

# 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 PERSONNEL MANAGEMENT

### 5 CFR Part 294

RIN 3206-AK53

### Implementation of the Freedom of Information Act

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is proposing to revise its regulations regarding implementation of the Freedom of Information Act (FOIA). The purpose of the revision is to make the regulations easier to understand and to update them with all changes to the FOIA since the last revision.

**DATES:** Comments must be received on or before September 22, 2008.

**ADDRESSES:** Send or deliver comments to Paul Carr, Freedom of Information/Privacy Act Officer, Center for Information Services, U.S. Office of Personnel Management, 1900 E Street, NW., Room 5415, Washington, DC 20415; FAX (202) 418-3251; or e-mail to [foia@opm.gov](mailto:foia@opm.gov).

**FOR FURTHER INFORMATION CONTACT:** Paul Carr, (202) 606-4018.

**SUPPLEMENTARY INFORMATION:** OPM is issuing proposed regulations to revise the rules implementing 5 U.S.C. 552, concerning the Freedom of Information Act (FOIA). The purpose of this revision to part 294 is to include both the 1996 E-FOIA and the 2007 OPEN Government Act amendments and to make part 294 easier to understand.

### E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

### Regulatory Flexibility Act

I certify these regulations will not have a significant economic impact on a substantial number of small entities because costs associated with requesting

information under the Freedom of Information Act are not affected.

### List of Subjects in 5 CFR Part 294

Freedom of information.

U.S. Office of Personnel Management.

Linda M. Springer,

Director.

Accordingly, OPM proposes to revise 5 CFR part 294 to read as follows:

## PART 294—AVAILABILITY OF OFFICIAL INFORMATION

### Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

Sec.

294.101 Purpose.

294.102 General definitions.

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294.111 Custody of records; subpoenas.

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### Subpart B—The Public Information Function

294.201 Public information policy.

### Subpart C—Office Operations

294.301 Policy and operations.

### Subpart D—Cross References

294.401 References.

**Authority:** 5 U.S.C. 552, Freedom of Information Act (FOIA), Public Law 92-502, as amended by the Freedom of Information Reform Act of 1986, Public Law 99-570, E.O. 12600, 52 FR 23781 (June 25, 1987), Public Law 104-201, Public Law 104-231, E.O. 13392 (December 14, 2005), and Public Law 110-175.

### Subpart A—Provisions for the Freedom of Information Act

#### § 294.101 Purpose.

This subpart contains the regulations the Office of Personnel Management (OPM) follows in processing all requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, except when an individual requests their own records maintained in an OPM or government-wide systems

of records. In this case, OPM will process the request under the Privacy Act, as provided by 5 CFR 294.105.

#### § 294.102 General definitions.

(a) All of the terms defined in the Freedom of Information Act, and the definitions included in the "Uniform Freedom of Information Act Fee Schedule and Guidelines" issued by the Office of Management and Budget apply, regardless of whether they are defined in this subpart.

(b) Definitions, as used in this subpart:

*Agency*, as used in this part, refers to the U.S. Office of Personnel Management (OPM).

*Component* means each separate office, division, center, or group in OPM with responsibility for responding to FOIA requests.

*Direct costs* means the expenditures OPM actually incurs in searching for, duplicating and reviewing documents to respond to a FOIA request. Overhead expenses, such as the cost of space and heating or lighting the facility in which the records are stored, are not included in direct costs.

*Disclose or disclosure* means making records available, on request, for examination and copying or furnishing a copy of records.

*Duplication* means the process of making a copy of a document necessary to respond to a FOIA request. Among the forms that such copies can take are paper, microform, audiovisual materials or machine readable documentation (e.g., magnetic tape, disk or CD-ROM).

*FOIA request* means a written request (including letter, FAX or e-mail), citing the FOIA, for access to records of the executive branch of the Federal Government the requester believes are held by OPM.

*Records, information, document and material* mean the same as the term *agency records* in 5 U.S.C. 552(f).

*Review* means the process of initially examining documents located in response to a request to determine whether any documents or portion of any document located may be withheld from disclosure. *Review* also includes processing documents for disclosure; e.g., doing all that is necessary to excise them and otherwise prepare them for release. *Review* does not include the time spent resolving general legal and policy issues regarding the application of exemptions.

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

**§ 294.103 Definitions of categories and assignment of requests and requesters to categories.**

OPM will apply the definitions and procedures outlined in this section to assign requesters to categories. The requester categories, as established by 5 U.S.C. 552(a), are:

(a) *Commercial use request* means a FOIA request from, or on behalf of, one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person or institution on whose behalf the request is made. In determining whether a request properly belongs in this category, OPM will look first to the intended use of the documents being requested.

(b) *Educational institution request* means a FOIA request that is made as authorized by, and under the auspices of, a qualifying public or private educational institution; and the records are sought in furtherance of scholarly goal of the institution and not an individual goal. Educational institutions refers to public or private, preschools, elementary or secondary schools, institutions of undergraduate or graduate higher education, institutions of professional education or vocational education that operate a program or programs of scholarly or scientific research.

(c) *News media request* means a FOIA request from a representative of the news media which means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of *news*) who make their products available for purchase or subscription or by free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A *freelance*

*journalist* shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; OPM may also consider the past publication record of the requester in making such a determination.

(d) *Non-commercial scientific institution request* means a FOIA request from an institution not operated on a commercial basis and is operated solely to conduct scientific research that produces results that are not intended to promote any particular product or industry.

(e) *Other request* means a FOIA request not covered in paragraphs (a), (b), (c), or (d) of this section. However, as provided by § 294.105, OPM will use its Privacy Act regulations, rather than this subpart, when individuals ask for records about themselves that may be filed in OPM systems of records.

**§ 294.104 Clarifying a requester's category.**

(a) *Seeking clarification of a requester's category.* OPM may seek additional clarification from a requester before assigning his or her request to a specific category if:

(1) There is reasonable cause to doubt the requester's intended use of records; or

(2) The intended use is not clear from the request itself; or

(3) There is any other reasonable doubt about qualifications that may affect the fees applicable or the services rendered under § 294.109.

(b) *Prompt notification to requester.* When OPM seeks clarification as provided by paragraph (a) of this section, it will notify a requester promptly either by telephone or in writing of the information or materials needed.

(c) *Effect of seeking clarification on time limits for responding.* If OPM does not receive the requested information from the requester within 30 days, OPM will assign a final requester category to the request, calculate any fees, and apply the time limits under 5 U.S.C. 552 for responding to the FOIA request. OPM will not consider any request for records as received from the requester until it:

(1) Receives any additional clarification needed under paragraph (a) of this section; and

(2) Determines the clarifying information is sufficient to correctly place the requester in one of the request categories in 5 CFR 294.103.

**§ 294.105 Access to the requester's own records.**

(a) *Personnel, retirement or background investigation records.* Only the subject of a record, or his or her authorized representative, may request records about him or herself as defined by 5 U.S.C. 552a(a)(4) by writing to the addresses in 5 CFR 294.107. The record must be identifiable by the subject's name or other personal identifier. OPM will process the request under Privacy Act procedures in 5 CFR part 297.

(b) *Medical records.* OPM may disclose a subject's medical records to him or her, or to his or her authorized representative. Medical records may contain information about a subject's mental or physical condition a physician would hesitate to give to the subject. In these circumstances, OPM will disclose the records, including the exact nature and probable outcome of the subject's condition, only to a licensed physician designated in writing by the subject or his or her designated representative. OPM will process the request under the Privacy Act procedures in 5 CFR part 297.

**§ 294.106 Publications, periodicals, and OPM issuances.**

(a) OPM makes available in the agency's Electronic Reading Room or for public inspection and copying the following types of records unless a FOIA exemption applies:

(1) Records requested three or more times under FOIA;

(2) OPM administrative staff manuals and instructions that affect members of the public;

(3) Final opinions made by OPM in the adjudication of cases;

(4) OPM policy statements and interpretations adopted but not published in the **Federal Register**;

(5) Public agency documents created after October 31, 1996.

(b) OPM may delete identifying details when publishing an opinion, statement of policy, interpretation, manual or instruction to prevent a clearly unwarranted invasion of personal privacy.

(c) These materials are available during normal working hours. Review of the materials must be coordinated with OPM's FOIA/PA Officer.

(d) Electronic copies are available through OPM's Electronic FOIA Reading room at <http://www.opm.gov/efoia/>.

(e) Paper copies are also available by writing to: FOIA/PA Officer, U.S. Office of Personnel Management, Office of the Chief Information Officer, FOIA Requester Service Center, 1900 E Street, NW., Washington, DC 20415.

(f) If a request is for material published and offered for sale (e.g., by

the Superintendent of Documents, Government Printing Office), OPM will explain where the material may be reviewed or purchased.

#### **§ 294.107 Places to obtain records.**

(a) Though OPM has a decentralized system for processing FOIA requests whereby each OPM component has responsibility for responding to FOIA requests for records they maintain, all requests for records except as shown in paragraphs (b), (c), (d), or (e) of this section should be sent to: FOIA/PA Officer, U.S. Office of Personnel Management, Office of the Chief Information Officer, FOIA Requester Service Center, 1900 E Street, NW., Washington, DC 20415. E-mail: [foia@opm.gov](mailto:foia@opm.gov). Fax: See the FAX number for this office on OPM's Web site at <http://www.opm.gov/efoia>.

(b) *Requesting copies of background investigations.* (1) The background investigations for most former civilian and military Federal employees, Federal contractors and applicants for Federal employment are stored at the address below. Requests *must* include the subject's hand-written signature and all of the information below. E-mail requests cannot be accepted.

- (i) Full name.
- (ii) Social Security Number.
- (iii) Date of birth.
- (iv) Place of birth.
- (v) Current home address (a Post Office Box is not acceptable).

(vi) FAX: See the FAX number for this office on OPM's Web site at <http://www.opm.gov/efoia>.

(2) *Mail requests to:* FOI/P, OPM-FIPC, P.O. Box 618, 1137 Branchton Road, Boyers, PA 16018-0618.

(c) *Requesting personnel records for current Federal employees.* The Official Personnel Folders (OPFs) for current Federal employees are stored at the employee's current employing agency. The request for the records must be made directly to that agency's Freedom of Information/Privacy office. The Department of Justice (DOJ) provides the current list of agency Freedom of Information/Privacy contacts on its Web site at <http://www.usdoj.gov/oip/foiacontacts.htm>.

(d) *Requesting personnel records for non-Postal former Federal employees.*

(1) The Official Personnel Folders (OPFs) for most former civilian and military Federal employees are stored at the address below. Requests *must* include the subject's hand-written signature and all of the information below. E-mail requests cannot be accepted.

- (i) Social Security Number.
- (ii) Date of birth.

(iii) Name of last agency where employed.

(iv) Approximate date when last employed with the Federal government.

(2) *Mail requests to:* National Personnel Records Center (NPRC), 111 Winnebago Street (*indicate Civilian or Military*), St. Louis, MO 63118-4126. Fax: (314) 801-9268.

(e) *Requesting personnel records for former Postal Federal employees.* (1) The Official Personnel Folders (OPFs) for former U.S. Postal Service (USPS) employees are stored at the U.S. Postal Service. Requests *must* include the subject's hand-written signature and all of the information below. E-mail requests cannot be accepted.

- (i) Social Security Number.
- (ii) Date of birth.
- (iii) Name of last agency where employed.

(iv) Approximate date when last employed with the U.S. Postal Service.

(2) *Mail requests to:* U.S. Postal Service, General Manager, Headquarters Personnel Division, 475 L'Enfant Plaza, SW., Washington, DC 20260-4261.

(f) *When an organization does not have records in its custody.* When an OPM organization receives a Freedom of Information Act request for OPM records that it does not have in its possession, it will promptly forward the request to the appropriate organization. If a person has asked to be kept apprised of anything that will delay the official receipt of a request, OPM will provide notice of this forwarding action. Otherwise, OPM may, at its option, provide such notice.

(g) *Records from other Government agencies.* When a person seeks records that originated in another Government agency, OPM may refer the request to the other agency for response. Ordinarily, OPM will provide notice of this type of referral.

(h) *Creating records.* If a person seeks information from OPM in a format that does not currently exist, OPM will not ordinarily compile the information for the purpose of creating a record to respond to the request. OPM will advise the individual that it does not have records in the format sought. If other existing records would reasonably respond to the request or portions of it, OPM may provide these. If fees as provided in § 294.109 apply to any alternative records, OPM will advise the requester before providing the records.

#### **§ 294.108 Procedures for obtaining records.**

Any individual (U.S./foreign), partnership, corporation, association or government (except foreign governments seeking intelligence

agency information) may file a FOIA request with OPM. All requests for OPM records should be sent to the OPM office listed in 5 CFR 294.107(a).

(a) *Delivering a request.* Requests for OPM records may be delivered to OPM during business hours on a regular business day in the following manner:

- (1) By mail;
- (2) In person;

(3) By faxing a request (FAX numbers are on the FOIA contacts list at <http://www.opm.gov/efoia/>); or

(4) By e-mailing a request to [foia@opm.gov](mailto:foia@opm.gov), EXCEPT for those Privacy requests shown in § 294.107 (b), (c), (d), and (e).

(b) *Marking the request.* Mark the request for records clearly and prominently with "FOIA Request" or "Freedom of Information Act Request." If the request is sent by:

- (1) Mail or in an envelope, mark the outside envelope and the letter;
- (2) FAX, mark the top of the page; or
- (3) E-mail, include the mark in the subject line.

(c) *Information to provide in the request.* The request, regardless of the format, must describe the records sought in sufficient detail to enable OPM staff to locate the records with a reasonable amount of effort. OPM will regard a request for a specific category of records as fulfilling the requirements of this paragraph, if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive to OPM operations. The more information the requester includes, the easier it will be for OPM to locate the record(s) he or she seeks. Each record request should include specific information, such as:

- (1) Requester's name, full mailing address, telephone number and, if available, e-mail address;
- (2) The approximate date the record was created;
- (3) The Social Security Number, retirement claim number, publication number or any other number the requester believes will help OPM to identify the record;

(4) The title, name or subject matter of the record; and

(5) The author of any publication.

(d) *Restrictions on e-mail requests.* OPM cannot accept e-mail requests for the following types of records because written signature of either the requester or his or her authorized representative are required:

- (1) Individual personnel records;
- (2) Individual retirement records; or
- (3) Individual background investigation records.

(e) *Medical records.* OPM or another Government agency may disclose the

medical records of an applicant, employee, or annuitant to the subject of the record, or to a representative designated in writing. However, medical records may contain information about an individual's mental or physical condition that a prudent physician would hesitate to give to the individual. Under such circumstances, OPM may disclose the records, including the exact nature and probable outcome of the condition, only to a licensed physician designated in writing for that purpose by the individual or his or her designated representative.

(f) *Publications.* If the subject matter of a request includes material published and offered for sale (e.g., by the Superintendent of Documents, Government Printing Office), OPM will explain where a person may review and/or purchase the publications.

(g) *Responsibility for responding to requests.* OPM has a decentralized system for processing FOIA requests whereby each OPM component has responsibility for responding to FOIA requests for records they maintain. Within 10 working days of receiving a request in OPM's FOIA Requester Service Center, or any OPM component, a request will be reviewed to:

(1) Determine if the request is for records OPM maintains and, if so, forward to the appropriate OPM component(s) which may have responsive records. The OPM component(s) will have 20 business days from receipt of the forwarded request to provide the records sought except as provided in paragraph (g)(2) of this section.

(2) Determine if the request reasonably describes the record(s) sought. If it does not, OPM will tell the requester why the request is insufficient and notify the requester of any additional information needed to process the request. OPM will also offer the requester an opportunity to prepare and reformulate the request so it meets the requirements of this section.

(3) Determine if another Federal agency may have the records and refer the request to that agency for action. The request will then be subject to that agency's FOIA regulations. If the requester or the requester's authorized representative asks to be notified of anything that will delay the official receipt of the requester's request, OPM will notify the requester in writing that his or her request has been forwarded to another agency for action.

(i) If a request is for records OPM does not have the authority to release without consulting another agency, copies of the request will be referred to the appropriate agency. Depending on the

records sought, the appropriate agency may respond directly to the requester. Otherwise, the final response to a request can be made only when the agency to whom OPM referred the documents responds to OPM.

(ii) If a request is for records containing confidential commercial information, OPM will contact the submitter of the requested information.

(h) *Acknowledgements of requests.* On receipt of a request, an OPM component will ordinarily send an acknowledgement letter to the requester under 5 CFR 294.109 and provide an assigned request number for further reference; acknowledgement letters will confirm the requester's agreement to pay fees, if required. Information regarding the status of the request can be obtained by following the procedures on OPM's FOIA page at <http://www.opm.gov/efoia/>.

(i) *New Time Limits.* As required by amendments to section 552 of title 5 United States Code, effective December 31, 2008, the 20-day period shall commence on the date on which the request is first received by the appropriate component of OPM, but in any event not later than ten days after the request is first received by the OPM FOIA Requester Center.

(j) *Applying the time limits.* When applying the time limits in section 552 of title 5, United States Code, OPM will not officially consider any request to be received until it arrives in the OPM organization that has responsibility for the records sought.

(k) *Responses to requests.*—(1) *Grants of requests.* (i) Once OPM decides to release the requested records in whole or in part, the requester will be informed in writing. If the records will be released, OPM's response may include the records or where they may be reviewed. If the records will be released only in part or the request will be denied, OPM's response will explain the reasons for this decision, the exemption(s) that apply and the requester's right to appeal the decision. If there are applicable fees associated with processing a request, OPM will release the records when payment is received as explained in 5 CFR 294.109. Once applicable fees are paid, OPM will provide the requester with copies of records in the format requested if the records:

(A) Already exist in the requested format; or

(B) Are readily reproducible in the requested format.

(ii) If a requester requests information from OPM in a format that does not currently exist, OPM will not create a record to respond to the requester.

(2) *Denials of requests.* When OPM decides to withhold in part or to deny the release of records, OPM will notify the requester in writing. Reasons for denying a request are:

(i) Records do not exist or cannot be located;

(ii) Records are not readily reproducible in the form or format requested;

(iii) Records are not subject to release under one of the nine published exemptions; or

(iv) Records are the subject of a disputed fee matter, including a denial of a fee waiver. OPM's denial letter will be signed by the appropriate official and will include:

(A) The name and title or position of the person responsible for the denial;

(B) A brief statement of the reason(s) for the denial, including any FOIA exemption(s) applied;

(C) An estimate of the volume of records withheld, in number of pages or other reasonable form of estimation. The estimate will include specific exemptions used where the deletions are shown on the records or if disclosure will harm an interest protected by an applicable exemption; and

(D) The requester's right to appeal OPM's denial under 5 CFR 294.110.

(l) *Expedited processing.* To request expedited processing of a FOIA request, the requester must submit a statement, certified to be true and correct to the best of his or her knowledge, explaining the basis for expedited processing. OPM will expedite a FOIA request or appeal for any of the following reasons:

(1) Imminent threat to an individual's life or physical safety;

(2) Imminent loss of a substantial due-process right;

(3) An urgent need to inform the public about an actual or alleged Federal Government activity if the request is made by a person primarily engaged in disseminating information to the public; or

(4) A matter of widespread and exceptional media interest in which there exists possible questions about the Government's integrity that affects public confidence. Ordinarily, OPM will respond to a request for expedited processing within 10 days of receipt of the request. If OPM grants a request for expedited processing, OPM will process the request as quickly as possible. If OPM denies a request for expedited processing and a requester decide to appeal the denial, OPM will expedite the review of the appeal.

#### **§ 294.109 Fees.**

(a) *Applicability of fees.* (1) OPM will provide, without charge, reasonable

quantities of material available for free distribution to the public.

(2) OPM may provide other material, subject to payment of fees intended to recoup the full allowable direct costs of providing services. Fees for these materials may be waived if the request meets the requirements specified in 5 CFR 294.109.

(3) If a request does not include an acceptable agreement to pay fees and does not otherwise convey a willingness to pay fees, OPM will promptly notify the requester of the estimated fees associated with processing the requester's FOIA request. OPM's notice will offer the requester an opportunity to confer with OPM staff to modify the request to meet the requester's needs at a lower cost. OPM will process the request when the requester or the requester's authorized representative come to an agreement with OPM about the payment of the required fee. If OPM does not receive a response from the requester within 30 days of the date of notification, either of the requester's agreement to pay the fees associated with processing the FOIA request, or a modification to the request lowering the estimated costs, OPM will close the request and no additional action will be taken.

(4) OPM will ordinarily respond to FOIA requests in a decentralized

manner. OPM may, at times, refer a single request to two or more components to make separate responses directly to a requester. Each component may assess fees for a requester's request for the direct costs to prepare the response.

(5) If a requester authorizes fees for a document search as provided in paragraph (c), OPM may assess charges for employee time spent searching for documents and other direct costs of a search, even if a fails to locate records or if the located records are determined to be exempt from disclosure. OPM will conduct searches in the most efficient and least expensive manner to minimize the cost for both the requester and OPM, e.g., personnel should not engage in line-by-line search when photocopying an entire document would be a less expensive and quicker way to comply with a request.

(6) OPM will charge the requester for services requested and performed, but not required, under the FOIA, such as formal certification of records as true copies, by using the Federal User Charge Statute (31 U.S.C. 483a) or other applicable statutes.

(7) If OPM is assessed fees from the National Archives and Records Administration (NARA) or other institutions for retrieving records to assist in preparing a response to a

request, those fees may be passed on to the requester.

(b) *Rates used to compute fees.* OPM will charge the requester the following rates for a document search, duplication, and review as required by 5 U.S.C. 552(a)(4). The rates below should be used in conjunction with the fee components listed in paragraph (c) of this section:

Service	Rate
(1) Employee time .....	Salary rate plus 20% to cover benefits.
(2) Photocopies (up to 8½" × 14").	\$0.25 per page.
(3) Computer time .....	Actual direct cost.
(4) Supplies and other materials.	Actual direct cost.
(5) Other costs not identified above.	Actual direct cost.

(c) *Assessing fees based on requester's category.* (1) OPM determines fees differently for each category of requester as defined in 5 CFR 294.103. Requests have three cost components for the purpose of assessing fees:

- (i) The cost of document search;
- (ii) The cost of review; and
- (iii) The cost of duplication.

(2) OPM will apply the rates in paragraph (b) of this section to the cost components that apply to the requester's category as follows:

Requester's category	Search	Review	Duplication
(i) Commercial .....	Actual direct costs .....	Actual direct costs .....	Actual direct costs.
(ii) Non-commercial (educational or scientific institution) or news media.	No charge .....	No charge .....	Actual direct costs. <sup>1</sup>
(iii) All others .....	Actual direct costs. <sup>2</sup> .....	No charge .....	Actual direct costs. <sup>1</sup>

<sup>1</sup> First 100 pages of paper copies or reasonable equivalent are copied free.

<sup>2</sup> First 2 hours of manual search time are free. If requested records are maintained in a computerized data base, OPM will use the following formula, suggested by OMB, to provide the equivalent of 2 hours manual search time free before charging for computer search time: The operator's hourly salary plus 20% will be added to the hourly cost of operating the central processing unit that contains the record information.

(d) *OPM failure to comply with FOIA time limits.* If OPM fails to comply with the FOIA's time limits, unless "unusual" or "exceptional" circumstances as defined by 5 U.S.C. 552 apply to the processing of the request, OPM will not assess search fees.

(e) *Agreement to pay fees.* If a requester makes a FOIA request, it shall be considered an agreement by the requester to pay all applicable fees charged under 5 CFR 294.109, unless the requester seeks a waiver of fees. When making a request, the requester may specify a willingness to pay a greater or lesser amount. The requester may find *OPM's Freedom of Information Act Reference Guide* helpful in making his or her request. It is available on OPM's Web site at <http://www.opm.gov/>

*efoia/* and in paper form by writing to: FOIA/Privacy Act Officer, U.S. Office of Personnel Management, Office of the Chief Information Officer, FOIA Requester Service Center, 1900 E Street, NW., Washington, DC 20415.

(f) *Payment of fees.* Fees are payable by check or money order to the Office of Personnel Management (OPM).

(1) When the fee total is less than \$25.00, OPM will usually waive the fee except as provided in 5 CFR 294.109.

(2) If a request may reasonably result in a fee assessment of more than \$25.00, OPM will not release the records unless the requester agrees in advance to pay the anticipated charges.

(3) OPM may put requests together (aggregate) and charge fees accordingly when there is a reasonable belief a requester, or a group of requesters acting

in concert, is attempting to break down a request into a series of requests to avoid the assessment of fees.

(i) If multiple requests of this type occur within a 30 day period, OPM may notify the requester it is aggregating the requests together as one and that it will apply the fee provisions of this section, including any required agreement to pay fees and any advance payment.

(ii) Before aggregating requests of this type made over a period longer than 30 days, OPM will assure that it has a solid basis on which to conclude that requesters are acting in concert and are acting specifically to avoid payment of fees.

(iii) OPM will not aggregate multiple requests on unrelated subjects from one requester.

(g) *Payment of fees in advance.* If OPM estimates or determines the fees are likely to exceed \$250.00, OPM may require the payment of applicable fees in advance.

(1) If an OPM official, who is authorized to make a decision on a particular request, determines a requester has a history of prompt payment of FOIA fees, OPM will provide notice of the likely cost and obtain satisfactory assurance of full payment.

(2) When a requester or an organization a requester represents previously failed to pay assessed fees in a timely manner (*i.e.*, payment was not made within 30 days of the billing date), OPM will require full payment of all fees in advance.

(3) If a requester or the organization the requester represents has not paid previously assessed fees, OPM will not begin to process any new request for records until the full amount the requester or the organization has paid the full amount owed plus any applicable interest, and the requester or the organization makes a full advance payment for the new request.

(h) *Waiver or reduction of fees.* 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. OPM will waive or reduce fees only if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government, and release of the material is not primarily in the commercial interest of the requester.

(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, OPM will consider the following factors:

(i) Subject of request: Whether the subject of the requested records concerns "the operations or activities of the Government";

(ii) The information value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of Government operations or activities;

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding" of the subject;

(iv) The significance of the contribution of public understanding: Whether disclosure of the requested information is likely to contribute

"significantly" to public understanding of Government operations or activities;

(2) A commercial interest is a commercial, trade, or profit interest as these terms are commonly understood. A requester's status as "profit making" or "non-profit making" is not the deciding factor. Not only profit-making entities, but other organizations or individuals may have a commercial interest to be served by disclosure, depending on the circumstances involved. In determining whether disclosure is or is not primarily in the commercial interest of the requester, OPM will consider the following factors:

(i) *Existence and magnitude of a commercial interest.* Whether disclosure of the requested information will further the requesters commercial interest; and, if so,

(ii) *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 with public interest in disclosure is "primarily in the commercial interest of the requester."

(3) In all cases, the burden of proof is on the requester to present evidence or information in support of a request for a fee waiver or reduction.

(i) *Denial of fee waiver and reduction requests.*

(1) An OPM official may deny a request for a full or partial waiver of fees without further consideration if a request does not include:

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

(ii) A clear statement of requester's proposed use for the information and whether the requester will derive an income or other benefit from this use;

(iii) A clear statement of how the public will benefit from OPM's release of the requested information; and

(iv) A clear statement of requester's qualifications, if a specialized use is planned.

(2) A requester may appeal the denial of a waiver request as provided by 5 CFR 294.110 of this part.

(j) *Fees not paid; penalties; debt collection.*

(1) OPM will promptly notify a requester if an advance payment, as provided under this section, is required before further processing of a request can begin. Payment of all fees is required within 30 days. OPM will not continue processing a request until payment is received.

(2) OPM may begin assessing interest charges on an unpaid bill starting on the 31st day following the date on which the bill was sent. Interest will be charged at the rate allowed in 31 U.S.C.

3717, and will accrue from the billing date.

(3) OPM may use the procedures authorized by Public Law 97-365, the Debt Collection Act of 1982, to encourage the repayment of debts incurred under this section. These procedures may include deciding to disclose information to consumer reporting agencies and to use collection agencies.

#### **§ 294.110 Appeals.**

(a) When an OPM official denies records or waivers of fees under the Freedom of Information Act, the requester may appeal to: Office of the General Counsel, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415. If the Office of the General Counsel denied the FOIA request, a requester may appeal the denial to the: Deputy Director, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

(b) An appeal must be received in writing within 60 calendar days from the date of OPM's letter denying a request. The appellant should mark the letter and envelope with the words "FOIA Appeal" and include a copy of his or her initial request and the letter of denial. Additionally, the appellant should explain why OPM should release the requested records, grant a fee waiver request, or expedite the processing of his or her request. If OPM was not able to find the records the requester wanted, the appellant should explain why he or she believes the search was inadequate. If OPM denied a requester access to records and told him or her that the records were not subject to FOIA, the appellant should explain why he or she believes the records are subject to FOIA.

(c) The appeals provided for in this section constitute the final available levels of administrative review. If OPM affirms a denial of information or a denial of a fee waiver, a requester may seek judicial review in the district court of the United States District in the district where he or she resides, or has his or her principal place of business, or in which the agency records are located; or in the District of Columbia.

(d) If an official of another agency denies a FOIA request for records in one of OPM's government-wide systems of records, the requester should consult that agency's regulations for any appeal rights which may apply. An agency may, at its discretion, direct these appeals to OPM's Office of the General Counsel.

#### **§ 294.111 Custody of records; subpoenas.**

(a) The Center for Information Services, OPM, has official custody of

OPM records. A subpoena or other judicial order for an official record from OPM must be signed by a judge and should be served on the: FOIA/PA Office, U.S. Office of Personnel Management, Office of the Chief Information Officer, FOIA Requester Service Center, 1900 E Street, NW., Washington, DC 20415.

(b) See 5 CFR part 297 for the steps other officials should take on receipt of a subpoena or other judicial order for an OPM record.

#### **§ 294.112 Confidential commercial information.**

(a) In general, OPM will not disclose confidential commercial information in response to a FOIA request except in accordance with this section.

(b) The following definitions from Executive Order 12600 apply to this section:

(1) *Confidential commercial information* means records provided to the Government by a submitter that arguably contain material exempt from release under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means any person or entity who provides confidential commercial information, directly or indirectly, to OPM. The term includes, but is not limited to, corporations, State governments and foreign governments.

(c) *Designation of confidential commercial information.* Submitters of confidential commercial information must show by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of their submissions they consider to be confidential information and protected from disclosure under Exemption 4.

(d) *Notice to submitters.* OPM will, to the extent permitted by law, provide prompt written notice to an information submitter of FOIA requests or administrative appeals if:

(1) The submitter has made a good faith designation that the requested material is confidential commercial information; or

(2) OPM has reason to believe the requested material may be confidential commercial information.

(e) The written notice required in paragraph (d) of this section will either describe the confidential commercial material requested or include as an attachment, copies or pertinent portions of the records.

(f) Whenever OPM provides the notification and opportunity to object required by paragraphs (d) and (h) of this section, OPM will advise the requester that notice and an opportunity

to object are being provided to the submitter.

(g) The notice requirements of paragraph (d) of this section will not apply if:

(1) OPM determines the information should not be disclosed;

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

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

(4) The information was submitted on or after August 20, 1992, and has not been designated by the submitter as exempt from disclosure in accordance with paragraph (c) of this section, unless OPM has substantial reason to believe disclosure of the information would result in competitive harm; or

(5) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous. In such a case, OPM will, within a reasonable number of days prior to a specified disclosure date, notify the submitter in writing of any final administrative decision to disclose the information.

(h) The notice described in paragraph (d) of this section will give a submitter a reasonable period from the date of the notice to provide OPM with a detailed written statement of any objection to disclosure. The statement must specify all the reasons for withholding any of the material under any exemption of the FOIA. When Exemption 4 of the FOIA is cited as the reason for withholding information, the specification will demonstrate the basis for any contention that the material is a trade secret, commercial or financial information that is privileged or confidential. The statement must also include a specification of any claim of competitive harm, including the degree of such harm, that will result from disclosure. The information provided in response to this paragraph may also be subject to disclosure under the FOIA. Information provided in response to this paragraph will also be subject to the designation requirements of paragraph (c) of this section. Failure to object in a timely manner, will be considered a statement of no objection by OPM, unless OPM extends the time for objection upon timely request from the submitter and for good cause shown. The provisions of this paragraph concerning opportunity to object will not apply to notices of administrative appeals when the submitter has been previously provided an opportunity to object at the time the request was initially considered.

(i) OPM will carefully consider a submitter's objections and specific grounds for nondisclosure, when it is received within the period of time described in paragraph (h) of this section, prior to determining whether to disclose the information. Whenever OPM decides to disclose the information over the objection of a submitter, OPM will send the submitter a written notice that will include:

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

(2) A description of the information to be disclosed; and

(3) A specific disclosure date.

(j) OPM will notify both the submitter and the requester of its intent to disclose material a reasonable number of days prior to the specific disclosure date.

(k) If a requester brings suit seeking to compel disclosure of confidential commercial information, OPM will promptly notify the submitter.

#### **Subpart B—The Public Information Function**

##### **§ 294.201 Public information policy.**

(a) OPM's public information policy is to release information about the functions and programs administered by OPM through news releases, publications, the world wide web or other methods.

(b) The Director, Office of Communications and Public Liaison, carries out OPM's public information policy. In addition, each OPM employee will cooperate in carrying out this policy.

#### **Subpart C—Office Operations**

##### **§ 294.301 Policy and operations.**

(a) Statements of Office policy and interpretations of the laws and regulations administered by the Office which the Office has adopted, whether or not published in the **Federal Register** are available to the public.

(b) Generally, memoranda, correspondence, opinions, data, staff studies, information received in confidence, and similar documentary material, when prepared for the purpose of internal communication within the Office or between the Office and other agencies, organizations, or persons, are not available to the public.

#### **Subpart D—Cross References**

##### **§ 294.401 References.**

The table below provides assistance in locating other OPM regulations in title 5 of the Code of Federal Regulations with provisions on the disclosure of records:

Type of information	Location (CFR part No.)
Classification appeal records .....	511
Classification information .....	175
Employee performance folders .....	293
Examination and related subjects records .....	300
Grade and pay retention records .....	536
Investigative records .....	736
Job grading reviews and appeals records .....	532
Medical information .....	297 & 293
Official Personnel Folders .....	293
Privacy and personnel records .....	297
Retirement .....	831 & 841

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 1000 and 1033

[Docket No. AO-166-A77; DA-08-06]

#### Milk in the Mideast Marketing Areas; Notice of Hearing on Proposed Amendments to Tentative Marketing Agreement and Order

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Notice of public hearing on proposed rulemaking.

**SUMMARY:** A public hearing is being held to consider and take evidence on a proposal to temporarily adjust certain Class I differentials in the Mideast milk marketing order.

**DATES:** The hearing will convene at 9 a.m., on Tuesday, August 19, 2008.

**ADDRESSES:** The hearing will be held at the Westin Cincinnati Hotel—21 E 5th Street, Cincinnati, Ohio 45202, phone (513) 621-7700.

**FOR FURTHER INFORMATION CONTACT:** Erin C. Taylor, Marketing Specialist, Order Formulation and Enforcement, USDA/AMS/Dairy Programs, Stop 0231—Room 2963, 1400 Independence Avenue, SW., Washington, DC 20250-0231, (202) 720-2357, e-mail-address: [erin.taylor@usda.gov](mailto:erin.taylor@usda.gov).

Persons requiring a sign language interpreter or other special accommodations should contact Paul Huber, Assistant Market Administrator, at (330) 225-4758; e-mail: [phuber@fnmaclev.com](mailto:phuber@fnmaclev.com) before the hearing begins.

**SUPPLEMENTARY INFORMATION:** This administrative action is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Notice is hereby given of a public hearing to be held at the Westin Cincinnati Hotel, Cincinnati, Ohio, beginning at 9 a.m. on Tuesday, August 19, 2008, with respect to a proposed amendment to the tentative marketing agreement and to the order regulating the handling of milk in the Mideast marketing area.

The hearing is called pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674) (Act), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR Part 900).

Land O'Lakes, Inc., Michigan Milk Producers Association, Inc., Foremost Farms USA Cooperative, Inc., Dairyalea Cooperative Inc., National Farmers Organization Inc., and Dairy Farmers of America, Inc. have jointly submitted a proposal that seeks to temporarily increase the Class I differentials in the southern tier of the Mideast milk marketing order. In addition to this proposed amendment to the order, AMS proposes to make any such changes as may be necessary to the order and its administrative rules and regulations to conform to any amendment that may result from the hearing.

The purpose of the hearing is to receive evidence with respect to the economic and marketing conditions which relate to the proposed amendments, hereinafter set forth, and any appropriate modifications thereof, to the tentative marketing agreement and to the order.

Evidence also will be taken to determine whether emergency marketing conditions exist that would warrant omission of a recommended decision under the rules of practice and procedure (7 CFR 900.12(d)) with respect to any proposed amendments.

Actions under the Federal milk order program are subject to the Regulatory Flexibility Act (5 U.S.C. 601-612) (RFA). The RFA seeks to ensure that, within the statutory authority of a program, the regulatory and information

collection requirements are tailored to the size and nature of small businesses. For the purpose of the RFA, a dairy farm is a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees (13 CFR 121.201). Most parties subject to a milk order are considered as a small business. Accordingly, interested parties are invited to present evidence on the probable regulatory and informational impact of the hearing proposals on small businesses. Also, parties may suggest modifications of these proposals for the purpose of tailoring their applicability to small businesses.

The amendments to the rules proposed herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have a retroactive effect. If adopted, the proposed amendments would not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 8c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (Department) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.