

the public at large, as opposed to an individual or a narrow segment of interested persons (including whether the requester has expertise in the subject area of the FOIA request as well as the intention and demonstrated ability to disseminate the information to the public).

(4) The significance of the disclosure's contribution to public understanding of government operations or activities, *i.e.*, the public's understanding of the subject matter existing prior to the disclosure must be likely to be enhanced significantly by the disclosure.

(c) To determine whether a FOIA request is eligible for waiver or reduction of fees pursuant to paragraph (a)(2) of this section, the Department considers the following factors:

(1) The existence of the requester's commercial interest, *i.e.*, whether the requester has a commercial interest that would be furthered by the requested disclosure.

(2) If a commercial interest is identified, whether the 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.

(d) When the fee waiver requirements are met only with respect to a portion of a FOIA request, the Department waives or reduces fees only for that portion of the request.

(e) A requester seeking a waiver or reduction of fees must submit evidence demonstrating that the FOIA request meets all the criteria listed in paragraphs (a) through (c) of this section.

(f) A requester must seek a fee waiver for each FOIA request for which a waiver is sought. The Department does not grant standing fee waivers but considers each fee waiver request independently on its merits.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(4)(A), 20 U.S.C. 3474)

## Subpart E—Administrative Review

### § 5.40 Appeals of adverse determinations.

(a) *In general.* A requester may seek an administrative review of an adverse determination on the FOIA request

made by the requester by submitting an appeal of the determination to the Department. Adverse determinations include denials of access to agency records, in whole or in part; "no agency records" responses; and adverse fee decisions, including denials of requests for fee waivers, and all aspects of fee assessments.

(b) *Appeal requirements.* A requester must submit an appeal within 35 calendar days of the date on the adverse determination letter issued by the Department or, where the requester has received no determination, at any time after the due date for such determination. An appeal must be in writing and must include a detailed statement of all legal and factual bases for the appeal. The requester's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(c) *Determination on appeal.* (1) The Department makes a written determination on an administrative appeal within 20 working days after receiving the appeal. The time limit may be extended in accordance with § 5.21(c) through (e). The Department's failure to comply with time limits set forth in this section constitutes exhaustion of the requester's administrative remedies for the purposes of initiating judicial action to compel disclosure.

(2) The Department's determination on an appeal constitutes the Department's final action on the FOIA request. Any Department determination denying an appeal in whole or in part includes the reasons for the denial, including any exemptions asserted under the Act, and notice of the requester's right to seek judicial review of the determination in accordance with 5 U.S.C. 552(a)(4). Where the Department makes a determination to grant an appeal in whole or in part, it processes the FOIA request subject to the appeal in accordance with the determination on appeal.

(Authority: 5 U.S.C. 552(a), 5 U.S.C. 552(a)(6), 20 U.S.C. 3474)