charge for searching and reviewing archival records accessioned into the National Archives of the United States when we receive a FOIA request for them.

In establishing fees for NARA's own operational records requested under FOIA we have followed the procedures established by OMB. Search and review fees are established at the salary of the individual who is doing the search and review. There is no charge for the first two hours of search or review time. NARA rarely charges for search or review of operational records as the two-hour free time is rarely used up.

This rule is not a significant regulatory action for the purpose of Executive Order 12866. As required by the Regulatory Flexibility Act, it is hereby certified that this rule will not have a significant impact on a substantial number of small entities because this regulation will affect only persons and organizations who file FOIA request with NARA. The rule does not have any federalism or tribal implications.

### List of Subjects

#### 36 CFR Part 1250

Archives and records, Confidential business information, Freedom of information.

#### 36 CFR Part 1254

Archives and records, Confidential business information, Freedom of information, Micrographics, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the National Archives and Records Administration amends chapter XII of title 36, Code of Federal Regulations as follows:

- 1. Revise part 1250 to read as follows:

## **PART 1250—PUBLIC AVAILABILITY AND USE OF FEDERAL RECORDS**

### **Subpart A—General Information About Freedom of Information Act (FOIA) Requests**

#### **Sec.**

- 1250.1** Scope of this part.  
**1250.2** Definitions.  
**1250.4** Who can file a FOIA request?  
**1250.6** Does FOIA cover all of the records at NARA?  
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**1250.10** Do I need to use FOIA to gain access to records at NARA?  
**1250.12** What types of records are available in NARA's FOIA Reading Room?  
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### **Subpart B—How to Access Records Under FOIA**

- 1250.20** What do I include in my FOIA request?  
**1250.22** Where do I send my FOIA request?  
**1250.24** Will you accept a FOIA request through email?  
**1250.26** How quickly will NARA respond to my FOIA request?  
**1250.28** Will NARA ever expedite the review of the records I requested?  
**1250.30** How do I request expedited processing?  
**1250.32** How quickly will NARA process an expedited request?  
**1250.34** How will I know if NARA is going to release the records I requested?  
**1250.36** When will NARA deny a FOIA request?  
**1250.38** In what format will NARA provide copies?

### **Subpart C—Fees**

- 1250.50** Will I be charged for my FOIA request?  
**1250.52** How much will I have to pay for a FOIA request for NARA operational records?  
**1250.54** General information on fees for NARA operational records.  
**1250.56** Fee schedule for NARA operational records.  
**1250.58** Does NARA ever waive FOIA fees for NARA operational records?  
**1250.60** How will NARA determine if I am eligible for a fee waiver for NARA operational records?

### **Subpart D—Appeals**

- 1250.70** What are my appeal rights under FOIA?  
**1250.72** How do I file an appeal?  
**1250.74** Where do I send my appeal?  
**1250.76** May I email my FOIA appeal?  
**1250.78** How does NARA handle appeals?

### **Subpart E—Special Situations**

- 1250.80** How does a submitter identify records containing confidential commercial information?  
**1250.82** How will NARA handle a FOIA request for confidential commercial information?  
**1250.84** Service of subpoena or other legal demand for NARA operational records.

**Authority:** 44 U.S.C. 2104(a), 2204; 5 U.S.C. 552; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

### **Subpart A—General Information About Freedom of Information Act (FOIA) Requests**

#### **§ 1250.1 Scope of this part.**

This part implements the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, for NARA operational records and archival records that are subject to FOIA. Other NARA regulations in 36 CFR parts 1254 through 1275 provide detailed guidance for conducting research at NARA.

#### **§ 1250.2 Definitions.**

The following definitions apply to this part:

(a) *Archival records* means permanently valuable records of the United States Government that have been transferred to the legal custody of the Archivist of the United States.

(b) *Commercial use requester* means a requester seeking 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.

(c) *Confidential commercial information* means records provided by a submitter that may contain material exempt from release under the FOIA because disclosure could reasonably be expected to cause the submitter substantial competitive harm.

(d) *Educational institution request* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in 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 not sought for a commercial use but are sought to further scholarly research.

(e) *FOIA request* means a written request for access to records of the executive branch of the Federal Government held by NARA, including NARA operational records, or to Presidential records in the custody of NARA that were created after January 19, 1981, that cites the Freedom of Information Act.

(f) *Freelance journalist* means an individual who qualifies as a representative of the news media because the individual can demonstrate a solid basis for expecting publication through a news organization, even though not actually in its employ. A publication contract would be the clearest proof of a solid basis, but the individual's publication history may also be considered in demonstrating this solid basis.

(g) *News media representative* means a person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of news) who make their products available for purchase or subscription to the general public.

(h) *Non-commercial scientific institution* means an institution that is not operated on a basis that furthers the commercial, trade, or profit interests of any person or organization, and which is operated solely for the purpose of conducting

scientific research which produces results that are not intended to promote any particular product or industry.

(i) *Operational records* means those records that NARA creates or receives in carrying out its mission and responsibilities as an executive branch agency. This does not include archival records as defined in paragraph (a) of this section.

(j) *Other requesters* means any individual who is not a commercial-use requester, not a representative of the news media, not a freelance journalist, nor one associated with an educational or non-commercial scientific institution whose research activities conform to the definition in paragraph (h) of this section.

(k) *Submitter* means any person or entity providing potentially confidential commercial information to an agency. The term submitter includes, but is not limited to, corporations, state governments, and foreign governments.

#### § 1250.4 Who can file a FOIA request?

Any individual, partnership, corporation, association, or government regardless of nationality may file a FOIA request.

#### § 1250.6 Does FOIA cover all of the records at NARA?

No, FOIA applies only to the records of the executive branch of the Federal government and certain Presidential records. Use the following chart to determine how to gain access:

If you want access to ...	Then access is governed by . . .
(a) Records of executive branch agencies	This part and parts 1254 through 1260 of this chapter. FOIA applies to these records.
(b) Records of the Federal courts	Parts 1254 through 1260 of this chapter. FOIA does not apply to these records.
(c) Records of Congress	Parts 1254 through 1260 of this chapter. FOIA does not apply to these records.
(d) Presidential records (created by Presidents holding office since 1981).	This part and parts 1254 through 1270 of this chapter. FOIA applies to these records 5 years after the President leaves office. However a President may invoke exemptions under the Presidential Records Act which would extend this up to 12 years after the President leaves office.
(e) Documents created by Presidents holding office before 1981 and housed in a NARA Presidential library.	The deed of gift under which they were given to NARA. These documents are not Federal records and FOIA does not apply to these materials.
(f) Nixon Presidential materials	Part 1275 of this chapter. FOIA does not apply to these materials.

#### § 1250.8 Does NARA provide access to all the executive branch records housed at NARA facilities?

(a) NARA provides access to the records NARA creates (operational records) and records originating in other Federal agencies that have been transferred to the legal custody of the Archivist of the United States (archival records).

(b) Twentieth-century personnel and medical records of former members of the military and of former civilian employees of the Federal government are held at NARA's National Personnel Records Center (NPRC), located in St. Louis, Missouri. These records remain in the legal custody of the agencies that created them and access to them is governed by the FOIA and other access regulations of the creating agencies. The NPRC processes FOIA requests under authority delegated by the originating agencies, not under the provisions of this part.

(c) In our national and regional records centers, NARA stores records that agencies no longer need for day-to-day business. These records remain in the legal custody of the agencies that created them. Access to these records is through the originating agency. NARA does not process FOIA requests for these records.

#### § 1250.10 Do I need to use FOIA to gain access to records at NARA?

(a) Most archival records held by NARA are available to the public for research without filing a FOIA request. You may either visit a NARA facility as a researcher to view and copy records or you may write to request copies of specific records.

(b) If you are seeking access to archival records that are restricted and not available to the public, you may need to file a FOIA request or a mandatory review request (see part 1254 of this chapter for procedures for accessing classified records) to gain access to these materials. If you make a reference request for restricted records, we may ask that you change your reference request to a FOIA request or a mandatory review request. See 36 CFR 1254.46 for information on filing mandatory review requests.

(c) You must file a FOIA request when you request access to NARA operational records that are not already available to the public.

#### § 1250.12 What types of records are available in NARA's FOIA Reading Room?

(a) NARA makes available for public inspection and copying the following materials described in subsection (a)(2) of the FOIA:

(1) Final NARA orders;

(2) Written statements of NARA policy that are not published in the Federal Register;

(3) Operational staff manuals and instructions to staff that affect members of the public;

(4) Copies of records requested 3 or more times under FOIA and other records that have been or are likely to become the subject of subsequent FOIA requests for substantially the same records;

(5) An index, updated quarterly, to these materials.

(b) These materials are available during normal working hours at the NARA facility where the records are located. See 36 CFR parts 1253 and 1254 for a fuller description of NARA facilities and research room procedures.

(c) Any of this material that was created after October 31, 1996, will also be placed on NARA's web site at <http://www.nara.gov/foia>.

(d) For paper copies of the index to these materials write the NARA FOIA Officer at the address listed in § 1250.22(d).

#### **§ 1250.14 If I do not use FOIA to request records, will NARA treat my request differently?**

Whether you choose to invoke the FOIA or not, NARA will respond as promptly as possible to your request.

#### **Subpart B—How To Access Records Under FOIA**

#### **§ 1250.20 What do I include in my FOIA request?**

In your FOIA request, you must:

(a) Describe the records you wish to access in enough detail to allow NARA staff to find them. The more information you provide, the better possibility NARA has of finding the records you are seeking. Information that will help us find the records includes:

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

(2) The approximate date when the records were created.

(b) Include your name and full mailing address. If possible, please include a phone number or email address as well. This information will allow us to reach you faster if we have any questions about your request.

(c) Mark both your letter and envelope with the words "FOIA Request."

#### **§ 1250.22 Where do I send my FOIA request?**

(a) For requests for archival records in the Washington, DC, area, mail your request to the Chief, Special Access and FOIA Staff (NWCTF), Room 6350, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001.

(b) For archival records in any of NARA's regional records services facilities, send the FOIA request to the director of the facility in which the records are located. The addresses for these facilities are listed in 36 CFR 1253.7.

(c) For Presidential records subject to FOIA, mail your request to the director of the library in which the records are located. The addresses for these facilities are listed in 36 CFR 1253.3.

(d) For the operational records of any NARA unit except the Office of the Inspector General, mail your request to the NARA FOIA Officer (NGC), Room 3110, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001.

(e) For records of the Inspector General write to Office of the Inspector General (OIG), FOIA Request, Room 1300,

National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001.

(f) If you are unable to determine where to send your request, send it to the NARA FOIA Officer (NGC), Room 3110, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. That office will forward your request to the office(s) that have the records you are seeking. Your request will be considered received when it reaches the proper office's FOIA staff.

#### **§ 1250.24 Will you accept a FOIA request through email?**

Yes, send email FOIA requests to [inquire@nara.gov](mailto:inquire@nara.gov). You must indicate in the subject line of your email message that you are sending a FOIA request. The body of the message must contain all of the information listed in § 1250.20.

#### **§ 1250.26 How quickly will NARA respond to my FOIA request?**

(a) NARA will make an initial response to all FOIA requests within 20 working days. The initial response will inform requesters of any complexity in processing their request, which may lengthen the time required to reach a final decision on the release of the records.

(b) In most cases, NARA will make a decision on the release of the records you requested within the 20 working days. If unusual circumstances prevent us from making a decision within 20 working days, we will inform you in writing how long it will take us to complete your request. Unusual circumstances are the need to:

(1) Search for and collect the records from field facilities;

(2) Search for, collect, and review a voluminous amount of records which are part of a single request; or

(3) Consult with another agency before releasing records.

(c) If we are extending the deadline for more than an additional 10 working days, we will ask you if you wish to modify your request so that we can meet the deadline. If you do not agree to modify your request, we will work with you to arrange an alternative time schedule for review and release.

(d) If you have requested records that we do not have the authority to release without consulting another agency (e.g. security-classified records), we will refer copies of the documents to the appropriate agency. NARA will send you an initial response to your FOIA requests within 20 working days informing you of this referral. However, the final response to your FOIA can only be made when the agency to which we have referred the documents responds to us.

(e) If you have requested Presidential records and NARA decides to grant you access, NARA must inform the incumbent and former Presidents of our intention to disclose information from those records. After receiving the notice, the incumbent and former Presidents have 30 days in which to decide whether or not to invoke Executive privilege to deny access to the information. NARA will send you an initial response to your FOIA request within 20 working days informing you of the status of your request. However, the final response to your FOIA can only be made at the end of the 30-day Presidential notification period.

(f) If you have requested records containing confidential commercial information that is less than 10 years old, we will contact the submitter of the requested information. NARA will send you an initial response to your FOIA request within 20 working days informing you of our

actions. See § 1250.82 for the time allowed the submitter to object to the release of confidential commercial information. If the records contain confidential commercial information that is 10 years old or older, NARA staff will not contact the submitter, but will process the request under normal FOIA procedures.

**§ 1250.28 Will NARA ever expedite the review of the records I requested?**

(a) In certain cases NARA will move your FOIA request or appeal to the head of our FOIA queue. We will do this for any of the following reasons:

(1) A reasonable expectation of an imminent threat to an individual's life or physical safety;

(2) A reasonable expectation of an imminent loss of a substantial due process right; or

(3) An urgent need to inform the public about an actual or alleged Federal government activity (this last criterion applies only to those requests made by a person primarily engaged in disseminating information to the public).

(b) NARA can expedite requests, or segments of requests, only for records over which we have control. If NARA must refer a request to another agency, we will so inform you and suggest that you seek expedited review from that agency. We cannot expedite requests for Presidential records or shorten the 30-day Presidential notification period.

**§ 1250.30 How do I request expedited processing?**

You must submit a statement, certified to be true and correct to the best of your knowledge, explaining the basis of your need for expedited processing. All such requests must be sent to the appropriate official at the address listed in § 1250.22. You may request expedited processing when you first request records or at any time during our processing of your request.

**§ 1250.32 How quickly will NARA process an expedited request?**

We will respond to you within 10 days of our receipt of your request for expedited processing. If we grant your request, the NARA office responsible for the review of the requested records will process your request as quickly as possible. If we deny your request for expedited processing and you decide to appeal our denial, we will also expedite our review of your appeal.

**§ 1250.34 How will I know if NARA is going to release the records I requested?**

Once NARA decides to release the requested records, in whole or in part, we will inform you in writing. Our response will tell you how much responsive material we found, where you may review the records, and the copying or other charges due. If the records you sought were released only in part, we will estimate, if possible, the amount of the withheld information. Also, if we deny any part of your request, our response will explain the reasons for the denial, which FOIA exemptions apply, and your right to appeal our decisions.

**§ 1250.36 When will NARA deny a FOIA request?**

The FOIA contains nine exemptions under which information may be exempted from release. Given the age and nature of archival records, many of these exemptions apply to only a few of the records in our custody. We will only withhold information where we must (such as information which remains classified, or information which is specifically closed by statute) or we reasonably foresee that disclosure would cause a harm. In addition if only part of a record must be withheld, NARA will provide access to the rest of the information in the record. Categories of information that may be exempt from disclosure under the FOIA are as follows:

Section of the FOIA:	Reason for exemption:
5 U.S.C. 552(b)(1)	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 under the Executive order.
5 U.S.C. 552(b)(2)	Related solely to the internal personnel rules and practices of an agency.
5 U.S.C. 552(b)(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that the 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.
5 U.S.C. 552(b)(4)	Trade secrets and commercial or financial information obtained from a person that are privileged or confidential.
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.
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.

Section of the FOIA:	Reason for exemption:
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 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.
5 U.S.C. 552(b)(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.
5 U.S.C. 552(b)(9)	Geological and geophysical information and data, including maps, concerning wells.

**§ 1250.38 In what format will NARA provide copies?**

After all applicable fees are paid, NARA will provide you copies of records in the format you request if the records already exist in that format, or if they are readily reproducible in the format you request.

**Subpart C—Fees****§ 1250.50 Will I be charged for my FOIA request?**

(a) Fees and fee waivers for FOIA requests for NARA operational records are listed in this subpart.

(b) Fees for FOIA requests for NARA archival records are listed in 36 CFR part 1258.

**§ 1250.52 How much will I have to pay for a FOIA request for NARA operational records?**

(a) If you are a commercial use requester, we will charge you fees for searching, reviewing, and copying.

(b) If you are an educational or scientific institution requester, or a member of the news media, we will charge you fees for copying. However, we will not charge you for copying the first 100 pages.

(c) If you do not fall into either of the categories in paragraphs (a) and (b) of this section, then we will charge you search and copying fees. However, we will not charge you for the first 2 hours of search time or for copying the first 100 pages.

**§ 1250.54 General information on fees for NARA operational records.**

(a) NARA is able to make most of its records available for examination at the NARA facility where the records are located. Whenever this is possible, you may review the records in a NARA research room at that facility.

(b) If you want NARA to supply you with copies, we will normally require you to pay all applicable fees in accordance with § 1250.52 before we provide you with the copies.

(c) NARA may charge search fees even if the records are not releasable or even if we do not find any responsive records during our search.

(d) If you are entitled to receive 100 free pages, but the records cannot be copied onto standard size (8.5× by 11×) photocopy paper, we will copy them on larger paper and will reduce your copy fee by the normal charge for 100 standard size photocopies. If the records are not on textual media (e.g., photographs or electronic files) we will provide the equivalent of 100 pages of standard size paper copies for free.

(e) We will not charge you any fee if the total costs are \$10 or less.

(f) If estimated search or review fees exceed \$50, 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 amount.

(g) If you have failed to pay FOIA fees in the past, we will require you to pay your past-due bill before we begin processing your request. If we estimate that your fees may be greater than \$250, we may require payment or a deposit before we begin processing your request.

(h) If we determine that you (acting either alone or with others) are breaking down a single request into a series of requests in order to avoid or reduce fees, we may aggregate all these requests in calculating the fees.

**§ 1250.56 Fee schedule for NARA operational records.**

In responding to FOIA requests for operational records, NARA will charge the following fees, where applicable, unless we have given you a reduction or waiver of fees under § 1250.60.

(a) *Search fees—(1) Manual searching of records.* When the search is relatively straightforward and can be performed by a clerical or administrative employee, the search rate is \$16 per hour (or fraction thereof). When the request is more complicated and must be done by a professional employee of NARA, the rate is \$33 per hour (or fraction thereof).

(2) *Computer searching.* This is the actual cost to NARA of operating the computer and the salary of the operator. When the search is relatively straightforward and can be performed by a clerical or administrative employee, the search rate is \$16 per hour (or fraction thereof). When the request

is more complicated and must be done by a professional employee of NARA, the rate is \$33 per hour (or fraction thereof).

(b) *Review fees.* (1) Review fees are charged for time spent examining all documents that are responsive to a request to determine if any are exempt from release and to determine if NARA will release exempted records.

(2) The review fee is \$33 per hour (or fraction thereof).

(3) NARA will not charge review fees for time spent resolving general legal or policy issues regarding the application of exemptions.

(c) *Reproduction fees—(1) Self-service photocopying.* At NARA facilities with self-service photocopiers, you may make reproductions of released paper documents for 15 cents per page.

(2) *Photocopying standard size pages.* This charge is 20 cents per page when NARA produces the photocopies.

(3) *Reproductions of electronic records.* The direct costs to NARA for staff time for programming, computer operations, and printouts or electromagnetic media to reproduce the requested information will be charged to requesters. When the work is relatively straightforward and can be performed by a clerical or administrative employee, the rate is \$16 per hour (or fraction thereof). When the request is more complicated and must be done by a professional employee of NARA, the rate is \$33 per hour (or fraction thereof).

(4) *Copying other media.* This is the direct cost to NARA of the reproduction. Specific charges will be provided upon request.

#### **§ 1250.58 Does NARA ever waive FOIA fees for NARA operational records?**

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

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

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

(b) All requests for fee waivers or reductions must be made at the time of the initial FOIA request. All requests must include the grounds for requesting the reduction or elimination of fees.

#### **§ 1250.60 How will NARA determine if I am eligible for a fee waiver for NARA operational records?**

(a) If you request a fee waiver, NARA will consider the following in reviewing how your request meets the public interest criteria in § 1250.58(a)(1):

(1) How do the records pertain to the operations and activities of the Federal Government?

(2) Will release reveal any meaningful information about Federal Government activities that is not already publicly known?

(3) Will disclosure to you advance the understanding of the general public on the issue?

(4) Do you have expertise in or a thorough understanding of these records?

(5) Will you be able to disseminate this information to a broad spectrum of the public?

(6) Will disclosure lead to a significantly greater understanding of the Government by the public?

(b) After reviewing your request and determining that there is a substantial public interest in release, NARA will also review it to determine if it furthers your commercial interests. If it does, you are not eligible for a fee waiver.

#### **Subpart D—Appeals**

##### **§ 1250.70 What are my appeal rights under FOIA?**

You may appeal any of the following decisions:

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

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

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

(d) The denial of a request for expedited processing; or

(e) The denial of a fee waiver request.

##### **§ 1250.72 How do I file an appeal?**

(a) All appeals must be in writing and received by NARA within 35 calendar days of the date of NARA's denial letter. Mark both your letter and envelope with the words "FOIA Appeal," and include a copy of your initial request and our denial.

(b) In your appeal, explain why we should release the records, grant your fee waiver request, or expedite the processing of your request. If we were not able to find the records you wanted, explain why you believe our search was inadequate. If we denied you access to records and told you that those records were not subject to FOIA, please explain why you believe the records are subject to FOIA.

##### **§ 1250.74 Where do I send my appeal?**

(a) If NARA's Inspector General denied your request, send your appeal to the Archivist of the United States, (ATTN: FOIA Appeal Staff), Room 4200, National Archives and Records Administration, 8601 Adelphi Road, College Park, Maryland 20740-6001.

(b) Send all other appeals to the Deputy Archivist of the United States, (ATTN: FOIA Appeal Staff), Room 4200, National Archives and Records Administration, 8601 Adelphi Road, College Park, Maryland 20740-6001.

(c) Denials under FOIA of access to national security information accessioned into the National Archives of the United States are made by designated officials of the originating or responsible agency or by NARA under a written delegation of authority. You must appeal determinations that records remain classified for reasons of national security to the agency with responsibility for protecting and declassifying that information. NARA will provide you with the necessary appeal information in those cases. You can find additional information on access to national security classified records at NARA in 36 CFR part 1254.

##### **§ 1250.76 May I email my FOIA appeal?**

Yes, you may submit a FOIA appeal via email to inquire@nara.gov. You must put the words "FOIA Appeal" in the subject line of your email message. The body of your message must contain the information in § 1250.72(b).

##### **§ 1250.78 How does NARA handle appeals?**

NARA will respond to your appeal within 20 working days after its receipt of the appeal by NARA. If we reverse or modify our initial decision, we will inform you in writing and reprocess your request. If we do not change our initial



decision, our response to you will explain the reasons for our decision, any FOIA exemptions that apply, and your right to judicial review of our decision.

### **Subpart E—Special Situations**

#### **§ 1250.80 How does a submitter identify records containing confidential commercial information?**

When a person submits records that contain confidential commercial information to NARA, that person may state in writing that all or part of the records are exempt from disclosure under exemption (b)(4) of the FOIA.

#### **§ 1250.82 How will NARA handle a FOIA request for confidential commercial information?**

If NARA receives a FOIA request for records containing confidential commercial information or for records that we believe may contain confidential commercial information and if the information is less than 10 years old, we will follow these procedures:

(a) If, after reviewing the records in response to a FOIA request, we believe that the records may be opened, we will make reasonable efforts to inform the submitter of this. When the request is for information from a single or small number of submitters, NARA will send a notice via registered mail to the submitter's last known address. Our notice to the submitter will include a copy of the FOIA request and will tell the submitter the time limits and procedures for objecting to the release of the requested material.

(b) The submitter will have 5 working days from the receipt of our notice to object to the release and to explain the basis for the objection. The NARA FOIA Officer may extend this period for an additional 5 working days.

(c) NARA will review and consider all objections to release that are received within the time limit. If we decide to release the records, we will inform the submitter in writing. This notice will include copies of the records as we intend to release them and our reasons for deciding to release. We will also inform the submitter that we intend to release the records 10 working days after the date of the notice unless a U.S. District Court forbids disclosure.

(d) If the requester files a lawsuit under the FOIA for access to any withheld records, we will inform the submitter.

(e) We will notify the requester whenever we notify the submitter of the opportunity to object or to extend the time for objecting.

#### **§ 1250.84 Service of subpoena or other legal demand for NARA operational records.**

(a) A subpoena duces tecum or other legal demand for the production of NARA operational records must be addressed to the Office of the General Counsel (NGC), Room 3110, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD, 20740-6001.

(b) The Archivist of the United States and the General Counsel are the only NARA employees authorized to accept, on behalf of NARA, service of a subpoena duces tecum or other legal demands for NARA operational records.

(c) Regulations concerning service of a subpoena duces tecum or other legal demand for archival records accessioned into the National Archives of the United States, records of other agencies in the custody of the Federal records centers, and donated historical materials are located at 36 CFR 1254.8.

## **PART 1254—AVAILABILITY OF RECORDS AND DONATED HISTORICAL MATERIALS**

■ 2. The authority citation for part 1254 continues to read as follows:

**Authority:** 44 U.S.C. 2101-2118; 5 U.S.C. 552; and E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

### **§§ 1254.38 and 1254.39 [Removed]**

■ 3. Amend Subpart C to remove §§ 1254.38 and 1254.39.

■ 4. Amend § 1254.44 by revising the section heading and paragraphs (a) and (c) to read as follows:

#### **§ 1254.44 Freedom of Information Act (FOIA) requests.**

(a) *Requests for access to national security information under the Freedom of Information Act.* Requests for access to national security information under the FOIA are processed in accordance with the provisions of 36 CFR part 1250. Time limits for responses to FOIA requests for national security information are those provided in the FOIA, rather than the longer time limits provided for responses to mandatory review requests specified by Executive Order 12958, Classified National Security Information (3 CFR, 1995 Comp., p. 333).

\* \* \* \* \*

(c) *Denials and appeals.* Denials under FOIA of access to national security information accessioned into the National Archives of the United States are made by designated officials of the originating or responsible agency or by NARA under a written delegation of authority. You must appeal determinations that records remain classified for reasons of national security to the agency with responsibility for protecting and declassifying that information. NARA will provide you with the necessary appeal information in those cases.

Dated: March 11, 2001.

**John W. Carlin,**  
*Archivist of the United States.*

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