

**PART 603—JURISDICTION OF THE  
INDEPENDENT COUNSEL: IN RE  
MADISON GUARANTY SAVINGS  
& LOAN ASSOCIATION**

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, 543, unless otherwise noted.

**§ 603.1 Jurisdiction of the Independent  
Counsel**

(a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with:

- (1) Madison Guaranty Savings & Loan Association;
- (2) Whitewater Development Corporation; or
- (3) Capital Management Services.

(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any

person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in paragraph (a) or (b) of this section.

(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or to bring civil actions against, any persons or entities involved in any of the matters referred to in paragraph (a), (b), or (c) of this section who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

[59 FR 5322, Feb. 4, 1994]

## CHAPTER VII—OFFICE OF INDEPENDENT COUNSEL

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<i>Part</i>		<i>Page</i>
700	Production or disclosure of material or information of the Office of Independent Counsel .....	599
701	Procedures for disclosure of records under the Freedom of Information Act .....	609



## PART 700—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION OF THE OFFICE OF INDEPENDENT COUNSEL

### Subpart A—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974

- Sec.
- 700.10 General provisions.
  - 700.11 Request for access to records.
  - 700.12 Responses to requests for access to records.
  - 700.13 Form and content of Office responses.
  - 700.14 Classified information.
  - 700.15 Records in exempt systems of records.
  - 700.16 Access to records.
  - 700.17 Fees for access to records.
  - 700.18 Appeals from denials of access.
  - 700.19 Preservation of records.
  - 700.20 Requests for correction of records.
  - 700.21 Records not subject to correction.
  - 700.22 Request for accounting of record disclosures.
  - 700.23 Notice of subpoenas and emergency disclosures.
  - 700.24 Security of systems of records.
  - 700.25 Use and collection of social security numbers.
  - 700.26 Employee standards of conduct.
  - 700.27 Other rights and services.

### Subpart B—Exemption of the Office of Independent Counsel's Systems of Records Under the Privacy Act

- 700.31 Exemption of the Office of Independent Counsel's systems of records—limited access.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 52 FR 48097, Dec. 18, 1987, unless otherwise noted.

### Subpart A—Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974

#### § 700.10 General provisions.

(a) *Purpose and scope.* The subpart contains the regulations of the Office of Independent Counsel implementing the Privacy Act of 1974, 5 U.S.C. 552a. The regulations apply to all records that are contained in systems of records maintained by the Office of Independent Counsel and that are retrieved by an individual's name or personal identifier. These regulations set

forth the procedures by which an individual may seek access under the Privacy Act to records pertaining to him, may request correction of such records, or may seek an accounting of disclosures of such records by the office.

(b) *Transfer of law-enforcement records.* The head of the Office, or his designee, is authorized to make written requests under 5 U.S.C. 552a(b)(7) for transfer of records maintained by other agencies that are necessary to carry out an authorized law-enforcement activity of the Office.

(c) *Definitions.* As used in this subpart, the following terms shall have the following meanings:

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

(2) *Record* has the same meaning given in 5 U.S.C. 552(a)(4).

(3) *Request for access* means a request made pursuant to 5 U.S.C. 552a(d)(1).

(4) *Request for correction* means a request made pursuant to 5 U.S.C. 552a(d)(2).

(5) *Request for an accounting* means a request made pursuant to 5 U.S.C. 552a(c)(3).

(6) *Requester* means an individual who makes either a request for access, a request for correction, or a request for an accounting.

(7) *System of records* means a group of any group of any records under the control of the Office from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to that individual.

#### § 700.11 Request for access to records.

(a) *Procedure for making requests for access to records.* An individual may request access to a record about him by appearing in person or by writing the Office. A requester in need of guidance in defining his request may write to the FOIA/PA Officer, Office of Independent Counsel, suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004. Both the envelope and the request itself should be marked: "Privacy Act Request."

(b) *Description of records sought.* A request for access to records must describe the records sought in sufficient detail to enable Office personnel to locate the system of records containing

## § 700.12

## 28 CFR Ch. VII (7-1-00 Edition)

the record with a reasonable amount of effort. Whenever possible, a request for access should describe the nature of the records sought, the date of the record or the period in which the record was compiled, and the name or identifying number of the system of records in which the requester believes the record is kept.

(c) *Agreement to pay fees.* The filing of a request for access to a record under this subpart shall be deemed to constitute an agreement to pay all applicable fees charged under § 700.17 up to \$25.00. The Office shall confirm this agreement in its letter of acknowledgment to the requesters. When filing a request, a requester may specify a willingness to pay a greater amount, if applicable.

(d) *Verification of identity.* Any individual who submits a request for access to records must verify his identity in one of the following ways, unless the notice published in the FEDERAL REGISTER describing the relevant system of records provides otherwise.

(1) Any requester making a request in writing must state in his request his full name, current address, and date and place of birth. In addition, a requester must provide with his request an example of his signature, which shall be notarized. In order to facilitate the identification and location of the requested records, a requester may also, at his option, include in his request his Social Security number.

(2) Any requester submitting a request in person may provide to the Office a form of Official photographic identification, such as a passport or an identification badge. If a requester is unable to produce a form of photographic identification, he may provide to the Office two or more acceptable forms of identification (such as a driver's license or credit card) bearing his name and address.

(e) *Verification of guardianship.* The parent or guardian of a minor (or the guardian of a person judicially determined to be incompetent) who submits a request for access to the records of the minor or incompetent must establish:

(1) His own identity and the identity of the subject of the record, as required in paragraph (d) of this section,

(2) That he is the parent or guardian of the subject of the record, which may be proved by providing a copy of the subject's birth certificate showing parentage or by providing a court order establishing the guardianship, and

(3) That he seeks to act on behalf of the subject of the record.

### § 700.12 Responses to requests for access to records.

(a) *Authority to grant or deny requests.* The head of the Office, or his designee, is authorized to grant or deny any request for access to a record.

(b) *Initial action by the Office.* When the Office receives a request for access to a record in its possession, the Office shall promptly determine whether another Government agency is better able to determine whether the record is exempt, to any extent, from access. If the Office determines that it is the agency best able to determine whether the record is exempt, to any extent, from access, then the Office shall respond to the request. If the Office determines that it is not the agency best able to determine whether the record is exempt from access, the Office shall respond to the request, after consulting with the agency best able to determine whether the record is exempt from access. Under ordinary circumstances, the agency that generated or originated a requested record shall be presumed to be the agency best able to determine whether the record is exempt from access. However, nothing in this section shall prohibit the agency that generated or originated a requested record from consulting with the Office, if the agency that generated or originated the requested record determines that the Office has an interest in the requested record or the information contained therein.

(c) *Law-enforcement information.* Whenever a request for access is made for a record containing information that relates to an investigation of a possible violation of criminal law or to a criminal law-enforcement proceeding and that was generated or originated by another agency, the Office shall consult with that other agency, as appropriate.

(d) *Classified information.* Whenever a request for access is made for a record

## Office of Independent Counsel

## § 700.15

containing information that has been classified, or that may be eligible for classification, by another agency under the provision of Executive Order 12356 or any other Executive order concerning the classification of records, the Office shall refer the responsibilities for responding to the request to the agency that classified the information or should consider the information for classification. Whenever a record contains information that has been derivatively classified by the Office because it contains information classified by another agency, the Office shall refer the responsibility for responding to the request to the agency that classified the underlying information; however, such referral shall extend only to the information classified by the other agency.

(e) *Agreements regarding consultations.* No provision of this section shall preclude formal or informal agreements between the Office and another agency, to eliminate the need for consultations concerning requests or classes of requests.

(f) *Date for determining responsive records.* In determining records responsive to a request for access, the Office ordinarily will include only those records within the Office's possession and control as of the date of its receipt of the request.

### § 700.13 Form and content of Office responses.

(a) *Form of notice granting request for access.* After the Office has made a determination to grant a request for access in whole or in part, the Office shall so notify the requester in writing. The notice shall describe the manner in which access to the record will be granted and shall inform the requester of any fees to be charged in accordance with § 700.17.

(b) *Form of notice denying request for access.* When the Office denies a request for access in whole or in part it shall so notify the requester in writing. The notice shall be signed by the head of the Office, or his designee, and shall include:

- (1) The name and title or position of the person responsible for the denial;
- (2) A brief statement of the reason or reasons for the denial, including the

Privacy Act exemption or exemptions that the Office has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under § 700.18(a) and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information supplied, or is known or believed to have been destroyed or otherwise disposed of, the Office shall so notify the requester in writing.

(d) *Medical records.* When an individual requests medical records pertaining to himself that are not otherwise exempt from individual access, the Office may advise the individual that the records will be provided only to a physician, designated by the individual, who requests the records and establishes his identity in writing. The designated physician shall determine which records should be provided to the individual and which records should not be disclosed to the individual because of possible harm to the individual or another person.

### § 700.14 Classified information.

In processing a request for access to a record containing information that is classified or classifiable under Executive Order 12356 or any other Executive order concerning the classification of records, the Office shall review the information to determine whether it warrants classification. Information that does not warrant classification shall not be withheld from a requester on the basis of 5 U.S.C. 552a(k)(1). The Office shall, upon receipt of any appeal involving classified or classifiable information, take appropriate action to ensure compliance with the provisions of Executive Order 12356.

### § 700.15 Records in exempt systems of records.

(a) *Law-enforcement records exempted under subsections (j)(2) and (k)(2).* Before denying a request by an individual for access to a law-enforcement record that has been exempted from access

## § 700.16

pursuant to 5 U.S.C. 552a(k)(2), the Office must review the requested record to determine whether information in the record has been used or is being used to deny the individual any right, privilege, or benefit for which he would otherwise be eligible or to which he would otherwise be entitled under federal law. If so, the Office shall notify the requester of the existence of the record and disclose such information to the requester, except to the extent that the information would identify a confidential source. In cases when disclosure of information in a law-enforcement record could reasonably be expected to identify a confidential source, the record shall not be disclosed to the requester unless the Office is able to delete from such information all material that would identify the confidential source.

(b) *Employee background investigations.* When a requester requests access to a record pertaining to a background investigation and the record has been exempted from access pursuant to 5 U.S.C. 552a(k)(5), the record shall not be disclosed to the requester unless the Office is able to delete from such record all information that would identify a confidential source.

### § 700.16 Access to records.

(a) *Manner of access.* The Office, once it has made a determination to grant a request for access, shall grant the requester access to the requested record by—

(1) Providing the requester with a copy of the record or

(2) Making the record available for inspection by the requester at a reasonable time and place.

The Office shall in either case charge the requester applicable fees in accordance with the provisions of § 700.17. If the Office provides access to a record by making the record available for inspection by the requester, the manner of such inspection shall not unreasonably disrupt the operations of the Office.

(b) *Accompanying person.* A requester appearing in person to review his records may be accompanied by another individual of his own choosing. Both the requester and the accompanying person shall be required to

## 28 CFR Ch. VII (7–1–00 Edition)

sign a form stating that the Office of Independent Counsel is authorized to disclose the record in the presence of both individuals.

### § 700.17 Fees for access to records.

(a) *When charged.* The Office shall charge fees pursuant to 5 U.S.C. 552a(f)(5) for the copying of records to afford access to individuals unless the Office, in its discretion, waives or reduces the fees for good cause shown. The Office shall charge fees only at the rate of \$0.10 per page. For materials other than paper copies, the Office may charge the direct costs of reproduction, but only if the requester has been notified of such costs before they are incurred. Fees shall not be charged when they would amount, in the aggregate, for one request or for a series of related requests, to less than \$3.00. However, the Office may, in its discretion, increase the amount of this minimum fee.

(b) *Notice of estimated fees in excess of \$25.* When the Office determines or estimates that the fees to be charged under this section may amount to more than \$25, the Office shall notify the requester as soon as practicable of the actual or estimated amount of the fee, unless the requester has indicated in advance his willingness to pay a fee as high as that anticipated. (If only a portion of the fee can be estimated readily, the Office shall advise the requester that the estimated fee may be only a portion of the total fee.) When the estimated fee exceeds \$25 and the Office has so notified the requester, the Office will be deemed not to have received the request for access to records until the requester has agreed to pay the anticipated fee. A notice to a requester pursuant to this paragraph shall offer him the opportunity to confer with Office personnel with the object of reformulating his request to meet his needs at a lower cost.

(c) *Form of payment.* Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(d) *Advance deposits.* (1) When the estimated fee chargeable under this section exceeds \$25, the Office may require a requester to make an advance deposit of 25 percent of the estimated fee or an

## Office of Independent Counsel

## § 700.20

advance payment of \$25, whichever is greater.

(2) When a requester has previously failed to pay a fee charged under this part, the requester must pay the Office the full amount owed and make an advance deposit of the full amount of any estimated fee before the Office shall be required to process a new or pending request for access from that requester.

### § 700.18 Appeals from denials of access.

(a) *Appeals to Independent Counsel.* When the Office denies in whole or part a request for access to records, the requester may appeal the denial to Independent Counsel within 30 days of his receipt of the notice denying his request. An appeal to Independent Counsel shall be made in writing, addressed to the Office of Independent Counsel, suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004. Both the envelope and the letter of appeal itself must be clearly marked: "Privacy Act Appeal."

(b) *Action on appeals.* Unless Independent Counsel otherwise directs, he or his designee shall act on all appeals under this section, except that: A denial of a request for access by Independent Counsel, or his designee, shall constitute the final action of the Office on that request.

(c) *Form of action on appeal.* The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request for access shall include a brief statement of the reason or reasons for the affirmance, including each Privacy Act exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request for access is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

### § 700.19 Preservation of records.

The Office shall preserve all correspondence relating to the requests it receives under this subpart, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the U.S. Code. Under no circumstances shall records be destroyed while they are the subject of a pending request for access, appeal, or lawsuit under the Act.

### § 700.20 Requests for correction of records.

(a) *How made.* Unless a record is exempted from correction and amendment, an individual may submit a request for correction of a record pertaining to him. A request for correction must be made in writing. The request must identify the particular record in question, state the correction sought, and set forth the justification for the correction. Both the envelope and the request for correction itself must be clearly marked: "Privacy Act Correction Request."

(b) *Initial determination.* Within 10 working days of receiving a request for correction, the Office shall notify the requester whether his request will be granted or denied, in whole or in part. If the Office grants the request for correction in whole or in part, it shall advise the requester of his right to obtain a copy of the corrected record, in releasable form, upon request. If the Office denies the request for correction in whole or in part, it shall notify the requester in writing of the denial. The notice of denial shall state the reason or reasons for the denial and advise the requester of his right to appeal.

(c) *Appeals.* When a request for correction is denied in whole or in part, the requester may appeal the denial to Independent Counsel within 30 days of his receipt of the notice denying his request. An appeal to Independent Counsel shall be made in writing, shall set forth the specific item of information sought to be corrected, and shall include any documentation said to justify the correction. An appeal shall be addressed to the Office of Independent Counsel, suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004.

## § 700.21

Both the envelope and the letter of appeal itself must be clearly marked: "Privacy Act Correction Appeal."

(d) *Determination on appeal.* Independent Counsel, or his designee, shall decide all appeals from denials or requests to correct records. All such appeals shall be decided within 30 working days of receipt of the appeal, unless there is good cause to extend this period. If the denial of a request is affirmed on appeal, the requester shall be so notified in writing and advised of—

(1) The reason or reasons the denial has been affirmed,

(2) The requester's right to file a Statement of Disagreement, as provided in paragraph (e) of this section, and

(3) The requester's right to obtain judicial review of the denial in the United States District Court for the judicial district in which the requester resides or has his principal place of business, the judicial district in which the record is located, or the District of Columbia.

If the denial is reversed on appeal, the requester shall be so notified and the request for correction shall be remanded to the Office for processing in accordance with the decision on appeal.

(e) *Statements of disagreement.* A requester whose appeal under this section is denied shall have the right to file a Statement of Disagreement with the Office of Independent Counsel, Suite 701 West, 555 Thirteenth Street, NW., Washington, DC 20004, within 30 days of receiving notice of denial of his appeal. Statements of disagreement may not exceed one typed page per fact disputed. Statements exceeding this limit shall be returned to the requester for condensation. Upon receipt of a statement of disagreement under this section, Independent Counsel, or his designee, shall have the statement included in the system of records in which the disputed record is maintained and shall have the disputed record marked so as to indicate—

(1) That a statement of disagreement has been filed, and

(2) Where in the system of records the statement of disagreement may be found.

(f) *Notices of correction or disagreement.* Within 30 working days of the correc-

## 28 CFR Ch. VII (7-1-00 Edition)

tion of a record, the Office shall advise all agencies to which it previously disclosed the record that the record has been corrected. Whenever an individual has filed a statement of disagreement, the Office shall append a copy of the statement to the disputed record whenever the record is disclosed. The Office may also append to the disputed record any written statement it has made giving the Office's reasons for denying the request to correct the record.

### § 700.21 Records not subject to correction.

The following records are not subject to correction or amendment as provided in § 700.20:

(a) Transcripts of testimony given under oath or written statements made under oath;

(b) Transcripts of grand jury proceedings, judicial proceedings, or quasi-judicial proceedings that constitute the official record of such proceedings;

(c) Presentence records that are the property of the courts, but may be maintained by the Office in a system of records; and

(d) Records duly exempted from correction pursuant to 5 U.S.C. 552a(j) or 552a(k) by notice published in the FEDERAL REGISTER.

### § 700.22 Request for accounting of record disclosures.

(a) An individual may request the Office to provide him with an accounting of those other agencies to which the Office has disclosed the record, and the date, nature, and purpose of each disclosure. A request for an accounting must be made in writing and must identify the particular record for which the accounting is requested. The request also must be addressed to the Office and both the envelope and the request itself must clearly be marked: "Privacy Act Accounting Request."

(b) The Office shall not be required to provide an accounting to an individual to the extent that the accounting relates to—

(1) Records for which no accounting must be kept pursuant to 5 U.S.C. 552a(c)(1),

## Office of Independent Counsel

## § 700.25

(2) Disclosures of records to law-enforcement agencies for lawful law-enforcement activities, pursuant to written requests from such law-enforcement agencies specifying records sought and the law-enforcement activities for which the records are sought, under 5 U.S.C. 552a (c)(3) and (b)(7), or

(3) Records for which an accounting need not be disclosed pursuant to 5 U.S.C. 552a (j) or (k).

(c) A denial of a request for an accounting may be appealed to Independent Counsel in the same manner as a denial of a request for access, with both the envelope and the letter of appeal itself clearly marked: "Privacy Act Accounting Appeal."

### § 700.23 Notice of subpoenas and emergency disclosures.

(a) *Subpoenas.* When records pertaining to an individual are subpoenaed by a grand jury, court, or quasi-judicial authority, the official served with the subpoena shall be responsible for ensuring that written notice of its service is forwarded to the individual. Notice shall be provided within 10 working days of the service of the subpoena or, in the case of a grand jury subpoena, within 10 working days of its becoming a matter of public record. Notice shall be mailed to the last known address of the individual and shall contain the following information: The date the subpoena is returnable, the court or quasi-judicial authority to which it is returnable, the name and number of the case of proceeding, and the nature of the records sought. Notice of the service of a subpoena is not required if the system of records has been exempted from the notice requirement of 5 U.S.C. 552a(e)(8), pursuant to 5 U.S.C. 552a(j), by a Notice of Exemption published in the FEDERAL REGISTER.

(b) *Emergency disclosures.* If the record of an individual has been disclosed to any person under compelling circumstances affecting the health or safety of any person, as described in 5 U.S.C. 552a(b)(8), the individual to whom the record pertains shall be notified of the disclosure at his last known address within 10 working days. The notice of such disclosure shall be in writing and shall state the nature of the information disclosed, the person

or agency to whom it was disclosed, the date of disclosure, and the compelling circumstances justifying the disclosure. The officer who made or authorized the disclosure shall be responsible for providing such notification.

### § 700.24 Security of systems of records.

(a) The Office Administrator or Security Officer shall be responsible for issuing regulations governing the security of systems of records. To the extent that such regulations govern the security of automated systems of records, the regulations shall be consistent with the guidelines developed by the National Bureau of Standards.

(b) The Office shall establish administrative and physical controls to prevent unauthorized access to its systems of records, to prevent the unauthorized disclosure of records, and to prevent the unauthorized disclosure of records, and to prevent the physical damage or destruction of records. The stringency of such controls shall reflect the sensitivity of the records the controls protect. At a minimum, however, the Office's administrative and physical controls shall ensure that—

(1) Records are protected from public view,

(2) The area in which records are kept is supervised during business hours to prevent unauthorized persons from having access to the records, and

(3) Records are inaccessible to unauthorized persons outside of business hours.

(c) The Office shall establish rules restricting access to records to only those individuals within the Office who must have access to such records in order to perform their duties. The Office also shall adopt procedures to prevent the accidental disclosure of records or the accidental granting of access to records.

### § 700.25 Use and collection of social security numbers.

(a) Each system manager of a system of records that utilizes Social Security numbers as a method of identification without statutory authorization, or authorization by regulation adopted prior to January 1, 1975, shall take steps to

**§ 700.26**

**28 CFR Ch. VII (7-1-00 Edition)**

revise the system to avoid future collection and use of the Social Security numbers.

(b) The Office shall take such measures as are necessary to ensure that employees authorized to collect information from individuals are advised that individuals may not be required to furnish Social Security numbers without statutory or regulatory authorization and that individuals who are requested to provide Social Security numbers voluntarily must be advised that furnishing the number is not required and that no penalty or denial of benefits will flow from the refusal to provide it.

**§ 700.26 Employee standards of conduct.**

(a) The Office shall inform its employees of the provisions of the Privacy Act, including the Act's civil liability and criminal penalty provisions. The Office also shall notify its employees that they have a duty to—

- (1) Protect the security of records,
- (2) Assure the accuracy, relevance, timeliness, and completeness of records,
- (3) Avoid the unauthorized disclosure, either verbal or written, of records, and
- (4) Ensure that the Office maintains no system of records without public notice.

(b) Except to the extent that the Privacy Act permits such activities, an employee of the Office of Independent Counsel shall:

- (1) Not collect information of a personal nature from individuals unless the employee is authorized to collect such information to perform a function or discharge a responsibility of the Office;
- (2) Collect from individuals only that information that is necessary to the performance of the functions or to the discharge of the responsibilities of the Office;
- (3) Collect information about an individual directly from that individual, whenever practicable;
- (4) Inform each individual from whom information is collected of—

(i) The legal authority that authorizes the Office to collect such information,

(ii) The principal purposes for which the Office intends to use the information,

(iii) The routine uses the Office may make of the information, and

(iv) The effects upon the individual of not furnishing the information;

(5) Maintain all records that are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as to assure fairness to the individual in the determination;

(6) Except as to disclosures to an agency or pursuant to 5 U.S.C. 552a(b)(2), make reasonable efforts, prior to disseminating any record about an individual, to assure that such records are accurate, relevant, timely, and complete;

(7) Maintain no record concerning an individual's religious or political beliefs or activities, or his membership in associations or organizations, unless—

(i) The individual has volunteered such information for his own benefit,

(ii) A statute expressly authorizes the Office to collect, maintain, use or disseminate the information, or

(iii) The individual's beliefs, activities, or membership are pertinent to and within the scope of an authorized law-enforcement or correctional activity;

(8) Notify the head of the Office of the existence or development of any system of records that has not been disclosed to the public;

(9) When required by the Act, maintain an accounting in the prescribed form of all disclosures of records by the Office to agencies or individuals whether verbally or in writing;

(10) Disclose no record to anyone, except within the Office, for any use, unless authorized by the Act;

(11) Maintain and use records with care to prevent the inadvertent disclosure of a record to anyone; and

(12) Notify the head of the Office of any record that contains information that the Act or the foregoing provisions of this paragraph do not permit the Office to maintain.

(c) Not less than once a year, the head of each Office shall review the systems of records maintained by that Office to ensure that the Office is in

## Office of Independent Counsel

## § 700.31

compliance with the provisions of the Privacy Act.

### § 700.27 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under 5 U.S.C. 552a.

## Subpart B—Exemption of the Office of Independent Counsel's Systems of Records Under the Privacy Act

### § 700.31 Exemption of the Office of Independent Counsel's systems of records—limited access.

(a) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4); (d); (e)(1), (2) and (3); (e)(4) (G), (H) and (I); (e) (5) and (8); (f); and (g):

(1) General Files System of the Office of Independent Counsel (OIC/001).

These exemptions apply only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1), (k)(2), and (k)(5).

(b) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest on the part of the Office of Independent Counsel as well as the recipient agency. This would permit record subjects to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid inquiries or apprehension by law-enforcement personnel. Moreover, the release of the accounting of disclosures made under subsection (b) of the Act, including those disclosures permitted under the routine uses published for these systems would permit the subject of an investigation of an actual or potential criminal, civil or regulatory violation to determine whether he is the subject of an investigation or to obtain valuable information concerning the nature of the investigation, material compiled during the investigation, and the identity of witnesses and informants. Dis-

closure of the accounting would, therefore, present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record; such notice requirement under subsection (f)(1) of the Act is specifically exempted for this system of records.

(2) From subsection (c)(4) because an exemption is being claimed under subsection (d) of the Act. This system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act. Subsection (c)(4), therefore, is inapplicable to this system of records.

(3) From subsection (d) because the records contained in this system relate to official federal investigations. Individual access to these records contained in this system would inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identities of witnesses and informants, or would provide information that could enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement because they could prevent the successful completion of the investigation, reveal confidential informants, endanger the physical safety of witnesses or informants, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. Individual access also could constitute an unwarranted invasion of the personal privacy of third parties who are involved in an investigation. Amendment of the records would interfere with ongoing criminal-law enforcement proceedings and impose an impossible administrative burden.

(4) From subsections (e) (1) and (5) because, in the course of criminal or other law-enforcement investigation, cases and matters, the Office of Independent Counsel may occasionally obtain information concerning actual or potential violations of law that are not strictly within its authority or jurisdiction, or may compile information, the accuracy of which is unclear or

which is not strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate and necessary to retain all information that may aid in establishing patterns of criminal activity. Moreover, it would impede the specific investigative process if it were necessary to ensure the relevance, accuracy, timeliness and completeness of all information obtained. In particular, this would restrict the ability of trained investigators, intelligence analysts, and government attorneys to exercise their judgment in reporting on information and investigations.

(5) From subsection (e)(2) because, in a criminal or other law-enforcement investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement. In such circumstances, the subject of the investigation or prosecution would be informed of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations or duties, as well as to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(6) From subsection (e)(3) because compliance with the requirements of this subsection during the course of an investigation could impede the information-gathering process, thus hampering the investigation. Furthermore, such requirements could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(7) From subsections (e)(4) (G) and (H) because this system is exempt from the individual-access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(8) From subsection (e)(4)(I) because the categories of sources of records in this system have been published in the FEDERAL REGISTER in broad generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires. In the event, however, that this subsection should be interpreted to require more detail as to the identity of sources of the records in these systems, exemption from this provision is necessary in order to protect the confiden-

tiality of the sources of criminal and other law-enforcement information. Such exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(9) From subsection (e)(8) because the individual-notice requirements of subsection (e)(8) could present a serious impediment to law enforcement through interference with the Office of Independent Counsel's ability to issue subpoenas and the disclosure of its investigative techniques and procedures.

(10) From subsection (f) because this system is exempt from the individual-access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act. Furthermore, such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation or prosecution pending or future.

(11) From subsection (g) because this system is exempt from the individual-access and amendment provisions of subsection (d) and the provisions of subsection (f) pursuant to subsections (j) and (k) of the Privacy Act.

(c) The following system of records is exempt from 5 U.S.C. 552a(c) (3) and (4), (d), (e) (1), (2) and (3), (e)(4), (G), (H) and (I); (e) (5) and (8); (f) and (g):

(1) Freedom of Information Act/Privacy Act Files (OIC/002). These exemptions apply to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), and (k)(5).

(d) Because this system contains Office of Independent Counsel criminal law-enforcement investigatory records, exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because the release of the disclosure accounting would permit the subject(s) of criminal investigations under investigation or in litigation to obtain valuable information concerning the nature of that investigation, matter or case and present a serious impediment to law-enforcement activities.

(2) From subsection (c)(4) because an exemption is being claimed for subsection (d) of the Act, rendering this subsection inapplicable to the extent that this system of records is exempted from subsection (d).

(3) From subsection (d) because access to the records contained in this system would inform the subject of criminal investigation or case of the existence of such, and provide the subject with information that might enable him to avoid detection, apprehension or legal obligations, and present a serious impediment to law enforcement and other civil remedies. Amendment of the records would interfere with ongoing criminal law-enforcement proceedings and impose an impossible administrative burden.

(4) From subsection (e)(1) because in the courses of criminal investigations, matters or cases, the Office of Independent Counsel often obtains information concerning the violation of laws other than those relating to an active case, matter, or investigation. In the interests of effective law enforcement and criminal litigation, it is necessary that the Office of Independent Counsel retain this information since it can aid in establishing patterns of activity and provide valuable leads for future cases that may be brought within the Office of Independent Counsel.

(5) From subsection (e)(2) because collecting information to the greatest extent possible from the subject individual of a criminal investigation or prosecution would present a serious impediment to law enforcement. In such circumstances, the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection, apprehension, or legal obligations and duties.

(6) From subsection (e)(3) because providing individuals supplying information with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement. In those circumstances, it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information, and endanger the life and physical safety of confidential informants.

(7) From subsection (e)(4) (G), (H) and (I) because this system of records is exempt from the individual-access and amendment provisions of subsection (d) and the rules provisions of subsection (f).

(8) From subsection (e)(5) because, in the collection of information for law-enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would inhibit the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(9) From subsection (e)(8) because the individual-notice requirements of subsection (e)(8) could present a serious impediment to law enforcement, i.e., this could interfere with the Office of Independent Counsel's ability to issue subpoenas and could reveal investigative techniques and procedures.

(10) From subsection (f) because this system has been exempted from the individual-access and amendment provisions of subsection (d).

(11) From subsection (g) because the records in this system are generally compiled for law-enforcement purposes and are exempt from the individual-access and amendment provisions of subsections (d) and (f), this rendering subsection (g) inapplicable.

## **PART 701—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT**

### Sec.

- 701.10 General provisions.
- 701.11 Requirements pertaining to requests.
- 701.12 Responses by the Office to requests.
- 701.13 Form and content of Office responses.
- 701.14 Classified information.
- 701.15 Business information.
- 701.16 Appeals.
- 701.17 Preservation of records.
- 701.18 Fees.
- 701.19 Other rights and services.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 53 FR 8895, Mar. 18, 1988, unless otherwise noted.

## § 701.10

### § 701.10 General provisions.

(a) This part contains the regulations of the Office of Independent Counsel implementing the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. Information customarily furnished to the public in the regular course of the performance of official duties may continue to be furnished to the public without complying with this part, provided that the furnishing of such information would not violate the Privacy Act of 1974, 5 U.S.C. 552a, and would not be inconsistent with regulations issued pursuant to the Privacy Act. To the extent permitted by other laws, the Office will also consider making available records that it is permitted to withhold under the FOIA if it determines that such disclosure would be in the public interest and would not interfere with the functioning of the Office.

(b) As used in this part, the following terms shall have the following meanings:

(1) *Appeal* means the appeal by a requester of an adverse determination of his request, as described in 5 U.S.C. 552(a)(6)(A)(ii).

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

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

(4) *Requester* means any person who makes a request to the Office.

(5) *Business information* means trade secrets or other commercial or financial information.

(6) *Business submitter* means any commercial entity that provides business information to the Office and that has a proprietary interest in the information.

(c) The FOIA/PA Officer of the Office of Independent Counsel shall be responsible to Independent Counsel for all matters pertaining to the administration of this part.

(d) The Office of Independent Counsel shall comply with the time limits set forth in the FOIA for responding to and processing requests and appeals, unless there are exceptional circumstances within the meaning of 5 U.S.C. 552(a)(6)(C). The Office shall notify a requester whenever it is unable to respond to or process the request or appeal within the time limits established

## 28 CFR Ch. VII (7-1-00 Edition)

by the FOIA. The Office shall respond to and process requests and appeals in their approximate order of receipt, to the extent consistent with sound administrative practice.

### § 701.11 Requirements pertaining to requests.

(a) *How made and addressed.* A requester may make a request under this part for a record of the Office of Independent Counsel by writing to the Office at: FOIA/PA Officer, Office of Independent Counsel, Suite 701 West, 555 Thirteenth Street NW., Washington, DC 20004. A request should be sent to the Office at its proper address and both the envelope and the request itself should be clearly marked: "Freedom of Information Act Request."

(b) *Request must reasonably describe the records sought.* A request must describe the records sought in sufficient detail to enable Office personnel to locate the records with a reasonable amount of effort. A request for a specific category of records shall be regarded as fulfilling this requirement if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive of Office operations. Wherever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if the request seeks records pertaining to pending litigation, the request should indicate the title of the case, the court in which the case was filed, and the nature of the case. If the Office determines that a request does not reasonably describe the records sought, the Office shall either advise the requester what additional information is needed or otherwise state why the request is insufficient. The Office also shall extend to the requester an opportunity to confer with Office personnel with the objective of reformulating the request in a manner that will meet the requirements of this section.

(c) *Agreement to pay fees.* (1) The filing of a request under this part shall be deemed to constitute an agreement by the requester to pay all applicable fees charged under § 701.18 of this part, up to \$25, unless a waiver of fees is sought.

## Office of Independent Counsel

## § 701.12

The Office shall confirm this agreement in its letter of acknowledgement to the requester. When filing a request, a requester may specify a willingness to pay a greater amount, if applicable.

(2) If a waiver of fees up to \$25 is sought in the requester's request to the Office, the Office will make its determination on the fee waiver (and notify the requester as soon as possible) after receipt of the request. The submission of a request for fee waiver will not delay the Office's responsibility to search for responsive records.

(3) If the fee waiver is denied by the Office, and the fees involved total \$25 or less, the Office will send the responsive documents to the requester, along with a bill for fees. The collection of the unpaid bill shall follow the procedures found herein at § 701.18 (g)(2) and (h).

### § 701.12 Responses by the Office to requests.

(a) *Authority to grant or deny requests.* The head of the Office, or his designee, is authorized to grant or deny and request for a record of the Office.

(b) *Initial action by the Office.* When the Office receives a request for a record in its possession, the Office shall promptly determine whether another agency of the Government is better able to determine whether the record is exempt, to any extent, from mandatory disclosure under the FOIA; and whether the record, if exempt to any extent from mandatory disclosure under the FOIA, should nonetheless be released to the requester as a matter of discretion. If the Office determines that it is the agency best able to determine whether to disclose the record in response to the request, then the Office shall respond to the request. If the Office determines that it is not the agency best able to determine whether to disclose the record in response to the request, the Office shall either:

(1) Respond to the request, after consulting with the other agency best able to determine whether to disclose the record and with any other agency having a substantial interest in the requested record or the information contained therein; or

(2) Refer the responsibility for responding to the request to another

agency that generated or originated the record, but only if that other agency is subject to the provisions of the FOIA.

Under ordinary circumstances, the agency that generated or originated a requested record shall be presumed to be the agency best able to determine whether to disclose the record in response to the request.

(c) *Law-enforcement information.* Whenever a request is made for a record containing information that relates to an investigation of a possible violation of criminal law or to a criminal law-enforcement proceeding and that was generated or originated by another agency, the Office shall refer the responsibility for responding to the request to that other agency; however, such referral shall extend only to the information generated or originated by that other agency.

(d) *Classified information.* Whenever a request is made for a record containing information that has been classified, or that may be eligible for classification, by another agency under the provisions of Executive Order 12356 or any other Executive Order concerning the classification of records, the Office shall refer the responsibility for responding to the request to the agency that classified the information or should consider the information for classification. Whenever a record contains information that has been derivatively classified by the Office because it contains information classified by another agency, the Office shall refer the responsibility for responding to the request to the agency that classified the underlying information; however, such referral shall extend only to the information classified by the other agency.

(e) *Notice of referral.* Whenever the Office refers all or any part of the responsibility for responding to a request to another agency, the Office will consult with the other agency to obtain specific approval to notify the requester of the referral and inform the requester of the name and address of the agency to which the request has been referred and the portions of the request so referred.

(f) *Agreements regarding consultations and referrals.* No provision of this section shall preclude formal or informal

### § 701.13

agreements between the Office and another agency to eliminate the need for consultations or referrals of requests or classes of requests.

(g) *Separate referrals of portions of a request.* Portions of a request may be referred separately to one or more other agencies whenever necessary to process the request in accordance with the provisions of this section.

(h) *Date for determining responsive records.* In determining records responsive to a request, the Office ordinarily will include only those records within the Office's possession and control as of the date of its receipt of the request.

### § 701.13 Form and content of Office responses.

(a) *Form of notice granting a request.* After the Office has made a determination to grant a request in whole or in part, the Office shall so notify the requester in writing. The notice shall describe the manner in which the record will be disclosed, whether by providing a copy of the record to the requester or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection shall not unreasonably disrupt the operations of the Office. The Office shall inform the requester in the notice of any fees to be charged in accordance with the provisions of § 701.18 of this part.

(b) *Form of notice denying a request.* The Office, when denying a request in whole or in part, shall so notify the requester in writing. The notice must be signed by the FOIA/PA Officer, or her designee, and shall include:

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

(2) A brief statement of the reason or reasons for the denial, including the FOIA exemption or exemptions that the Office has relied upon in denying the request and a brief explanation of the manner in which the exemption or exemptions apply to each record withheld; and

(3) A statement that the denial may be appealed under § 701.16(a) and a description of the requirements of that subsection.

(c) *Record cannot be located or has been destroyed.* If a requested record cannot be located from the information

### 28 CFR Ch. VII (7-1-00 Edition)

supplied, or is known or believed to have been destroyed or otherwise disposed of, the Office shall so notify the requester in writing.

### § 701.14 Classified information.

In processing a request for information that is classified or classifiable under Executive Order 12356 or any other Executive Order concerning the classification of records, the Office shall review the information to determine whether it warrants classification. Information that does not warrant classification shall not be withheld from a requester on the basis of 5 U.S.C. 552(b)(1). The Office shall, upon receipt of any appeal involving classified or classifiable information, take appropriate action to ensure compliance with Executive Order 12356 or any other Executive Order concerning the classification of records.

### § 701.15 Business information.

(a) *In general.* Business information provided to the Office by a business submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Notice to business submitters.* The Office shall provide a business submitter with prompt written notice of a request encompassing its business information whenever required under paragraph (c) of this section, except as is provided in paragraph (g) of this section, and only to the extent permitted by law. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(c) *When notice is required.* For business information submitted to the Office it shall provide a business submitter with notice of a request whenever the business submitter has in good faith designated the information as commercially or financially sensitive, or the Office has reason to believe that disclosure of the information may result in commercial or financial injury to the business submitter. Notice of a request for business information falling within the former category shall be required for a period of not more than ten years after the date of submission

## Office of Independent Counsel

## § 701.16

unless the business submitter requests, and provides acceptable justification for, a specific notice period of greater duration. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the company that the information in question is in fact confidential commercial or financial information and has not been disclosed to the public.

(d) *Opportunity to object to disclosure.* Through the notice described in paragraph (b) of this section, the Office shall afford a business submitter a reasonable period within which to provide the Office with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the FOIA and, in the case of Exemption 4, shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(e) *Notice of intent to disclose.* (1) The Office shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the Office decides to disclose business information over the objection of a business submitter, the Office shall forward to the business submitter a written notice which shall include:

- (i) A statement of the reasons for which the business submitter's disclosure objections were not sustained;
- (ii) A description of the business information to be disclosed; and
- (iii) A specified disclosure date.

(2) Such notice of intent to disclose shall be forwarded a reasonable number of days, as circumstances permit, prior to the specified date upon which disclosure is intended. A copy of such disclosure notice shall be forwarded to the requester at the same time.

(f) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information covered by paragraph (c) of this section,

the Office shall promptly notify the business submitter.

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

- (1) The Office determines that the information should not be disclosed;
- (2) The information lawfully has been published or otherwise made available to the public;
- (3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or
- (4) The Office is a criminal law-enforcement agency that acquired information in the course of a lawful investigation of a possible violation of criminal law.

### § 701.16 Appeals.

(a) *Appeals to Independent Counsel.* When a request for access to records or for a waiver of fees has been denied in whole or in part, or when the Office fails to respond to a request within the time limits set forth in the FOIA, the requester may appeal the denial of the request to Independent Counsel within 30 days of his receipt of a notice denying his request. An appeal to Independent Counsel shall be made in writing and addressed to the Office of Independent Counsel, Suite 701 West, 555 Thirteenth Street NW., Washington, DC 20004. Both the envelope and the letter of appeal itself must be clearly marked: "Freedom of Information Act Appeal."

(b) *Action on appeals by the Office of Independent Counsel.* Unless Independent Counsel otherwise directs, his designee shall act on behalf of the Independent Counsel on all appeals under this section, except that a denial of a request by Independent Counsel shall constitute the final action of the Office on that request.

(c) *Form of action on appeal.* The disposition of an appeal shall be in writing. A decision affirming in whole or in part the denial of a request shall include a brief statement of the reason or reasons for the affirmance, including each FOIA exemption relied upon and its relation to each record withheld, and a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides

## § 701.17

or has his principal place of business, the judicial district in which the requested records are located, or the District of Columbia. If the denial of a request is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

### § 701.17 Preservation of records.

The Office shall preserve all correspondence relating to the requests it receives under this part, and all records processed pursuant to such requests, until such time as the destruction of such correspondence and records is authorized pursuant to title 44 of the United States Code. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

### § 701.18 Fees.

(a) *In general.* Fees pursuant to the FOIA shall be assessed according to the schedule contained in paragraph (b) of this section for services rendered by the Office in responding to and processing requests for records under this part. All fees so assessed shall be charged to the requester, except when the charging of fees is limited under paragraph (c) of this section or when a waiver or reduction of fees is granted under paragraph (d) of this section. The Office shall collect all applicable fees before making copies of requested records available to a requester. Requesters shall pay fees by check or money order made payable to the Treasury of the United States.

(b) *Charges.* In responding to requests under this part, the following fees shall be assessed, unless a waiver or reduction of fees has been granted pursuant to paragraph (d) of this section:

(1) *Search.* (i) No search fee shall be assessed with respect to requests by educational institutions, noncommercial scientific institutions, and representatives of the news media (as defined in paragraphs (j)(6), (j)(7), and (j)(8) of this section, respectively). Search fees shall be assessed with respect to all other requests, subject to the limitations of paragraph (c) of this section. The Office may assess fees for time spent searching even if it fails to

## 28 CFR Ch. VII (7-1-00 Edition)

locate any respective record or when records located are subsequently determined to be entirely exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee shall be \$2.25. When the search and retrieval cannot be performed entirely by clerical personnel—for example, when the identification of records within the scope of the request requires the use of professional personnel—the fee shall be \$4.50 for each quarter hour of search time spent by such professional personnel. When the time of managerial personnel is required, the fee shall be \$7.50 for each quarter hour of time spent by such managerial personnel.

(iii) For computer searches of records, which may be undertaken through the use of existing programming, requesters shall be charged the actual direct costs of conducting the search, although certain requesters (as defined in paragraph (c)(2) of this section) shall be entitled to the cost equivalent of two hours of manual search time without charge. These direct costs shall include the cost of operating a central processing unit for that portion of operating time that is directly attributable to searching for records responsive to a request, as well as the costs of operator/programmer salary apportionable to the search (at no more than \$4.50 per quarter hour of time so spent). The Office is not required to alter or develop programming to conduct a search.

(2) *Duplication.* Duplication fees shall be assessed with respect to all requesters, subject to the limitations of paragraph (c) of this section. For a paper photocopy of a record (no more than one copy of which need be supplied), the fee shall be \$0.10 per page. For other methods of duplication, the Office shall charge the actual direct costs of duplicating a record.

(3) *Review.* Review fees shall be assessed with respect to only those requesters who seek records for a commercial use, as defined in paragraph (j)(5) of this section. For each quarter hour spent by agency personnel in reviewing a requested record for possible disclosure, the fee shall be \$4.50, except

that when the time of professional personnel is required, the fee shall be \$7.50 for each quarter hour of time spent by such managerial personnel. Review fees shall be assessed only for the initial record review, *i.e.*, all of the review undertaken when the Office analyzes the applicability of a particular exemption to a particular record or record portion at the initial request level. No charge shall be assessed for review at the administrative appeal level of an exemption already applied. However, records or record portions withheld pursuant to an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs of such a subsequent review are properly assessable, particularly when that review is made necessary by a change of circumstances.

(c) *Limitations on charging fees.* (1) No search or review fee shall be charged for a quarter-hour period unless more than half of that period is required for search or review.

(2) Except for requesters seeking records for a commercial use (as defined in paragraph (j)(5) of this section), the Office shall provide without charge

(i) The first 100 pages of duplication (or its cost equivalent), and

(ii) The first two hours of search (or its cost equivalent).

(3) Whenever a total fee calculated under this section is \$8.00 or less, no fee shall be charged.

(4) The provisions of paragraphs (c) (2) and (3) of this section work together. For requesters other than those seeking records for a commercial use, no fee shall be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages exceeds \$8.00.

(d) *Waiver or reduction of fees.* (1) Records responsive to a request under the FOIA shall be furnished without charge or at a charge reduced below that established under paragraph (b) of this section when the Officer determines, based upon information provided by a requester in support of a fee waiver request or otherwise made known to the Office, that disclosure of the requested information is in the

public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. Requests for a waiver or reduction of fees shall be considered on a case-by-case basis.

(2) In order to determine whether the first fee waiver requirement is met—*i.e.*, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government—the Office shall consider the following four factors in sequence:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject matter of the requested records, in the context of the request, must specifically concern the identifiable operations of the federal government—with a connection that is direct and clear, not remote or attenuated. Furthermore, the records must be sought for their informative value with respect to those government operations or activities; a request for access to records for their intrinsic informational content alone would not satisfy this threshold consideration.

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

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."* The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow

segment of identified persons. A requester's identity and qualifications—*e.g.*, expertise in the subject area and ability and intention to convey effectively information to the general public—should be considered. It reasonably may be presumed that a representative of the news media (as defined in paragraph (j)(8) of this section) who has access to the means of public dissemination readily will be able to satisfy this consideration. Requests from libraries or other record repositories (or requesters who intend merely to disseminate information to such institutions) shall be analyzed, like those of other requesters, to identify a particular person who represents that he actually will use the requested information in scholarly or other analytic work and then disseminate it to the general public.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.* The public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, must be likely to be enhanced by the disclosure to a significant extent. The Office shall not make separate value judgments as to whether information, even though it in fact would contribute significantly to public understanding of the operations or activities of the government, is "important" enough to be made public.

(3) In order to determine whether the second fee waiver requirement is met—*i.e.*, that disclosure of the requested information is not primarily in the commercial interest of the requester—the Office shall consider the following two factors in sequence:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* The Office shall consider all commercial interests of the requester (with reference to the definition of "commercial use" in paragraph (j)(5) of this section), or any person on whose behalf the requester may be acting, but shall consider only those interests that would be furthered by the requested disclosure. In assessing the magnitude

of identified commercial interests, consideration shall be given the role that such FOIA-disclosed information plays with respect to those commercial interests, as well as to the extent to which FOIA disclosures serve those interests overall. Requesters shall be given a reasonable opportunity in the administrative process to provide information bearing upon this consideration.

(ii) *The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is warranted only when, once the "public interest" standard set out in paragraph (d)(2) of this section is satisfied, that public interest can fairly be regarded as greater in magnitude than that of the requester's commercial interest in disclosure. The Office shall ordinarily presume that, where a news media requester has satisfied the "public interest" standard, that will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who compile and market governmental information for direct economic return shall not be presumed to serve primarily the "public interest."

(4) When only a portion of the requested records satisfies both of the requirements for a waiver or reduction of fees under this paragraph, a waiver or reduction shall be granted only as to that portion.

(5) Requests for the waiver or reduction of fees shall address each of the factors listed in paragraphs (d) (2) and (3) of this section, as they apply to each record request.

(e) *Notice of anticipated fees in excess of \$25.00.* When the Office determines or estimates that the fees to be assessed under this section may amount to more than \$25.00, the Office shall notify the requester as soon as practicable of the actual or estimated amount of the fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. (If only a portion of the fee can be estimated readily, the Office shall advise the requester that the estimated fee may be

## Office of Independent Counsel

## § 701.18

only a portion of the total fee.) In cases when a requester has been notified that actual or estimated fees may amount to more than \$25.00, the request will be deemed not to have been received until the requester has agreed to pay the anticipated total fee. A notice to the requester pursuant to this paragraph shall offer him the opportunity to confer with Office personnel in order to reformulate his request to meet his needs at a lower cost.

(f) *Aggregating requests.* When the Office reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of evading the assessment of fees, the Office may aggregate any such requests and charge accordingly. The Office may presume that multiple requests of this type made within a 30-day period have been made in order to evade fees. When requests are separated by a longer period, the Office shall aggregate them only when there exists a solid basis for determining that such aggregation is warranted, *e.g.*, when the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated.

(g) *Advance payments.* (1) When the Office estimates that a total fee to be assessed under this section is likely to exceed \$250.00, it may require the requester to make an advance payment of an amount up to the entire estimated fee before beginning to process the request, except when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment or where a fee waiver, or reduction of fees, has been requested. In the case where a fee waiver or reduction of fees has been requested, the requester shall submit the advance payment, if required by the agency. This prepayment will not affect the Office's responsibility for speedy determination of the fee waiver, or reduction of fees, nor be deemed in derogation of the request for the fee waiver or reduction of fees. If the agency approves the fee waiver, or reduction of fees, the appropriate sum will be reimbursed to the requester, with no accumulated interest, if any.

(2) When a requester has previously failed to pay a records access fee within 30 days of the date of billing, the Office may require the requester to pay the full amount owed, plus any applicable interest (as provided for in paragraph (h) of this section), and to make an advance payment of the full amount of may estimated fee before the Office begins to process a new request or continues to process a pending request from that requester.

(3) For requests other than those described in paragraphs (g) (1) and (2) of this section, the Office shall not require the requester to make an advance payment, *i.e.*, a payment made before work is commenced or continued on a request. Payment owed for work already completed is not an advance payment.

(4) When a component acts under paragraphs (g) (1) or (2) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA for the processing of an initial request or an appeal, plus permissible extensions of these time limits, shall be deemed not to begin to run until the Office has received payment of the assessed fee.

(h) *Charging interest.* The Office may assess interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent to the requester. Once a fee payment has been received by the Office, even if not processed, the accrual of interest shall be stayed. Interest charges shall be assessed at the rate prescribed in section 3717 of title 31 U.S.C. and shall accrue from the date of the billing. The Office shall follow the provisions of the Debt Collection Act of 1982, Public Law 97-265 (Oct. 25, 1982), 96 Stat. 1749, and its implementing procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Other statutes specifically providing for fees.* (1) The fee schedule of this section does not apply with respect to the charging of fees under a statute specifically providing for setting the level of fees for particular types of records—*i.e.*, any statute that specifically requires a government printing entity such as the Government Printing Office or the National Technical Information Service to set and collect fees for

particular types of records—in order to:

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

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

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

(iv) Return revenue to the Treasury for defraying, wholly or in part, appropriated funds used to pay the cost of disseminating government information.

(2) When records responsive to requests are maintained for distribution by agencies operating statutorily based fee schedule programs, the Office shall inform requesters of the steps necessary to obtain records from those sources.

(j) *Definitions.* For the purpose of this section:

(1) The term *direct costs* means those expenditures that the Office actually incurs in searching for and duplicating (and, in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the 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 of 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. The Office shall ensure, however, that searches are undertaken in the most efficient and least expensive manner reasonably possible; thus, for example, the Office shall not engage in line-by-line search when merely duplicating an entire document would be quicker and less expensive.

(3) The term *duplication* refers to the process of making a copy of a record

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

(4) The term *review* refers to the process of examining a record located in response to a request in order to determine whether any portion of it is permitted to be withheld. It also includes processing any record for disclosure, e.g., doing all that is necessary to excise it and otherwise prepare it for release, although review costs shall be recoverable even where there ultimately is no disclosure of a record. Review time does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(5) The term *commercial use* in the context of a 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, which can include furthering those interests through litigation. The Office shall determine, as well as reasonably possible, the use to which a requester will put the records requested. When the circumstances of a request suggest that the requester will put the records sought to a commercial use, either because of the nature of the request itself or because the Office otherwise has reasonable cause to doubt a requester's stated use, the Office shall provide the requester a reasonable opportunity to submit further clarification.

(6) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, and institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. To be eligible for inclusion in this category, a requester 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

## Office of Independent Counsel

## § 701.19

sought in furtherance of scholarly research.

(7) The term *noncommercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (j)(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 product or industry. To be eligible for inclusion in this category, a requester 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 scientific research.

(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. For "freelance"

journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization; a publication contract would be the clearest proof, but the Office shall also look to the past publication record of a requester in making this determination. To be eligible for inclusion in this category, a requester also must not be seeking the requested records for a commercial use. In this regard, a request for records supporting the news dissemination function of the requester shall not be considered to be for a commercial use.

(k) *Charges for other services and materials.* Apart from the other provisions of this section, when the Office elects, as a matter of administrative discretion, to comply with a request for a special service or materials, such as certifying that records are true copies or sending them other than by ordinary mail, the actual direct costs of providing the service or materials shall be charged.

### § 701.19 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under 5 U.S.C. 552.