

PART 612—AVAILABILITY OF RECORDS AND INFORMATION

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AUTHORITY: 5 U.S.C. 552, as amended.

§612.1 Scope.

This part establishes procedures by which the National Science Foundation (NSF) will implement the Freedom of Information Act, 5 U.S.C. 552(a), relating to public availability of NSF records.

[56 FR 47415, Sept. 19, 1991]

§612.2 Information policy.

(a) Subject to the policies set forth below, NSF will make the fullest possible disclosure of information to any person who requests information, without unnecessary expenses or delay. The Inspector General (concerning records maintained by the Office of Inspector General) or the Deputy Director (concerning all other NSF records) may, except where prohibited by law, order disclosure in the public interest of records exempt from mandatory disclosure under §612.8 of this part.

(b) A collection of NSF policy documents, staff instructions, and of agency opinions and orders in the adjudication of cases, with respective indices, shall be physically located in the National Science Foundation library at 4201 Wilson Boulevard, Arlington, VA, where they will be available for inspection by the public during regular working hours on Monday through Friday. Copies of such documents shall be furnished in accordance with these regulations.

(c) The Director, Office of Information and Resource Management (D/IRM) shall be responsible for maintaining, publishing, distributing and making available for inspection and copying the current indexes and supplements thereto which are required by 5 U.S.C. 552(a)(2). Such indexes shall promptly be published, quarterly or more frequently, unless the D/IRM determines by order published in the FEDERAL REGISTER that the publication would be unnecessary. The fee for furnishing copies of indexes and supplements shall not exceed the direct cost of duplication.

[40 FR 12793, Mar. 21, 1975, as amended at 49 FR 23049, June 4, 1984; 49 FR 37595, Sept. 25, 1984; 56 FR 47416, Sept. 19, 1991; 59 FR 37437, 37438, July 22, 1994]

§612.3 Procedures applicable to the public—requests and appeals.

(a) *Publications excluded.* For the purpose of public requests for records the term *record* does not include publications which are available to the public in the FEDERAL REGISTER, or by sale or free distribution. Such publications may be obtained from the Government Printing Office, the National Technical Information Service, the NSF Forms and Publications Unit or NSF grantees or contractors. Requests for such publications will be referred to or the requester informed of the appropriate source. The booklet, *Publications of the National Science Foundation*, which is available without charge from Forms and Publications, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, identifies Annual Reports, Descriptive Brochures, Program Announcements, Science Resources Studies, Special Studies, and Periodicals descriptive of Foundation activities, policies, and procedures, sets forth the cost of each, and tells how copies may be obtained.

(b) *Form of request.* A request need not be in any particular format, but it: (1) Must be in writing and include the requester's mailing address, (2) must be clearly identified both on the envelope and in the letter as a Freedom of Information Act or FOIA request, (3) must

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describe the records sought with sufficient specificity to permit identification, and (4) must state that the requester promptly will pay the fees chargeable under this regulation. Provided, however, that when the requester places an inadequate limit on the amount he will pay or the requester has failed to make payments for previous requests, the NSF may require advance payment in accordance with § 612.12(d) of this part except in cases when fees have been waived or reduced in accordance with § 612.13 of this part.

(c) *Place of request.* Any request for records under FOIA shall be addressed to the National Science Foundation, Office of General Counsel, 4201 Wilson Boulevard, Arlington, VA 22230, except that requests for records maintained by the Office of the Inspector General may be addressed to either the Office of General Counsel, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230 or to the Office of the Inspector General, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. A request which meets the requirements of paragraph (b) of this section and is properly addressed will be deemed received on the date of arrival in the Office of General Counsel or the Office of the Inspector General.

(d) *Time for appeal.* A person whose request has been denied or partially denied may initiate an appeal by filing a request for review within ten days of the receipt of the denial, Saturdays, Sundays, legal public holidays, and the date of receipt excluded.

(e) *Form of appeal.* The appeal shall include a copy of the written request and the denial together with any written argument the requester wishes to submit, and shall be signed by the requester.

(f) *To whom appeal is made.* An appeal shall be addressed to the General Counsel, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

(g) *Decisions on appeal.* Decisions on appeal shall be made by the General Counsel in writing within 20 days (excepting the date of receipt, Saturdays, Sundays, and legal public holidays) from receipt of the appeal. If the decision is in favor of the requester it shall

order the record made available promptly to the requester. If adverse to the requester in whole or in part it shall briefly state the reasons and notify the requester that he may seek judicial review of the decision pursuant to paragraph (4) of section 552(a), title 5, United States Code.

[40 FR 12793, Mar. 21, 1975, as amended at 49 FR 23049, June 4, 1984; 56 FR 47416, Sept. 19, 1991; 59 FR 37438, July 22, 1994; 61 FR 51022, Sept. 30, 1996]

§ 612.4 Copies of records.

If a requested record is to be disclosed, a copy will be furnished the requester as promptly as possible provided payment of fees has been arranged, or has been waived pursuant to § 612.13 of this part. Records will not be released for copying.

[56 FR 47416, Sept. 19, 1991]

§ 612.5 Creation of records.

A record will not be created by compiling selected items from other documents at the request of a member of the public nor will a record be created by analysis, computation or other processing specifically for the requesting party. If such analysis or computation is available in the form of a record, copies shall be made available as provided in this regulation.

[40 FR 12793, Mar. 21, 1975]

§ 612.6 Confidential commercial information—notice.

(a) *In general.* Commercial information provided to the NSF by a submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* The following definitions are used in reference to this section:

Commercial information means information provided to the NSF by a submitter that arguably is protected from disclosure under section b(4) of the Freedom of Information Act, 5 U.S.C. 552(b)(4) and § 612.8(a)(4) of this part.

Submitter means any person, organization, or entity who provides commercial information, directly or indirectly, to the NSF. The term includes, but is not limited to, corporations, state governments and foreign governments.

(c) *Designation of commercial information.* Submitters of commercial information shall use good-faith efforts to designate, by appropriate markings, either at the time of submission or within a reasonable time thereafter, those portions of their submissions which they deem to be protected from disclosure under 5 U.S.C. 552(b)(4) and §612.8(a)(4) of this part. Such designations shall be deemed to have expired ten years after the date of the submission unless the submitter requests, and provides reasonable justification for, a designation period of greater duration.

(d) *Notice to submitters.* The NSF shall, to the extent permitted by law, provide a submitter with written notice of a Freedom of Information Act request or administrative appeal encompassing its commercial information wherever required under paragraph (e) of this section, except as provided for in paragraph (f) of this section. Such written notice, given in order to afford the submitter an opportunity to object to disclosure pursuant to paragraph (g) of this section, shall be given within a reasonable time after NSF's receipt of the Freedom of Information Act request or administrative appeal, consistent with statutory requirements, and shall either describe the exact nature of the commercial information requested or provide copies of the records or portions thereof containing the information. The requester also shall be notified that notice and an opportunity to object are being provided to a submitter.

(e) *When notice is required.* Notice shall be given to a submitter whenever:

(1) The information has been designated in good faith by the submitter as information deemed protected from disclosure under 5 U.S.C. 552(b)(4) and §612.8(a)(4) of this part, or

(2) The NSF has reason to believe that the information may be protected from disclosure under 5 U.S.C. 552(b)(4) and §612.8(a)(4) of this part.

(f) *Exceptions to notice requirements.* The notice requirements of paragraph (d) of this section shall not apply if:

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

(2) The information lawfully has been published 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 (c) of this section appears obviously frivolous, except that, in such case, the NSF shall send to the submitter written notice of any final administrative decision to disclose commercial information at least ten days prior to a specified disclosure date.

(g) *Opportunity to object to disclosure.* Through the notice described in paragraph (d) of this section, the NSF shall afford a submitter a reasonable time, consistent with statutory requirements, within which to provide the NSF with a detailed written statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act and, in the case of 5 U.S.C. 552(b)(4) and §612.8(a)(4) of this part, shall provide a detailed description of why the information is a trade secret or commercial or financial information that is privileged or confidential. This description shall explain why release of commercial or financial information would cause substantial harm to the competitive position of the submitter. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA. When the submitter fails to object within the specified time or the objection appears obviously frivolous, the NSF shall provide the submitter with written notice pursuant to paragraph (f)(4) of this section.

(h) *Notice of intent to disclose.* The NSF shall consider a submitter's objections and specific grounds for non-disclosure prior to determining whether to disclose confidential information. Whenever the Foundation decides to disclose confidential information over the objection of a submitter, the NSF shall forward to the submitter a written notice which shall include:

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

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

(3) A specified disclosure date.

Such notice of intent to disclose shall be forwarded to the submitter at least ten days prior to the specified disclosure date and the requester shall be notified likewise.

(i) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of confidential information, the NSF shall promptly notify the submitter.

[56 FR 47416, Sept. 19, 1991]

§ 612.7 Agency actions on receipt of a properly presented request for record.

(a) *Monitoring of requests.* The NSF Office of General Counsel, or such other office as may be designated by the Director, will serve as the central office for internal administration of these regulations. For records maintained by the Office of Inspector General, that Office will control incoming requests made directly to it, dispatch response letters, and maintain administrative records. For all other records maintained by NSF, the Office of General Counsel, or such other office as may be designated by the Director, will control incoming requests, assign them to appropriate action offices, monitor compliance, consult with action offices on disclosure, approve unavoidable extensions, dispatch denial and other letters, and maintain administrative records.

(b) *Time for response.* The Foundation will seek to take appropriate agency action on a request within 10 days of its receipt (excepting the date of receipt, Saturdays, Sundays, and legal public holidays). If the record may exist only in a retired file which has been placed in storage or there is otherwise a need to search for and collect the requested records from field facilities or other establishments that are separate from the Foundation, NSF shall immediately notify the requester by letter that the record has been ordered from storage (or is otherwise being sought) and that the time limit for acting on the request is extended by

the length of time required to obtain the record. The letter will also give the date on which a determination is expected to be dispatched. If the request seeks a voluminous amount of separate and distinct records requiring an unusual length of time for search, collection, and appropriate examination, and determination on the request cannot be made within 10 working days after agency receipt, NSF shall within such ten-day period furnish to the requester written notice extending the period for not more than ten working days. This notice shall set forth the reasons for such extension and the date on which a determination is expected to be dispatched. If the record has not been obtained and examined and notice of the determination whether to comply with the request has not been given by the last day of the period as extended, the requester shall be notified on that last day that the request is denied because the record has not yet been found and examined. Such denial shall state that NSF will reconsider the denial as soon as the search and examination is complete, which should be within a specifically stated number of days, but that the requester may, if he wishes, file an administrative appeal as provided in § 612.3 of this regulation. This same procedure for extending the period shall be followed if the nature of the record requires consultation with another agency having a substantial interest in the determination of the request or requires consultation among two or more components of NSF having substantial subject-matter interest therein.

(c) *Records containing commercial information.* When the requested record contains confidential commercial information such as a successful proposal that was submitted to NSF, the NSF will normally contact, in accordance with § 612.6 of this part, the organization that submitted the record in order to ask whether the submitter wished portions of the records withheld under any applicable exemptions. (The Foundation protects from disclosure pending proposals or unsuccessful proposals in any case.)

(d) *Denial of request.* No written request for records shall be denied except by the Office of General Counsel, the

Office of Inspector General or such other office as may be designated by the Director. Notice of the denial of a request shall briefly set forth the reasons therefor which shall be based solely upon one or more of the exemptions specified in § 612.8 of this part. Each notice of denial shall set forth the names and title or positions of each person responsible for the denial and shall inform the requester of the right to appeal as provided in § 612.3 of this part.

(e) *Oral requests.* Nothing in these regulations shall be deemed to preclude NSF from honoring oral requests for information where feasible, but if the requester is dissatisfied with the disposition of such a request, he shall be asked to put the request in writing.

[40 FR 12793, Mar. 21, 1975, as amended at 49 FR 23050, June 4, 1984; 56 FR 47417, Sept. 19, 1991; 61 FR 51022, Sept. 30, 1996]

§ 612.8 Records not available.

(a) *Exemptions.* The following types of records are not normally available for inspection and copying:

(1) Records specifically authorized and in fact properly classified pursuant to Executive Order to be kept secret in the interest of national defense or foreign policy.

(2) Records related solely to the internal personnel rules and practices of NSF. This exemption does not apply to rules relating to the work hours, leave, and working conditions of NSF personnel, or similar matters, to the extent that they can be disclosed without harm to the functions to which they pertain. Examples of exempt records of the type specified in the first sentence of this paragraph include, but are not limited to:

(i) Operating rules, guidelines, manuals on internal procedure, schedules and methods utilized by NSF auditors and examiners;

(ii) Negotiating positions and limitations involved in a negotiation prior to the execution of a contract or the completion of the action to which the negotiating positions or limitations were applicable. They may also be exempt pursuant to other provisions of this section.

(iii) Personnel policies, procedures and instructions, internal staffing plans, requirements, authorizations,

controls, and supporting data relating to position management and manpower utilization and information involved in the determination of the qualifications of candidates for employment or advancement.

(3) Records specifically exempted from disclosure by statute such as 18 U.S.C. 1905 which prohibits disclosure of information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association. This also includes records that disclose any invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license) as provided in 35 U.S.C. 205.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential. Matter subject to this exemption is that which is customarily held in confidence by the originator without regard to whether or not the originator is, or is not employed by, a nonprofit organization. It includes, but is not limited to:

(i) Information received in confidence, such as grant applications, fellowship applications and research proposals prior to award;

(ii) Statistical data or information if received in confidence from a contractor or potential contractor concerning contract performance, income, profits, losses, and expenditures.

(5) Inter-agency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with NSF. To the extent not so available by law, examples include, but are not limited to:

(i) Reports, memoranda, correspondence, workpapers, minutes of meetings (other than those governed by the Federal Advisory Committee Act), and staff papers prepared for use within NSF or within the Executive Branch of the Government by personnel or consultants of NSF, or any Government agency.

(ii) Advance information on proposed NSF plans to procure, lease, or otherwise acquire, or dispose of materials,

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real estate, facilities, services or functions, when such information would provide undue or unfair competitive advantage to any person;

(iii) Records prepared for use in proceedings before any Federal or State court or administrative body;

(iv) Evaluations of and comments on specific grant applications, research proposals, or potential contractors, whether made by NSF personnel or by external reviewers acting either individually or in committees;

(v) Preliminary, draft unapproved recommendations, evaluations, and opinions, such as evaluations of invention disclosures, of research projects, and of incomplete studies conducted or supported by NSF;

(vi) Proposed budget requests and supporting projections used or arising in the preparation and/or execution of a budget; proposed annual and multi-year policy, priorities, program and financial plan and supporting papers.

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Information in such files which is not otherwise exempt from disclosure pursuant to other provisions of this section will be released to the subject or to his designated legal representative, and it may be disclosed to others with his written consent. Examples of personnel files exempt from disclosure include, but are not limited to, file containing reports, records and other materials pertaining to individual cases in which disciplinary or other administrative action has been or may be taken. Similar files include reports and evaluations which reflect upon the qualifications or competence of individuals. Opinions and orders resulting from those proceedings shall be disclosed without identifying details if used, cited, or relied upon as precedent.

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

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

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

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

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis,

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

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

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

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

(10) Records belonging to another government agency or dealing with subject matter as to which government agency, other than NSF, has exclusive or primary responsibility. Requests for such records shall be promptly forwarded to the appropriate government agency for disposition or for guidance with respect to disposition.

(b) *Deletion of exempt portion and identifying details.* Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. Whenever any final opinion, order, or other materials required to be made available relates to a private party or parties and the release of the name or names or other identifying details will constitute a clearly unwarranted invasion of personal privacy, the record shall be published or made available with such identifying details left blank, or shall be published or

made available with obviously fictitious substitutes and with a notification such as the following as a preamble:

Names of parties and certain other identifying details have been removed (and fictitious names substituted) in order to prevent a clearly unwarranted invasion of the personal privacy of the individuals involved.

[40 FR 12793, Mar. 21, 1975, as amended at 47 FR 54943, Dec. 7, 1982. Redesignated at 49 FR 23050, June 4, 1984, and amended at 52 FR 43073, Nov. 9, 1987; 56 FR 47417, Sept. 19, 1991]

§ 612.9 Fees to be charged—definitions.

For the purpose of these Guidelines:

(a) All the terms defined in the Freedom of Information Act apply.

(b) A *statute specifically providing for setting the level of fees for particular types of records* (5 U.S.C. 552(a)(4)(A)(vi)) means any statute that specifically requires a government agency, such as the Government Printing Office (GPO) or the National Technical Information Service (NTIS), to set the level of fees for particular types of records, in order to:

(1) Serve both the general public and private sector organizations by conveniently making available government information;

(2) Ensure that groups and individuals pay the cost of publications and other services which are for their special use so that these costs are not borne by the general taxpaying public;

(3) Operate an information dissemination activity on a self-sustaining basis to the maximum extent possible; or

(4) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information. Statutes, such as the User Fee Statute, which only provide a general discussion of fees without explicitly requiring that an agency set and collect fees for particular documents do not supersede the Freedom of Information Act under section (a)(4)(A)(vi) of that statute.

(c) The term *direct costs* means those expenditures which an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond

to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(d) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. NSF shall ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. For example, NSF shall not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. “Search” should be distinguished, moreover, from “review” of material in order to determine whether the material is exempt from disclosure (see paragraph (f) of this section). Searches may be done manually or by computer using existing programming.

(e) The term *duplication* refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

(f) The term *review* refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (g) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(g) The term *‘commercial use’ request* refers to a 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 on whose behalf the request is made. In determining whether a requester properly belongs in this category, NSF shall determine the use to which a requester will put the documents requested. Moreover, where NSF has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, NSF shall seek additional clarification before assigning the request to a specific category.

(h) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(i) The term *non-commercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (g) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(j) The term *representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid

basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but NSF may also look to the past publication record of a requester in making this determination.

[52 FR 43074, Nov. 9, 1987]

§ 612.10 Fees to be charged—general.

NSF shall charge fees that recoup the full allowable direct costs they incur. Moreover, NSF shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. NSF will contract with private sector services to locate, reproduce and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When doing so, however, NSF shall ensure that the ultimate cost to the requester is no greater than it would be if NSF itself had performed these tasks. In no case will NSF contract out responsibilities which the FOIA provides that it alone may discharge, such as determining the applicability of an exemption, or determining whether to waive or reduce fees. In addition, NSF shall ensure that when documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see definition in §612.9(b), such as the NTIS, they inform requesters of the steps necessary to obtain records from those sources.

(a) Manual searches for records. Whenever feasible, NSF shall charge at the salary rate(s) (i.e., basic pay plus 16 percent) of the employee(s) making the search. However, where a homogeneous class of personnel is used exclusively (e.g., all administrative/clerical, or all professional/executive), NSF may establish an average rate for the range of grades typically involved. Thus, for each one-quarter hour after the first quarter hour, for search of a record by clerical personnel, the charge is \$2.50. For a nonroutine, nonclerical search by professional personnel, for example, where the task of determining which records fall within a request and search requires professional or managerial time, the charge is \$7.50 for each one

quarter hour spent in excess of the first quarter hour.

(b) *Computer searches for records.* NSF shall charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search. When NSF can establish a reasonable agency-wide average rate for CPU operating costs and operator/programmer salaries involved in FOIA searches, the Foundation will do so and charge accordingly.

(c) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time NSF spends reviewing records to determine whether they are exempt from mandatory disclosure. It should be noted that charges may be assessed only for the *initial* review; i.e., the review undertaken the first time NSF analyzes the applicability of a specific exemption to a particular record or portion of a record. NSF may not charge for review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption which is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review would be properly assessable. Where a single class of reviewers is typically involved in the review process, NSF may establish a reasonable agency-wide average and charge accordingly.

(d) *Duplication of records.* NSF shall establish an average agency-wide, per-page charge for paper copy reproduction of documents. This charge shall represent the reasonable direct costs of making such copies, taking into account the salary of the operators as well as the cost of the reproduction machinery. For copies prepared by computer, such as tapes or printouts, NSF shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, NSF shall charge the actual direct

costs of producing the document(s). For photocopies of documents, \$0.25 per copy per page will be charged. In practice, if NSF estimates that duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(e) *Other charges.* It should be noted that complying with requests for special services such as those listed below is entirely at the discretion of NSF. Neither the FOIA nor its fee structure cover these kinds of services. NSF shall recover the full costs of providing services such as those enumerated below to the extent that it elects to provide them:

- (1) Certifying that records are true copies;
- (2) Sending records by special methods such as express mail.

(f) *Restrictions on assessing fees.* With the exception of requesters seeking documents for a commercial use, section (4)(A)(iv) of the Freedom of Information Act, as amended, requires NSF to provide the first 100 pages of duplication and the first two hours of search time without charge. Moreover, this section prohibits NSF from charging fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. These provisions work together, so that except for commercial use requesters, NSF would not begin to assess fees until after they had provided the free search and reproduction. For example, for a request that involved two hours and ten minutes of search time and resulted in 105 pages of documents, NSF will determine the cost of only 10 minutes of search time and only five pages of reproduction. If this cost was equal to or less than the cost to the agency of billing the requester and processing the fee collected, no charges would result.

The elements to be considered in determining the "cost of collecting a fee," are the administrative costs to the

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NSF of receiving and recording a requester's remittance, and processing the fee for deposit in the Treasury Department's special account (or the NSF's account if the agency is permitted to retain the fee). The per-transaction cost to the Treasury to handle such remittances is negligible and shall not be considered in the NSF's determination. For purposes of these restrictions on assessment of fees, the word "pages" refers to paper copies of a standard agency size which will normally be "8½ x 11" or "11 by 14." Thus, requesters would not be entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or 100 pages of computer printout, however, might meet the terms of the restriction. Similarly, the term "search time" in this context has as its basis *manual search*. To apply this term to searches made by computer, NSF shall determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of the search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search, i.e., the operator, NSF shall begin assessing charges for computer search.

[52 FR 43074, Nov. 9, 1987, as amended at 56 FR 47417, Sept. 19, 1991]

§612.11 Fees to be charged—categories of requesters.

There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each of these categories:

(a) *Commercial use requesters.* When a request for documents for commercial use is received, NSF shall assess charges which recover the full direct cost of searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. NSF may recover the cost of

searching for and reviewing records even if there is ultimately no disclosure of records (see §612.12(b) of this part).

(b) *Educational and non-commercial scientific institution requesters.* NSF shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. Requesters must reasonably describe the records sought.

(c) *Requesters who are representatives of the news media.* NSF shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category a requester must meet the criteria in §612.9(j) of this part, and his request must not be made for a commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use. Requesters must reasonably describe the records sought.

(d) *All other requesters.* NSF shall charge requesters who do not fit into any of the categories above fees which recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge. Moreover, requests from record subjects for records about themselves filed in NSF's systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974 which permit fees only for reproduction. Requesters must reasonably describe the records sought.

[52 FR 43075, Nov. 9, 1987, as amended at 56 FR 47417, Sept. 19, 1991]

§ 612.12 Administrative actions to improve assessment and collection of fees.

NSF shall ensure that procedures for assessing and collecting fees are applied consistently and uniformly by all components. To do so, NSF amends its FOIA regulations to conform to the provisions of this Fee Schedule and Guidelines, especially including the following elements:

(a) *Charging interest—notice and rate.* NSF may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. NSF shall ensure that their accounting procedures are adequate to properly credit a requester who has remitted the full amount within the time period. The fact that the fee has been received by the agency, even if not processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in section 3717 of Title 31 U.S.C. and will accrue from the date of the billing.

(b) *Charges for unsuccessful search.* NSF may assess charges for time spent searching, even if NSF fails to locate the records or if records located are determined to be exempt from disclosure. In practice, if NSF estimates that search charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(c) *Aggregating requests.* Except for requests that are for a commercial use, NSF shall not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When NSF reasonably believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, NSF may aggregate any such requests and charge accordingly. One element to be

considered in determining whether a belief would be reasonable is the time period in which the requests have occurred. For example, it would be reasonable to presume that multiple requests of this type made within a relatively short period had been made to avoid fees. For requests made over a longer period, however, such a presumption becomes harder to sustain and NSF should have a basis for determining that aggregation is warranted in such cases.

(d) *Advance payments.* NSF shall not require a requester to make an advance payment, i.e., payment before work is commenced or continued on a request, unless:

(1) The NSF estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then, NSF should notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require 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), NSF may require the requester to pay the full amount owed plus any applicable interest as provided above or demonstrate that he has, in fact, paid the fee, and to make an advance payment of the full amount of the estimated fee before the NSF begins to process a new request or a pending request from that requester.

(e) When NSF acts under paragraph (d) (1) or (2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after NSF has received fee payments described above.

[52 FR 43076, Nov. 9, 1987]

§ 612.13 Waivers or reductions.

(a) Employees of the National Science Foundation are encouraged to waive fees whenever the statutory fee

waiver standard is met. However, employees are expected to respect the balance drawn in the statute, safeguarding federal funds by granting waivers or reductions only where it is determined that the following statutory standard is satisfied:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(b) NSF will employ the following six factors in determining when FOIA fees should be waived or reduced:

(1) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";

(2) The informative value of the information to be disclosed: whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(3) 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";

(4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities;

(5) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(6) 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."

(c) NSF will use U.S. Department of Justice policy guidance in applying the foregoing factors.

[52 FR 43076, Nov. 9, 1987]

PART 613—PRIVACY ACT REGULATIONS

Sec.

613.1 Purpose and scope.

613.2 Procedures for notification of existence of records pertaining to individuals.

613.3 Procedures for requests for access to or disclosure of records pertaining to an individual.

613.4 Correction of records.

613.5 Disclosure of records to agencies or persons other than the individual to whom the record pertains.

613.6 Exemptions.

AUTHORITY: 5 U.S.C. 552a(f).

SOURCE: 40 FR 44510, Sept. 26, 1975, unless otherwise noted.

§ 613.1 Purpose and scope.

This part sets forth the National Science Foundation procedures under the Privacy Act of 1974 as required by 5 U.S.C. 552a(f). Internal guidance for NSF staff and other regulations implementing the Privacy Act are contained or will be contained in NSF Circulars.

§ 613.2 Procedures for notification of existence of records pertaining to individuals.

(a) The systems of records, as defined in the Privacy Act of 1974, maintained by the National Science Foundation are listed annually in the FEDERAL REGISTER as required by that Act. Any person who wishes to know whether a system of records contains a record pertaining to him may either appear in person at the NSF Division of Administrative Services at 4201 Wilson Boulevard, Arlington, VA, on work days between the hours of 8:30 a.m. and 5 p.m. or may write to the NSF Privacy Act Officer, Division of Contracts, Policy, and Oversight, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, it is recommended that requests be made in writing, since in many cases it will take several days to ascertain whether a record exists.

(b) Requests for notification of the existence of a record should specifically identify the system of records involved and should state, if the requester is other than the individual to whom the record pertains, the relationship of the requester to that individual. (Note that requests will not be honored