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used in this paragraph, “unusual circumstances” are defined in § 4.6(b)(2).

(d) If a decision on appeal is to make the records available to the requester in part or whole, such records shall be promptly made available as provided in § 4.6.

(e) If no determination of an appeal has been sent to the requester within the twenty day period or the last extension thereof, the requester is deemed to have exhausted his administrative remedies with respect to such request, giving rise to a right of judicial review as specified in 5 U.S.C. 552(a)(6)(C). When no determination can be sent to the requester within the time limit, the Assistant General Counsel for Administration shall nonetheless exercise due diligence in continuing to process the appeal. When the time limit expires, the requester shall be informed of the reason for the delay, of the date when a determination may be expected to be made, and of his right to seek judicial review. The requester may be asked to forego judicial review until the appeal is determined.

(f) A determination on appeal shall be in writing and, when it denies records in whole or in part, the notice to the requester shall include:

(1) Identification of the specific exemption or exemptions of the Act authorizing the withholding, a brief explanation of how the exemption applies, and, when relevant, a statement as to why a discretionary release is not appropriate;

(2) A statement that the decision is final for the Department;

(3) Advice that judicial review of the denial is available in the district in which the requester resides or has his principal place of business, the district in which the agency records are located, or the District of Columbia; and

(4) The names and titles or positions of each official responsible for the denial of the appeal.

(g) The Assistant General Counsel for Administration shall send a copy of each determination on appeal to the central public reference facility referred to in § 4.4(c) where it will be indexed and kept available for public inspection and copying.

[53 FR 6972, Mar. 4, 1988; 53 FR 16058, May 5, 1988, as amended at 57 FR 28781, June 29, 1992]

#### 15 CFR Subtitle A (1-1-00 Edition)

#### § 4.9 Fees.

(a) *Definitions.* The following definitions are applicable to this section.

(1) 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.

(2) 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. Such activity should be distinguished, however, from “review” of material in order to determine whether the material is exempt from disclosure (see paragraph (a)(4) of this section). Searches may be done manually or by computer using existing programming.

(3) 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.

(4) The term “review” refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (a)(5) 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.

(5) 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, the Department must determine the use to which a requester will put the documents requested. Moreover, where the department 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, the Department shall seek additional clarification before assigning the request to a specific category.

(6) 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 undergraduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research.

(7) 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 (a)(5) 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 products or industry.

(8) 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 the Department may also look to the past publication record of a requester in making this determination.

(b) *Application—Uniform fee schedule.* The fees described in this section apply to FOIA requests processed by all units of the Department. They reflect rates for the full allocable direct cost of search, review, and duplication. The fees to be charged shall be based on the requester category.

(1) The four specific categories and chargeable fees are:

Category	Chargeable service
(i) Commercial Use Requesters.	Search, Review, and Duplication.
(ii) Educational and Non-commercial Scientific Institution Requesters.	Duplication (excluding the cost of the first 100 pages).
(iii) Representatives of the News Media.	Duplication (excluding the cost of the first 100 pages).
(iv) All Other Requesters .....	Search and Duplication (excluding the cost of the first 2 hours of search and 100 pages).

(2) *Uniform fee schedule.*

Category	Rate
(i) Manual search .....	Actual salary rate of employee involved, plus 16 percent of salary rate.
(ii) Computerized search .....	Actual direct cost, including operator time.
(iii) Duplication of records:	
(A) Paper copy reproduction	\$.07 per page.
(B) Computer tape or printout reproduction.	Actual cost, including operator time.
(C) Other reproduction (i.e., microfilm, microfiche, microform).	Actual direct cost, including operator time.
(iv) Review of records (includes preparation for release, i.e. excising).	Actual salary rate of employee conducting review, plus 16 percent of salary rate.

(3) *Charging interest.* Interest may be charged to those requesters who fail to pay fees charged in a timely fashion. Assessment of such interest will commence on the 31st day following the day on which the billing was sent. Interest will be charged at the rate specified in section 3717 of title 31 U.S.C. and will accrue from the date of the billing. The Department reserves the right to utilize consumer reporting

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agencies, and collection agencies, when appropriate, to encourage repayment as authorized by the Debt Collection Act of 1982 (Pub. L. 97-365).

(c) *Waiver or reduction of fees.* (1) Documents shall be furnished without charge, or at reduced charges 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. To assure that the two basic requirements for waiver are met, Commerce shall rely on the following factors in making a determination on the fee waiver request:

(i) The subject of the request (whether the subject of the requested records concerns the operations or activities of the government);

(ii) The informative 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);

(iv) The significance of the contribution to public understanding (whether the disclosure is likely to contribute significantly to public understanding of government operations or activities);

(v) The existence and magnitude of a commercial interest (whether the requester has a commercial interest that would be furthered by the requested disclosure);

(vi) 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).

(2) Additionally, a fee shall not be charged, or alternatively it may be reduced, in the following instances:

(i) Requests for Department records made by a Federal agency, Federal court (excluding parties), Congressional committee or subcommittee, the

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General Accounting Office, or the Library of Congress, are not made under the Act, and fees payable under this part do not apply.

(ii) The records are requested by a state or local government, an intergovernmental agency, a foreign government, a public international organization, or an agency thereof, and when it is determined by a responsible Department official that it is an appropriate courtesy, or the records are for purposes that are in the public interest and will promote the objectives of the Act and of the Department.

(iii) A fee shall not be charged if the allowable charges are less than or equal to the cost of routine collection and processing of the fee. Therefore, if the total of charges due for processing a request is \$20 or less, no fee will be charged.

(d) *Payment of fees.* The following conditions shall apply to payment of fees charged under this part.

(1) A search fee provided in paragraph (b) of this section is chargeable even when no records responsive to the request are found, or when the records requested are determined by the responsible Department official to be totally exempt from disclosure. If the estimated search or duplication charges exceed \$25 the requester shall be notified of the estimated amount of search or duplication fees, unless the requester has previously advised the Department of a willingness to pay an amount sufficient to cover the estimated fee. Such notice shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request in order to reduce the cost.

(2) A requester may be required to make an advance payment (i.e., payment before work is commenced or continued on a request) if the estimated or determined allowable charges that a requester may be required to pay will exceed \$250 or the requester has previously failed to pay a fee charged in a timely manner (i.e., within 30 days of the date of the billing).

(i) When the estimated charges exceed \$250, the Department shall 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. If the requester has no history of prompt payment of FOIA fees, the Department shall require an advance payment of an amount up to the full estimated charges.

(ii) If a requester has previously failed to pay a fee charged in a timely manner, the Department shall require the requester to pay the full amount owed plus any applicable interest and to make an advance payment of the full amount of the estimated fee before the Department will process the request.

(3) Whenever the Department acts pursuant to paragraph (d)(2) of this section, the administrative time limits prescribed in 5 U.S.C. 552(a)(6) will begin only after the agency has received payment of the required fee.

(4) Upon the completion of processing of a request, when a specific fee is determined to be payable and appropriate notice has been given to the requester, the payment of such fee shall be received before the requested records or a portion of the records are made available to the requester.

(5) Payment of fees shall be made in cash or preferably by check or money order payable to "Treasury of the United States", and they shall be paid or sent to the unit stated in the billing notice or, if none, to the unit handling the request. Where appropriate, the responsible official may require that payment be made in the form of a certified check.

(6) If an advance payment of an estimated fee exceeds the actual total fee by \$1 or more, the difference shall be refunded to the requester.

(7) When the responsible official reasonably believes that a requester or group of requesters acting in concert is attempting to break a request into a series of requests for the purpose of evading the assessment of fees, the unit may aggregate any such requests and charge accordingly.

(e) *Other charges.* (1) This part does not apply to any special statistical compilation, study, or other record requested pursuant to statutes specifically providing for setting the level of fees for particular types of records such as 15 U.S.C. 1525-1527. The fee for the performance of such service is the ac-

tual cost of the work involved in compiling the record. All monies received by the Department in payment of the cost of this work are deposited in a separate account administered under the direction of the Secretary, and may be used to defray the ordinary expenses incidental to the work.

(2) The full cost of other special services will be assessed. Such services would include:

(i) Certifying that records are true copies; and

(ii) Sending records by special methods such as express mail, etc.

[53 FR 6972, Mar. 4, 1988; 53 FR 16058, 16211, May 5, 1988]

#### APPENDIX A TO PART 4—DEPARTMENT ADMINISTRATIVE ORDER 205-12—PUBLIC INFORMATION

SECTION 1. *Purpose*—.01 This order, and the rules and other materials which implement it, are designed to carry out the responsibilities of the Department of Commerce under the Freedom of Information Act, as amended (5 U.S.C. 552), hereinafter referred to as "the Act."

.02. This revision updates and clarifies the provisions of the order (dated June 29, 1967) which it supersedes, in light of the amendments to the Act which become effective February 19, 1975. Section 7, "Compulsory Process Requesting Documents or Testimony" contained in the superseded order, is now found in Department Administrative Order 218-5, to be published separately in the FEDERAL REGISTER.

SEC. 2 *Authorities*—This order is issued pursuant to the Act: 5 U.S.C. 553; 5 U.S.C. 301; Reorganization Plan No. 5 of 1950; and other authority vested by law in the Secretary applicable to the dissemination of records and other information of the Department and charges for services related thereto.

SEC. 3. *Policies*—.01 The Department of Commerce, in fulfilling its statutory missions to foster, promote and develop the foreign and domestic commerce of the United States and to administer the specific programs entrusted to it, regularly develops, collects, analyzes, and disseminates facts, statistics, consensus, charts, scientific findings, technology, and other information, and performs other services, in order to assist the business community and other segments of the public, according to their needs and interest. This information which the Department develops, collates, and disseminates is generally made readily available, either without charge or by purchase, to the affected persons and to anyone else who may be interested, through publications, reprints