

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF GOVERNMENT ETHICS

### 5 CFR Part 2604

RIN 3209-AA17

#### Freedom of Information Act Rules and Schedule of Fees for the Production of Public Financial Disclosure Reports

AGENCY: Office of Government Ethics (OGE).

ACTION: Proposed rule.

**SUMMARY:** The Office of Government Ethics is issuing a proposed rule to establish procedures for the implementation of the Freedom of Information Act (FOIA). The rule also proposes to establish a schedule of fees which will be charged for the reproduction and mailing of public financial disclosure reports (SF 278s).

**DATES:** Public comments on this proposed rule are invited and must be received by December 2, 1994.

**ADDRESSES:** Submit comments to the Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917, Attention: Ms. Roell.

**FOR FURTHER INFORMATION CONTACT:** Janet K. Roell, Office of Government Ethics, telephone (202) 523-5757, FAX (202) 523-6325.

**SUPPLEMENTARY INFORMATION:** The Freedom of Information Act, 5 U.S.C. 552, requires every agency to promulgate regulations implementing certain of its provisions. On October 1, 1989, the Office of Government Ethics, formerly part of the Office of Personnel Management, was established as a separate executive branch agency and is therefore proposing to adopt this rule incorporating many of its existing practices for the implementation of the Freedom of Information Act, as amended by the Freedom of Information Reform Act of 1986 (Pub. L. 99-570). This rule would also implement the Guidelines for a uniform Freedom of Information Act fee schedule published by the Office of Management and Budget on March 27, 1987 (52 FR

10012) and the Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act dated December, 1987. Subpart G of the rule proposes to establish a separate schedule of fees for the reproduction and mailing of public financial disclosure reports requested pursuant to section 105 of the Ethics in Government Act of 1978, as amended.

### I. General Provisions

Subpart A of the proposed rule contains general provisions describing the purpose of the Freedom of Information Act and its coverage. Section 2604.102 describes the types of records to which the Freedom of Information Act applies, and the relationship between the FOIA and the Privacy Act of 1974, 5 U.S.C. 552a. The proposed rule also provides that if another statute, such as the Ethics Act, sets forth procedures for the disclosure of specific types of records, the Office will process a request for those records in accordance with the procedures that apply to those specific records. However, in cases where the record is not required to be released under the specific procedures set forth in another statute, the Office will consider the request under FOIA.

Section 2604.102 as proposed also explains that records which are available through an established distribution system (for example, the National Technical Information Service) should preferably be obtained through that system, rather than pursuant to the provisions of the FOIA. The terms frequently used in the rule are defined in proposed § 2604.104.

### II. Public Reading Room

Subpart B of the proposed rule describes the location of OGE's public reading room and the materials available there. The subpart would also set forth the indexing requirements as to any records OGE maintains which are required to be indexed under 5 U.S.C. 552(a)(2). Proposed § 2604.202 contains the Director's determination that, because of OGE's size and the relatively small number of requests for records required to be indexed, such indexes do not need to be published quarterly.

### III. Production and Disclosure of Records Under FOIA

Subpart C as proposed contains detailed rules of procedure for

requesting records under FOIA. It also describes the format to which OGE will adhere in responding to these requests.

Requests for OGE records have generally been directed to the Office of the General Counsel. Since this approach is administratively practical, this system is being proposed for codification. Proposed § 2604.301 states that requests for records should be addressed to the General Counsel of OGE. Requesters will generally be required to submit FOIA requests in writing. Each request should contain sufficient detail to allow the Office to locate the record with a reasonable amount of effort. If a request is too broad or too vague to allow the Office to locate the record with a reasonable amount of effort, the Office would assist the requester in revising the request as appropriate.

The filing of a request would be deemed to constitute an agreement to pay any applicable fees up to \$25.00, unless a waiver were sought. The request could also specify a limit on fees the requester is willing to pay.

The General Counsel of OGE, or his designee, has been delegated responsibility in proposed § 2604.302 to grant or deny requests and to determine appropriate fees.

Consistent with the terms of proposed § 2604.302(b), OGE will ordinarily refer FOIA requests for records that originated in another Government agency to the other agency for response. In such cases, the requester will be notified of the referral. Section 2604.302(c) as proposed specifies that, in cases where a requester asks for a record in a format which does not currently exist, OGE will provide whatever records reasonably respond to the request, but will not create a new record in order to respond. Under § 2604.302(d) of the proposed rule, if a record cannot be located from the information supplied, the General Counsel will so inform the requester.

Proposed § 2604.303 requires the General Counsel to notify a requester in writing of the determination to grant a request in whole or in part. The response must describe the manner in which the record will be disclosed and inform the requester of any fees which will be charged. Similarly, the General Counsel's determination to deny a request in whole or in part must be made in writing and signed by the

General Counsel (or his designee). Consistent with § 2604.303(b) as proposed, any denial is to contain a brief statement describing the basis for the denial, including the FOIA exemptions which were relied upon. Moreover, the denial must state that requesters have a right to appeal and must explain OGE's appeal procedures.

The Office's appeal procedures are set forth in § 2604.304 of the proposed rule. Denials may be appealed to OGE's Deputy Director within 30 days after receipt of a denial letter. Appeals must be in writing and must contain reasons or arguments in support of disclosure. The Office will respond to appeals in writing, and will specify the reason for affirming any original denial. When a denial is reversed in whole or in part, the request for disclosure will be processed promptly. The decision on appeal is the Office's final action on a request. Requesters have a right to seek judicial review of the action under 5 U.S.C. 552(a)(4).

Section 2604.305 of the proposed rule describes the time limits to which the Office will adhere in responding to requests. The time limits may be extended up to a total of 10 working days in unusual circumstances, i.e., when the records are in a location other than the Office, the request is for a large number of records, or the Office must consult with another agency or consult with various OGE components.

#### IV. Exemptions Under FOIA

The Freedom of Information Act contains nine exemptions from its mandatory disclosure provisions. These exemptions permit an agency to withhold a requested record in certain circumstances. Section 2604.401 in subpart D of the proposed rule generally references the nine classes of records that may be exempted from disclosure under FOIA. Proposed § 2604.401(a) states that OGE will not withhold a requested record unless it falls within a FOIA exemption and that in deciding whether to withhold material, OGE will consider whether another statute, Executive order or regulation prohibits release or, if not, whether there is a need in the public interest to withhold it. Further, under proposed § 2604.401(b), the Office will withhold information which falls within an exemption if the information was furnished on a pledge of confidentiality authorized by statute, Executive order or regulation.

Section 2604.401(c) also provides that certain information compiled for law enforcement purposes may not be subject to the requirement of FOIA. Additionally, proposed § 2604.401(d)

provides for partial application of the exemptions to a record.

Proposed § 2604.402 contains OGE's procedures for disclosure of business information provided to the Office. Generally, § 2604.402 would require submitters of business information to designate those portions of their submissions they believe may be exempt from disclosure under any exemption of the FOIA. If records so designated are subsequently requested under FOIA, in most cases the submitter will have an opportunity to provide a written objection to disclosure.

#### V. Fees

Subpart E of the proposed rule contains provisions relating to the fees which will be assessed for services rendered in responding to and processing requests for records under FOIA. Fees are to be based on the type of service provided (e.g., search, review, duplication) as well as the category of person making the request (e.g., commercial user, educational institution, news media). Generally, commercial requesters will pay the full amount of permissible fees; educational and noncommercial scientific institutions and news media will pay only duplication costs. As a matter of policy, OGE will not charge fees for any individual request if the total charge would be \$10.00 or less. Additionally, under the proposal OGE may furnish records without charge or at a reduced charge where disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. In making this determination, OGE will apply the factors suggested by the Department of Justice in the Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act dated December, 1987. These factors have been incorporated in proposed § 2604.503.

Section 2604.504 as proposed contains a number of miscellaneous provisions concerning fees, including a requirement that requesters pay in advance fees likely to exceed \$250.00. However, advance payment may not be required in the case of a requester who has a history of prompt payment.

#### VI. Annual Report to Congress

On or before March 15 of each year, the Office sends a report of OGE's FOIA activities for the prior calendar year to the Speaker of the House of Representatives and the President of the Senate. Section 2604.502 of the

proposed rule lists the information included in this annual report.

#### VII. Fees for the Production and Mailing of Public Financial Disclosure Reports

Section 105(a) of the Ethics in Government Act of 1978, as amended, requires an agency, with certain limited exceptions, to make available to the public any public financial disclosure report (SF 278) filed with the agency. Section 105(b)(1) permits an agency to charge a fee adequate to recover the cost of reproduction and mailing of a public financial disclosure report (SF 278) requested by any person in accordance with the requirements of section 105. However, the fee may not include any charge attributable to the salary of any employee involved in the reproduction or mailing of these reports. To implement this provision for such reports filed with it, OGE is proposing to create a fee structure separate from the FOIA fee structure set forth in subpart E of this proposed rule. Proposed subpart G contains provisions to implement this authority.

Section 2604.702 as proposed provides that public financial disclosure reports will be furnished upon payment of \$.03 per page and the actual direct cost of mailing. The \$.03 per page charge includes the actual cost of the paper used and the cost of operating duplicating machinery. It does not include any overhead charges (such as lighting and heat), nor does it include the salary of any employee involved in operating a duplicating machine. No charge will be made for individual requests if the total charge would be \$10.00 or less. Proposed § 2604.702(d) specifically provides that the miscellaneous fee provisions in § 2604.504 of subpart E will apply to requests for public financial disclosure reports (SF 278s). However, no other provisions in subpart E concerning fees, fee waivers, and fee reductions apply to requests for public financial disclosure reports.

#### Executive Order 12866

In promulgating this proposed rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulations set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This proposed regulation has been reviewed by the Office of Management and Budget under that Executive order.

#### Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the

Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed regulation will not have a significant economic impact on a substantial number of small entities.

#### Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed regulation because it does not contain information collection requirements that require the approval of the Office of Management and Budget.

#### List of Subjects in 5 CFR Part 2604

Administrative practice and procedure, Archives and records, Confidential business information, Conflict of interests, Freedom of Information, Government employees.

Approved: September 27, 1994.

Stephen D. Potts,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend subchapter A of chapter XVI of title 5 of the Code of Federal Regulations by adding the text of and an authority citation for part 2604, previously reserved, and by revising the title thereof to read as follows:

### PART 2604—FREEDOM OF INFORMATION ACT RULES AND SCHEDULE OF FEES FOR THE PRODUCTION OF PUBLIC FINANCIAL DISCLOSURE REPORTS

#### Subpart A—General Provisions

- Sec.  
2604.101 Purpose.  
2604.102 Applicability.  
2604.103 Definitions.

#### Subpart B—Public Reading Room and Index Identifying Information for the Public

- 2604.201 Public reading room.  
2604.202 Index identifying information for the public.

#### Subpart C—Production and Disclosure of Records Under FOIA

- 2604.301 Requests for records.  
2604.302 Response to requests.  
2604.303 Form and content of responses.  
2604.304 Appeal of denials.  
2604.305 Time limits.

#### Subpart D—Exemptions Under FOIA

- 2604.401 Policy.  
2604.402 Business information.

#### Subpart E—Schedule of Fees

- 2604.501 Fees to be charged—general.  
2604.502 Fees to be charged—categories of requesters.  
2604.503 Limitations on charging fees.  
2604.504 Miscellaneous fee provisions.

#### Subpart F—Annual Report to Congress

- 2604.601 Submission of report.  
2604.602 Contents of the report.

#### Subpart G—Fees for the Reproduction and Mailing of Public Financial Disclosure Reports

- 2604.701 Policy.  
2604.702 Charges.

Authority: 5 U.S.C. 552; 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

#### Subpart A—General Provisions

##### § 2604.101 Purpose.

This part contains the regulations of the Office of Government Ethics (OGE) implementing the Freedom of Information Act (FOIA) and Executive order 12600. It describes how any person may obtain records from OGE under the FOIA. It also implements section 105(b)(1) of the Ethics in Government Act of 1978, as amended, which authorizes an agency to charge reasonable fees to cover the cost of reproduction and mailing of public financial disclosure reports requested by any person.

##### § 2604.102 Applicability.

(a) *General.* The FOIA and this rule apply to all OGE records. However, if another law sets forth procedures for the disclosure of specific types of records, such as section 105 of the Ethics in Government Act of 1978, 5 U.S.C. appendix, OGE will process a request for those records in accordance with the procedures that apply to those specific records. See 5 CFR 2634.603 and subpart G of this part. If there is any record which is not required to be released under those provisions, OGE will consider the request under the FOIA and this rule, provided that the special Ethics Act access procedures cited must be complied with as to any record within the scope thereof.

(b) *The relationship between the FOIA and the Privacy Act of 1974.* The Privacy Act of 1974, 5 U.S.C. 552a, applies to records that are about individuals, but only if the records are in a system of records as defined in the Privacy Act. Requests from individuals for records about themselves which are contained in an OGE system of records will be processed under the provision of the Privacy Act as well as the FOIA. OGE will not deny access by a first party to a record under the FOIA or the Privacy Act unless the record is not available to that individual under both the Privacy Act and the FOIA.

(c) *Records available through routine distribution procedures.* When the record requested includes material

published and offered for sale (e.g., by the Superintendent of Documents, Government Printing Office) or which is available to the public through an established distribution system (such as that of the National Technical Information Service of the Department of Commerce), OGE will instead explain how the record may be obtained through those channels.

##### § 2604.103 Definitions.

As used in this part,

(a) *Agency* has the meaning given in 5 U.S.C. 551(1) and 5 U.S.C. 552(f).

(b) *Business information* means trade secrets or other commercial or financial information, provided to the Office by a submitter, which arguably is protected from disclosure under Exemption 4 of the Freedom of Information Act.

(c) *Business submitter* means any person who provides business information, directly or indirectly, to the Office and who has a proprietary interest in the information.

(d) *Commercial use* means, when referring to a request, that the request is from, or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or of a person on whose behalf the request is made. Whether a request is for a commercial use depends on the purpose of the request and the use to which the records will be put. When a request is from a representative of the news media, a purpose or use supporting the requester's news dissemination function is not a commercial use.

(e) *Direct costs* means those expenditures actually incurred in searching for and duplicating (and, in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include the salary of the employee performing the work and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space and heating or lighting of the facility in which the records are stored.

(f) *Duplication* means the process of making a copy of a record. Such copies include paper copy, microform, audio-visual materials, and magnetic tapes, cards, and discs.

(g) *Educational institution* means a preschool, elementary or secondary school, institution of undergraduate or graduate higher education, or institute of professional or vocational education, which operates a program of scholarly research.

(h) *Freedom of Information Act* or *FOIA* means section 552 of Title 5, United States Code, as amended.

(i) *General Counsel* means the General Counsel of the Office of Government Ethics. The General Counsel may delegate any of his responsibilities in handling FOIA requests in this part to a designee on OGE's staff.

(j) *He, his and him* include she, hers and her.

(k) *Noncommercial scientific institution* means an institution that is not operated solely for purposes of furthering its own or someone else's business, trade, or profit interests, and that is operated for purposes of conducting scientific research the results of which are not intended to promote any particular product or industry.

(l) *Office* or *OGE* means the United States Office of Government Ethics.

(m) *Person* has the meaning given in 5 U.S.C. 551(2).

(n) *Records* means any handwritten, typed, or printed documents (such as memoranda, books, brochures, studies, writings, drafts, letters, transcripts, and minutes) and documentary material in other forms (such as punchcards, magnetic tapes, cards or discs, paper tapes, audio or video recordings, maps, photographs, slides, microfilm and motion pictures) that are either created or obtained by the Office and are under Office control. It does not include objects or articles such as exhibits, models, equipment, and duplication machines or audiovisual processing materials.

(o) *Representative of the news media* means a person actively gathering information for an entity organized and operated to publish or broadcast news to the public. News media entities include television and radio broadcasters, publishers of periodicals who distribute their products to the general public or who make their products available for purchase or subscription by the general public, and entities that may disseminate news through other media, such as electronic dissemination of text. Freelance journalists will be considered as representatives of a news media entity if they can show a solid basis for expecting publication through such an entity. A publication contract is such a basis, and the requester's past publication record may show such a basis.

(p) *Request* means any request for records made pursuant to 5 U.S.C. 552(a)(3).

(q) *Requester* means any person who makes a request for records to OGE.

(r) *Review* means the process of initially, or upon appeal (see § 2604.501(b)(3)), examining documents located in a response to a request to determine whether any portion of any

document is permitted to be withheld. It also includes processing documents for disclosure, such as redacting portions which may be withheld. Review does not include time spent resolving general legal and policy issues regarding the application of exemptions.

(s) *Search* means the time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents.

(t) *Working days* means calendar days, excepting Saturdays, Sundays, and legal public holidays.

#### Subpart B—Public Reading Room and Index Identifying Information for the Public

##### § 2604.201 Public reading room.

(a) *Location of public reading room.* The Office of Government Ethics maintains a public reading room at its offices located at 1201 New York Avenue, NW., Suite 500, Washington, DC 20005-3917. Persons desiring to utilize the reading room should contact the Office, in writing or by telephone at (202) 523-5757 or FAX (202) 523-6325, to arrange a time to inspect the materials available there.

(b) *Records available.* The Office of Government Ethics public reading room contains OGE records which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying, including:

(1) Any final opinions, as well as orders, made in the adjudication of cases;

(2) Any statements of policy and interpretation which have been adopted by the agency and are not published in the *Federal Register*;

(3) Any administrative staff manuals and instructions to staff that affect a member of the public, and which are not exempt from disclosure under section (b) of the FOIA; and

(4) Current indexes providing identifying information for the public as to any matter which was issued, adopted or promulgated after July 4, 1967, and is required by 5 U.S.C. 552(a)(2) to be made available or published.

(c) *Copying.* The cost of copying information available in OGE's public reading room shall be imposed on a requester in accordance with the provisions of subpart E of this part.

##### § 2604.202 Index identifying information for the public.

(a) The Office of Government Ethics will maintain and make available for public inspection and copying a current index of the materials available at its

public reading room which are required to be indexed under 5 U.S.C. 552(a)(2).

(b) The Director of the Office of Government Ethics has determined that it is unnecessary and impracticable to publish quarterly or more frequently and distribute (by sale or otherwise) copies of each index and supplements thereto, as provided in 5 U.S.C. 552(a)(2). The Office will provide copies of such indexes upon request, at a cost not to exceed the direct cost of duplication and mailing, if sending records by other than ordinary mail.

#### Subpart C—Production and Disclosure of Records Under FOIA

##### § 2604.301 Requests for records.

(a) *Addressing requests.* Requests for copies of records may be made in person or by telephone, (202) 523-5757 during normal business hours at the Office of Government Ethics, 1201 New York Avenue NW., Suite 500, Washington, DC 20005-3917 or by mail addressed to the General Counsel of OGE. Although oral requests may be honored, a requester generally will be asked to submit his request under the FOIA in writing. In the case of a written request, the envelope containing the request and the letter itself should both clearly indicate that the subject is a Freedom of Information Act request.

(b) *Description of records.* Each request must reasonably describe the desired records in sufficient detail to enable Office personnel to locate the records with a reasonable amount of effort. A request for a specific category of records will be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of Office operations.

(1) Wherever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record.

(2) If the General Counsel determines that a request does not reasonably describe the records sought, he will either advise the requester what additional information is needed to locate the record, or otherwise state why the request is insufficient. The General Counsel will also extend to the requester an opportunity to confer with Office personnel with the objective of reformulating the request in a manner which will meet the requirements of this section.

(c) *Agreement to pay fees.* The filing of a request under this subpart will be deemed to constitute an agreement by the requester to pay all applicable fees

charged under subpart E of this part, up to \$25.00, unless a waiver of fees is sought. The request may also specify a limit on the amount the requester is willing to spend, or may indicate a willingness to pay an amount greater than \$25.00, if applicable. In cases where a requester has been notified that more or estimated fees may amount to more than \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee.

(d) *Requests for records relating to corrective actions.* No record developed pursuant to the authority of 5 U.S.C. app. 402(f)(2) concerning the investigation of an employee for a possible violation of any provision relating to a conflict of interest shall be made available pursuant to this part unless the request for such information identifies the employee to whom the records relate and the subject matter of any alleged violation to which the records relate. Nothing in this subsection shall affect the application of subpart D of this part to any record so identified.

#### § 2604.302 Response to requests.

(a) *Response to initial request.* The General Counsel is authorized to grant or deny any request for a record and to determine appropriate fees.

(b) *Referral to another agency.* When a requester seeks records that originated in another Government agency, OGE will normally refer the request to the other agency for response. If OGE refers the request to another agency, it will notify the requester of the referral. If release of certain records may adversely affect United States relations with foreign governments, the Office will usually consult with the Department of State. A request for any records classified by some other agency will be referred to that agency for response.

(c) *Creating records.* If a person seeks information from OGE in a format that does not currently exist, OGE will not ordinarily reformat the information for the purpose of responding to the request. OGE will advise the requester that it does not have the record in the format sought, but will provide whatever records in existing formats that would reasonably respond to the request. Additionally, OGE will not generally develop a new record of information to satisfy a request.

(d) *Record cannot be located.* If a requested record cannot be located from the information supplied, the General Counsel will so notify the requester in writing.

#### § 2604.303 Form and content of responses.

(a) *Form of notice granting a request.* After the General Counsel has made a determination to grant a request in whole or in part, the requester will be notified in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record with the response or at a later date, or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection may not unreasonably disrupt the operations of the Office. The response letter will also inform the requester with the provisions of subpart E of this part.

(b) *Form of notice denying a request.* When the General Counsel denies a request in whole or in part, he will so notify the requester in writing. The response will be signed by the General Counsel and will include:

(1) The name and title or position of the person making the denial;

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions which the General Counsel has relied upon in denying the request; and

(3) A statement that the denial may be appealed under § 2604.304 of this subpart, and a description of the requirements of that section.

#### § 2604.304 Appeal of denials.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial to the Deputy Director of the Office of Government Ethics, 1201 New York Avenue, NW., Suite 500, Washington, DC 20005-3917.

(b) *Letter of appeal.* The appeal must be in writing and must be sent within 30 days of receipt of the denial letter. An appeal should include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons or arguments advanced in support of disclosure of the request for the record. Both the envelope and the letter of appeal must be clearly marked "Freedom of Information Act Appeal."

(c) *Action on appeal.* The disposition of an appeal will be in writing and will constitute the final action of the Office on a request. A decision affirming in whole or in part the denial of a request will include a brief statement of the reason or reasons for affirmation, including each FOIA exemption relied on. If the denial of a request is reversed in whole or in part on appeal, the request will be processed promptly in accordance with the decision on appeal.

(d) *Judicial review.* If the denial of the request for records is upheld in whole or in part, the Office will notify the person making the request of his right to seek judicial review under 5 U.S.C. 552(a)(4).

#### § 2604.305 Time limits.

(a) *Initial request.* Following receipt of a request for records, the General Counsel will determine whether to comply with the request and will notify the requester in writing of his determination within 10 working days.

(b) *Appeal.* A written determination on a appeal submitted in accordance with § 2604.304 of this subpart will be issued within 20 working days after receipt of the appeal.

(c) *Extension of time limits.* The time limits specified in either paragraph (a) or (b) of this section may be extended in unusual circumstances up to a total of 10 working days, after written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be made. As used in this paragraph, *unusual circumstances* means that there is a need to:

(1) Search for and collect records from archives;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) Consult with another agency having a substantial interest in the determination of the request, or consult with various OGE components that have substantial subject matter interest in the records requested.

#### Subpart D—Exemptions under FOIA

##### § 2604.401 Policy.

(a) *Policy on application of exemptions.* Section 552(b) of the Freedom of Information Act contains nine exemptions to the mandatory disclosure of records. A requested record will not be withheld from inspection or copying unless it comes within one of the classes of records exempted by 5 U.S.C. 552. In making its determination on withholding, OGE will consider whether another statute, Executive order or regulation prohibits release or, if not, whether there is a need in the public interest to withhold material which is otherwise exempt under FOIA.

(b) *Pledge of confidentiality.* Information obtained from any individual or organization, furnished in reliance on a provision for confidentiality authorized by applicable statute, Executive order or regulation,

will not be disclosed to the extent it can be withheld under one of the exemptions. However, this paragraph does not itself authorize the giving of any pledge of confidentiality by any officer or employee of the Office of Government Ethics.

(c) *Exception for law enforcement information.* The Office may treat records compiled for law enforcement purposes as not subject to the requirements of the Freedom of Information Act when:

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

(2) There is reason to believe that the subject of the investigation or proceeding is unaware of its pendency; and

(3) The disclosure of the existence of the records could reasonably be expected to interfere with the enforcement proceedings.

(d) *Partial application of exemptions.* Any reasonably segregable portion of a record will be provided to any person requesting the record after deletion of the portions which are exempt under this subpart.

#### § 2604.402 Business Information.

(a) *In general.* Business information provided to the Office of Government Ethics by a submitter will not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section.

(b) *Designation of business information.* Submitters of business information should use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, those portions of their submissions which they deem to be protected under Exemption 4 of the FOIA. Any such designation will expire 10 years after the records were submitted to the Government, unless the submitter requests, and provides reasonable justification for, a designation period of longer duration.

(c) *Predisclosure notification.* The General Counsel will provide a submitter with prompt written notice of a FOIA request regarding its business information if:

(1) The information has been designated by the submitter as information deemed protected from disclosure under Exemption 4 of the FOIA; or

(2) The General Counsel has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

Such written notice shall either describe the exact nature of the business

information requested or provide copies of the records containing the business information. The requester also shall be notified that notice and an opportunity to object are being provided to a submitter.

(d) *Opportunity to object to disclosure.* A submitter has five working days from receipt of the predisclosure notification to provide a written statement of any objection to disclosure. Such statement shall specify all the grounds for withholding any of the information under any exemption of the FOIA and, in the case of Exemption 4, shall demonstrate why the information is deemed to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* The General Counsel will consider all objections raised by a submitter and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the General Counsel decides to disclose business information over the objection of a submitter, he will send the submitter a written notice at least 10 working days before the date of disclosure containing:

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

(2) A copy of the records which will be disclosed or a written description of the records; and

(3) A specified disclosure date. The requester shall also be notified of the General Counsel's determination to disclose records over a submitter's objections.

(f) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information, the General Counsel shall promptly notify the submitter.

(g) *Exceptions to predisclosure notification.* The notice requirements in paragraph (c) of this section do not apply if:

(1) The General Counsel determines that the information should not be disclosed;

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

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

(4) The designation made by the submitter in accordance with paragraph (b) of this section appears obviously frivolous; except that, in such a case, the General Counsel will provide the submitter with written notice of any

final decision to disclose business information within a reasonable number of days prior to a specified disclosure date.

#### Subpart E—Schedule of Fees

##### § 2604.501 Fees to be charged—general.

(a) *Policy.* Fees shall be assessed according to the schedule contained in paragraph (b) of this section and the category of requesters described in § 2604.502 for services rendered in responding to and processing requests for records under subpart C of this part. All fees shall be charged to the requester, except where the charging of fees is limited under § 2604.503 (a) and (b) or where a waiver or reduction of fees is granted under § 2604.503(c). Requesters shall pay fees by check or money order made payable to the Treasury of the United States.

(b) *Types of charges.* The types of charges that may be assessed in connection with the production of records in response to a FOIA request are as follows:

##### (1) Searches—

##### (i) *Manual searches for records.*

Whenever feasible, the office will charge at the salary rate (i.e., basic pay plus 16%) of the employee making the search. However, where a homogeneous class of personnel is used exclusively in a search (e.g., all clerical time or all professional time) the Office will charge \$10.00 per hour for clerical time and \$20.00 per hour for professional time. Charges for search time will be billed by fifteen minute segments.

##### (ii) *Computer searches for records.*

Requesters will be charged the actual direct cost of conducting a search using existing programming. These direct costs shall include the cost of operating a central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a request, as well as the cost of operator/programmer salary apportionable to the search. The Office will not alter or develop programming to conduct a search.

##### (iii) *Unproductive searches.*

The Office will charge search fees even if no records are found which are responsive to the request, of if the records found are exempt from disclosure.

(2) *Duplication.* The standard copying charge for documents in paper copy is \$.15 per page. When responsive information is provided in a format other than paper copy, such as in the form of computer tapes and discs, the requester may be charged the direct costs of the tape, disc, or whatever medium is used to produce the

information, as well as any related reproduction costs.

(3) *Review.* Costs associated with the review of documents, as defined in § 2604.104(g), will be charged at the salary rate (i.e., basic pay plus 16%) of the employee conducting the review. Except as noted below, charges may be assessed only for review at the initial level, i.e., the review undertaken the first time the documents are analyzed to determine the applicability of specific exemptions to a particular record or portion of the records. A requester will not be charged for review at the administrative appeal level concerning the applicability of an exemption already applied at the initial level. However, when a record has been withheld pursuant to an exemption which is subsequently determined not to apply and the record is reviewed again at the appeal level to determine the potential applicability of other exemptions, the costs of such additional review may be assessed.

(4) *Other services and materials.* Where the Office elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending records by special methods, the actual direct costs of providing the service or materials will be charged.

**§ 2604.502 Fees to be charged—categories of requesters.**

(a) *Fees for various requester categories.* The paragraphs below state, for each category of requester, the type of fees generally charged by the Office. However, for each of these categories, the fees may be limited, waived or reduced in accordance with the provisions set forth in § 2604.503. In determining whether a requester belongs in any of the following categories, the Office will determine the use to which the requester will put the documents requested. If the Office has reasonable cause to doubt the use to which the requester will put the records sought, or where the use is not clear from the request itself, the Office will seek clarification before assigning the request to a specific category.

(b) *Commercial use requester.* The Office will charge the full costs of search, review, and duplication. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction as described in § 2604.503(a); however, the de minimis fees provision of § 2604.503(b) does apply to such requesters.

(c) *Educational and noncommercial scientific institutions and news media.* If

the request is from an educational institution or a noncommercial scientific institution, operated for scholarly or scientific research, or a representative of the news media, and the request is not for a commercial use, the Office will charge only for duplication of documents, excluding charges for the first 100 pages.

(d) *All other requesters.* If the request is not one described in paragraph (b) or (c) of this section, the Office will charge the full and direct costs of searching for and reproducing records that are responsive to the request, excluding the first 100 pages of duplication and the first two hours of search time.

**§ 2604.503 Limitations on charging fees.**

(a) *In general.* Except for requesters seeking records for a commercial use as described in § 2604.502(b), the Office will provide, without charge, the first 100 pages of duplication and the first two hours of search time, or their cost equivalent.

(b) *De minimis fees.* The Office will not assess fees for individual requests if the total charge would be \$10.00 or less.

(c) *Waiver or reduction of fees.* Records responsive to a request under 5 U.S.C. 552 will be furnished without charge or at a reduced charge where the Office determines, based upon information provided by a requester in support of a fee waiver request, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees will be considered on a case-by-case basis.

(1) In determining whether disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, the Office will consider the following factors:

(i) *The subject of the request: Whether the subject of the requested records concerns the operations or activities of the Government.* The subject matter of the requested records, in the context of the request, must specifically and directly concern identifiable operations or activities of the Federal Government. Furthermore, the records must be sought for their information value with respect to those Government operations or activities;

(ii) *The informative value of the information to be disclosed: Whether the information is likely to contribute to an understanding of Government operations or activities.* The disclosable

portions of the requested records must be meaningfully information on specific Government operations or activities in order to hold potential for contributing to increased public understanding of those operations and activities. The disclosure of information which is already in the public domain, in either a duplicative or substantially identical form, would not be likely to contribute to such understanding, as nothing new would be added to the public record;

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding.* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. A requester's identity and qualifications e.g., expertise in the subject area and ability and intention to convey information to the general public—will be considered; and

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of Government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be significantly enhanced by the disclosure.

(2) In determining whether disclosure of the requested information is not primarily in the commercial interest of the requester, the Office will consider the following factors:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* The Office will consider all commercial interests of the requester, or any person on whose behalf the requester may be acting, which would be furthered by the requested disclosure. In assessing the magnitude of identified commercial interests, consideration will be given to the effect that the information disclosed would have on those commercial interests; and

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.* A fee waiver or reduction is warranted only where the public interest can fairly be regarded as greater in magnitude than

the requester's commercial interest in disclosure. The Office will ordinarily presume that, where a news media requester has satisfied the public interest standard, the public interest will be served primarily by disclosure to that requester. Disclosure to data brokers and others who compile and market Government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only a portion of the requested record satisfies the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(4) A request for a waiver or reduction of fees must accompany the request for disclosure of records, and should include:

(i) A clear statement of the requester's interest in the documents;

(ii) The proposed use of the documents and whether the requester will derive income or other benefit from such use;

(iii) A statement of how the public will benefit from release of the requested documents; and

(iv) If specialized use of the documents is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(5) A requester may appeal the denial of a request for a waiver or reduction of fees in accordance with the provisions of § 2604.304.

#### § 2604.504 Miscellaneous fee provisions.

(a) *Notice of anticipated fees in excess of \$25.00.* Where the Office determines or estimates that the fees to be assessed under this section may amount to more than \$25.00, the Office shall notify the requester as soon as practicable of the actual or estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Where a requester has been notified that the actual or estimated fees may exceed \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to the requester pursuant to this paragraph will include the opportunity to confer with Office personnel in order to reformulate the request to meet the requester's needs at a lower cost.

(b) *Aggregating requests.* A requester may not file multiple requests, each seeking portions of a document or documents in order to avoid the payment of fees. Where there is reason to believe that a requester or group of requesters acting in concert, is

attempting to divide a request into a series of requests for the purpose of evading the assessment of fees, the Office may aggregate the requests and charge accordingly. The Office will presume that multiple requests of this type made within a 30-day period have been made in order to evade fees. Multiple requests regarding unrelated matters will not be aggregated.

(c) *Advance payments.* An advance payment before work is commenced or continued will not be required unless:

(1) The Office estimates or determines that the total fee to be assessed under this section is likely to exceed \$250.00. When a determination is made that the allowable charges are likely to exceed \$250.00, the requester will be notified of the likely cost and will be required to provide satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or will be required to submit an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing). In such cases the requester may be required to pay the full amount owed plus any applicable interest as provided by paragraph (e) of this section, and to make an advance payment of the full amount of the estimated fee before the Office begins to process a new request.

(3) When the Office requests an advance payment of fees, the administrative time limits described in subsection (a)(6) of the FOIA will begin to run only after the Office has received the advance payment.

(d) *Billing and payment.* Normally the Office will require a requester to pay all fees before furnishing the requested records. However, the Office may send a bill along with, or following the furnishing of records, in cases where the requester has a history of prompt payment.

(e) *Interest charges.* Interest charges on an unpaid bill may be assessed starting on the 31st day following the day on which the billing was sent. Interest shall be at the rate prescribed in 31 U.S.C. 3717 and shall accrue from the date of billing. To collect unpaid bills, the Office will follow the provisions of the Debt Collection Act of 1982 (P.L. 97-365) including the use of consumer reporting agencies, collection agencies, and offset.

## Subpart F—Annual Report to Congress

### § 2604.601 Submission of report.

On or before March 15 of each calendar year, a report of OGE's activities over the preceding year relating to the Freedom of Information Act will be submitted to the Speaker of the House of Representatives and the President of the Senate.

### § 2604.602 Contents of the report.

The annual report to Congress will include for the relevant reporting period:

(a) The number of FOIA requests made to OGE, determinations made by OGE not to comply with requests for records made to it under the FOIA and the reasons for each such determination;

(b) The number of appeals made by persons under the FOIA, the results of such appeals, and the reasons for the action by OGE upon each appeal that results in a denial of information;

(c) The names and titles or positions of each person responsible for the denial of records requested under the FOIA;

(d) The results of each proceeding conducted pursuant to subsection (a)(4)(F) of the FOIA, including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(e) A copy of every rule made by OGE regarding the FOIA;

(f) A copy of the fee schedule and the total amount of fees collected by OGE for making records available under the FOIA; and

(g) Such other information as indicates efforts by OGE to administer fully the FOIA.

## Subpart G—Fees for the Reproduction and Mailing of Public Financial Disclosure Reports

### § 2604.701 Policy.

Fees for the reproduction and mailing of public financial disclosure reports (SF 278s) requested pursuant to section 105 of the Ethics in government Act of 1978, as amended, and § 2634.603 of this title shall be assessed according to the schedule contained in § 2604.702. Requesters shall pay fees by check or money order made payable to the Treasury of the United States. Except as provided in § 2604.702(d), nothing concerning fees in subpart E of this part supersedes the charges set forth in this subpart for records covered in this subpart.



**2604.702 Charges.**

(a) *Duplication.* Except as provided in paragraph (c) of this section, copies of public financial disclosure reports (SF 278s) requested pursuant to section 105 of the Ethics in Government Act of 1978, as amended, and § 2634.603 of this chapter will be provided upon payment of \$.03 per page furnished.

(b) *Mailing.* Except as provided in paragraph (c) of this section, the actual direct cost of mailing public financial disclosure reports will be charged for all forms requested. Where the Office elects to comply, as a matter of administrative discretion, with a request for special mailing services, the actual direct cost of such service will be charged.

(c) *De minimis fees.* The Office will not assess fees for individual requests if the total charge would be \$10.00 or less.

(d) *Miscellaneous fee provision.* The miscellaneous fee provisions set forth in § 2604.504 apply to requests for public financial disclosure reports pursuant to § 2634.603 of this chapter.

[FR Doc. 94-24229 Filed 9-30-94; 8:45 am]  
BILLING CODE 6345-01-P-M

**DEPARTMENT OF JUSTICE****Bureau of Prisons****28 CFR Part 542**

[BOP-1014-P]

RIN 1120-AA20

**Administrative Remedy Program**

AGENCY: Federal Bureau of Prisons, Justice.

ACTION: Proposed rule.

**SUMMARY:** In this document, the Bureau of Prisons is proposing to revise its regulations on the Administrative Remedy Program. These regulations describe the process through which inmates may seek formal review of any issue related to their confinement. The proposed changes are deemed necessary in order to attend to increased numbers of remedy requests occasioned by the continued growth of the inmate population. Proposed procedural changes include increases in the time limits set for inmate filing of requests and for Bureau responses; additional specifications for the provision of assistance to inmates; and increased access to Administrative Remedy indexes.

**DATES:** Comments due by December 2, 1994.

**ADDRESSES:** Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320

First Street NW., Washington, DC 20534.

**FOR FURTHER INFORMATION CONTACT:** Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.

**SUPPLEMENTARY INFORMATION:** The Bureau of Prisons is proposing to amend its regulations on the Administrative Remedy Program. A final rule on this subject was published in the Federal Register on October 29, 1979 (44 FR 62250), and was amended December 27, 1979 (44 FR 76726), November 20, 1991 (56 FR 58634), and on October 29, 1993 (58 FR 58246).

The proposed revision set forth below is the first major change to the Bureau's Administrative Remedy Program since its adoption on October 29, 1979. Subsequent growth of the inmate population has resulted in an increase in the number of remedy requests filed. As a means of effectively addressing this situation, the Bureau has reorganized its regulation, currently entitled Administrative Remedy Procedure for Inmates, for the sake of clarity, and is proposing various efficiencies in the procedures for processing remedy requests.

Procedural efficiencies include making adjustments to the time limits for filing requests by inmates and for responses by the Bureau. The time limit for submission of an initial remedy request by an inmate has been lengthened to 20 calendar days following the date on which the basis for the request had occurred. Current regulations specify a 15-day limit. The time limit for submission of an appeal to the General Counsel has been lengthened to 30 calendar days following the date Regional Counsel signed the response. The proposed time limits for agency responses have also been lengthened, from 15 to 20 calendar days at the institution level, and from 30 to 40 calendar days at the Central Office level.

Additional revisions include additional guidelines in the following areas: informal resolution, forms, and assistance to inmates. Also, advances in recordkeeping technology have now made it possible to expand the provisions for access to remedy indexes.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866, and accordingly this rule was not reviewed by the Office of Management and Budget. After review of the law and regulations, the Director, Bureau of Prisons, has certified that this rule, for the purpose of the Regulatory Flexibility Act (Pub. L. 96-354), does not have a

significant impact on a substantial number of small entities.

Interested persons may participate in this proposed rulemaking by submitting data, views, or arguments in writing to the Bureau of Prisons, 320 First Street, NW., HOLC Room 754, Washington, DC 20534. Comments received during the comment period will be considered before final action is taken. All comments received remain on file for public inspection at the above address. The proposed rule may be changed in light of the comments received. No oral hearings are contemplated.

**List of Subjects in 28 CFR Part 542****Prisoners.**

Wade B. Houk,

*Acting Director, Bureau of Prisons.*

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons in 28 CFR 0.96(p), it is proposed to revise part 542 in subchapter C of 28 CFR, chapter V as set forth below.

**SUBCHAPTER C—INSTITUTIONAL MANAGEMENT**

1. 28 CFR part 542 is revised to read as follows:

**PART 542—ADMINISTRATIVE REMEDY****Subpart A—[Reserved]****Subpart B—Administrative Remedy Program****Sec.**

- 542.10 Purpose and scope.
- 542.11 Responsibility.
- 542.12 Excluded matters.
- 542.13 Informal resolution.
- 542.14 Initial filing.
- 542.15 Appeals.
- 542.16 Assistance.
- 542.17 Resubmission.
- 542.18 Response time.
- 542.19 Access to indexes and responses.

**Authority:** 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 [Repealed in part as to offenses committed on or after November 1, 1987], 5006-5024 [Repealed October 12, 1984 as to offenses committed after that date], 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

**Subpart A—[Reserved]****Subpart B—Administrative Remedy Program****§ 542.10 Purpose and scope.**

The Administrative Remedy Program is a process through which inmates may seek formal review of an issue which relates to any aspect of their confinement, except as excluded in § 542.12, if less formal procedures have not resolved the matter. This Program applies to all inmates confined in