

**Register
Federal Order**

**MONDAY, JANUARY 8, 1979
PART VI**



**DEPARTMENT OF
ENERGY**

**FREEDOM OF
INFORMATION**

Final Rule

[6450-01-M]

Title 10—Energy

CHAPTER II—DEPARTMENT OF ENERGY

PART 1004—FREEDOM OF INFORMATION

Final rule

AGENCY: Department of Energy.

ACTION: Final Rule.

SUMMARY: The Department of Energy (DOE) is adopting final regulations prescribing the procedures to be followed and the substantive principles to be applied by the DOE in processing requests for information under the Freedom of Information Act 5 U.S.C. 552 (FOIA). DOE published proposed regulations on September 12, 1978, 43 FR 40530, inviting interested persons to submit comments related to the proposed regulations. This notice discusses the comments received and publishes the DOE regulations as amended pursuant to certain of the comments.

EFFECTIVE DATE: January 1, 1979.

FOR FURTHER INFORMATION CONTACT:

Milton Jordan, Office of Administrative Services, Room GB137, Forrestal Building, 1000 Independence Avenue, SW., Washington, D.C. 20585, (202) 252-5955;

Marilyn Ross, Laura Rockwood, Office of General Counsel, Room 6146, 12th and Pennsylvania Avenue, NW., Washington, D.C. 20461, (202) 633-8653.

SUPPLEMENTARY INFORMATION:

I. Background.

II. Section concerning the handling of information of a private business, foreign government or international organization.

III. Minor revisions.

IV. Comments not adopted.

I. BACKGROUND

Approximately twenty-five parties submitted comments to the DOE concerning various provisions of the proposed FOIA regulations. A significant number of comments addressed the section of the regulations which relates to the handling of information claimed to be confidential or proprietary and these comments persuaded DOE to modify substantially that portion of the proposed regulations. With respect to comments on other issues, some were adopted, resulting in a number of minor modifications to various provisions of the proposed regulations. All other comments were considered, but were not adopted because in

each case DOE determined the comment to be insignificant, contrary to DOE policy, or inconsistent with DOE's experience in administering the FOIA.

II. SECTION CONCERNING THE HANDLING OF INFORMATION OF A PRIVATE BUSINESS, FOREIGN GOVERNMENT OR INTERNATIONAL ORGANIZATION

Many comments received concerned proposed § 1004.11 of the regulations, dealing with FOIA requests for records containing information of a private business, foreign government or international organization. After consideration of the arguments presented concerning these issues, DOE substantially amended the proposed section in an effort to simplify and clarify its procedures.

The regulations as proposed contained different provisions for identifying possible confidential or proprietary information of private businesses, foreign governments or international organizations. These different provisions were based upon a distinction between regulatory data and all other data. A significant number of comments argued that having separate procedures for regulatory and non-regulatory records was both confusing and unduly complicated. The differing procedures for regulatory and non-regulatory records derived from the differing practices of the Federal Energy Administration and Energy Research Development Agency, DOE's predecessors. It was DOE's view that the differing procedures had proved satisfactory and might be continued. However, after analysis of the comments on this issue and further internal consideration, DOE has amended the proposed regulations to eliminate the distinction between regulatory and non-regulatory records for FOIA purposes.

Proposed § 1004.11 required that, with respect to regulatory documents subject to claims of exemption from mandatory disclosure, two sets of documents be submitted to the agency, one complete, and the other indicating those portions of the document the submitter alleged to be confidential together with a justification for nondisclosure. One objection to this procedure was that it was needlessly burdensome to companies submitting many kinds of information to DOE in connection with DOE regulatory programs, often on a regular basis. Moreover, it was argued that requiring preparation of a justification for nondisclosure at the time of submission of information to DOE would entail often unnecessary effort on the part of the submitters, since many documents submitted to DOE never become subject to FOIA requests.

After consideration of these comments, DOE has, in large part, elimi-

nated the requirement for submission of double copies of regulatory documents. However, a party may still submit a justification for nondisclosure at the time documents are submitted to DOE. In addition, if a submitter's views have not already been made available to the Department, DOE will, at the time of receipt of an FOI request, solicit the views of a party who has previously submitted arguably confidential data to the agency in a document which is the subject of a pending FOIA request.

However, individual DOE offices may require that persons submitting information to these offices, at the time of submission, indicate their views with respect to the possible exempt nature of information submitted or submit copies from which claimed confidential information is deleted.

In part, this provision is necessary because documents submitted to certain offices, whether or not likely to become subject to individual Freedom of Information requests, are routinely made available in public reference facilities.

Numerous comments concerned the length of the period in which DOE will give notice of its intent to release material determined to be non-exempt but which the party who submitted the information claimed to be confidential. These comments asserted that the five-day period was inadequate and that the submitters would be unable to take appropriate action. The DOE is aware of the difficulties inherent in such a brief notification period and has amended the section so that notice will be given no less than seven days prior to DOE's intended release.

The subject matter of § 1004.11 supersedes the subject matter of 10 CFR 205.9(f) and 303.9(f), which, therefore, are repealed.

III. MINOR REVISIONS

The following minor modifications were made in response to comments received in response to the proposed regulations:

1. Section 1004.3(a) has been amended to include the requirement that the Headquarters Freedom of Information Officer maintain a current list of all reading room facilities located in the Headquarters and field offices, such as the ERA Reading Room and the Office of Hearings and Appeals Docket Room. This is to assure that members of the public can be apprised of all DOE sources of readily available public documents.

2. Section 1004.4(c) has been amended to specifically provide that in making the determination whether a request meets the "reasonably described records" requirement the Freedom of Information Officer may take

into account the filing capabilities and practices of each particular program office possibly affected by the request. Although a particular request may be sufficiently descriptive with respect to some DOE offices, local search problems associated with filing systems or storage of documents in one or more of the specific offices to which the request is directed may require additional description of that request. DOE frequently receives requests which involve numerous program offices, where different systems may be used to index and organize the files. Accordingly, it may be necessary to obtain additional descriptive information from a requester to enable a responsible official to identify the materials requested in a particular office's files.

This amendment to the regulation will allow DOE to respond to some requests with documents from one or more program offices where possible, even though the request may be determined not to be one for "reasonably described records" with respect to other program offices.

3. Section 1004.4(f) prescribes the procedures to be followed when a request involves records or information of other agencies. Subsection 1004.4(f)(2) of the proposed regulations provided that a requester who does not object within 5 days to the referral of his request to the other agency involved would be deemed to have consented to such referral. No provision was made for those instances where a requester objects to the referral. Therefore, § 1004.4(f)(2) is amended to make it explicit that, where timely objections are made to a referral, the DOE will, in consultation with the other agency, continue to process the request.

4. Section 1004.5(b), which prescribes the procedures for processing requests for DOE records, has been modified by the addition of § 1004.5(b) (5) and (6). These subparagraphs clarify that the written response prepared by the Authorizing Official may contain, in addition to the four alternatives listed in the proposed regulations: (5) A statement that additional information is required from the requester in order to comply with the requirement imposed by § 1004.4(c)(1) that a request must reasonably describe the records sought or (6) denying the request because responsive records cannot be located or do not exist.

5. Section 1004.8(b) of the proposed regulations provided that an appeal of an initial denial be sent to the Headquarters Freedom of Information Officer, who would then forward the appeal to the Office of Hearings and Appeals for consideration. In response to a comment objecting to this two-step procedure, the DOE has decided

to modify this section to require appeals to be sent directly to the Office of Hearings and Appeals. This modified procedure will be simpler and should reduce the amount of handling of such appeals and attendant delays.

IV. COMMENTS NOT ADOPTED

The following comments were received and considered, but were not, for one reason or another, adopted by the DOE. Generally, comments were not adopted either because they were determined to be insignificant in nature, contrary to DOE policy, or inconsistent with DOE's experience in administering the FOIA.

1. Section 1004.1 provides that "[t]o the extent permitted by other laws, the DOE will make available records which it is authorized to withhold under 5 U.S.C. 552 unless it determines that such disclosure is not in the public interest." Comments were received which questioned the propriety of DOE's discretionary release of material which DOE is authorized to withhold under the fourth exemption. For the most part, the comments relied upon 18 U.S.C. 1905, which prohibits disclosure of certain information "in any manner or to any extent not authorized by law." Exemption 4 of the FOIA (5 U.S.C. 552(b)(4)), protects from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." In *Chrysler v. Schlesinger*, 565 F. 2d 1172 (3rd Cir. 1977), cert. granted sub nom., *Chrysler v. Brown*, 435 U.S. 914 (1978), the Court of Appeals held that, under the circumstances of that case, the FOIA did not prohibit discretionary disclosure of information falling within Exemption 4, even when it was of the type described in 18 U.S.C. 1905. The *Chrysler* court expressly relied upon the holding in *Westinghouse Electric Corporation v. Nuclear Regulatory Commission*, 555 F. 2d 82 (3rd Cir. 1977), that the broad nondisclosure provisions of 18 U.S.C. 1905 apply only to disclosures not "authorized by law" and that a validly promulgated agency regulation authorizing release could provide the requisite legal authority to make 18 U.S.C. 1905 inapplicable. While a contrary result was reached in *Westinghouse v. Schlesinger*, 542 F. 2d 1190 (4th Cir. 1976), cert. denied sub nom., *Brown v. Westinghouse*, 431 U.S. 924 (1977), the position of the United States before the Supreme Court in *Chrysler v. Brown*, supra, supports the *Chrysler v. Brown* result. The previously quoted portion of § 1004.1 is similar to the agency regulation considered in *Chrysler v. Brown*. While DOE has reserved the authority to make such discretionary releases, it is DOE's expectation that instances of discretionary release of

Exemption 4 material will be extremely rare.

2. One comment argued that § 1004.8, which deals with appeals from initial denials, should provide for appeals from determinations by an Authorizing Official that a request is not one for reasonably described documents. Such a provision would not be necessary. A determination that a request is not one for reasonably described documents is ordinarily not considered to be a denial subject to remedy upon appeal, but in extraordinary circumstances, the appeal authority may consider an appeal to be appropriate.

Issued in Washington, D.C., on December 29, 1978.

WILLIAM S. HEFFELFINGER,
Director of Administration.

10 CFR Chapter II is amended by adding a new Part 1004, reading as follows:

PART 1004—FREEDOM OF INFORMATION

- Sec.
 - 1004.1 Purpose and scope.
 - 1004.2 Definitions.
 - 1004.3 Public reading facilities.
 - 1004.4 Elements of a request.
 - 1004.5 Processing requests for records.
 - 1004.6 Requests for classified records.
 - 1004.7 Responses by authorizing officials: form and content.
 - 1004.8 Appeals from initial denials.
 - 1004.9 Fees for provision of records.
 - 1004.10 Exemptions.
 - 1004.11 Handling of proprietary information of a private business, foreign government, or an international organization.
 - 1004.12 Computation of time.
- AUTHORITY: 5 U.S.C. 552.

§ 1004.1 Purpose and scope.

This part contains the regulations of the Department of Energy (DOE) implementing 5 U.S.C. 552, Pub. L. 89-487, as amended by Pub. L. 93-502, 88 Stat. 1561 and by Pub. L. 94-409, 90 Stat. 1241. The regulations of this part provide information concerning the procedures by which records may be obtained from all offices within the DOE, excluding the Federal Energy Regulatory Commission (FERC). Records of the DOE made available pursuant to the requirements of 5 U.S.C. 522 shall be furnished to members of the public as prescribed by this part. Officers and employees of the DOE may furnish to the public informally and without compliance with procedures prescribed herein, information and records of types which were furnished customarily in the regular performance of their duties to the public by the predecessor agencies to the DOE. Persons seeking information or records of the DOE may find it useful

to consult with a DOE Freedom of Information Officer before invoking the formal procedures set out below. To the extent permitted by other laws, the DOE will make available records which it is authorized to withhold under 5 U.S.C. 552 unless it determines that such disclosure is not in the public interest.

§ 1004.2 Definitions.

As used in this part:

(a) "Appeal Authority" means the Office of Hearings and Appeals.

(b) "Authorizing or Denying Official" means that DOE officer or employee, as identified by the Directorate of Administration by separate directive, having custody of or responsibility for records requested under 5 U.S.C. 552. The term refers in DOE Headquarters to officials who report directly to a Secretarial Officer. In the Field Offices, the term refers to the head of a field location identified in § 1004.2(e) and the head of field offices to which they provide administrative support.

(c) "Department" or "Department of Energy (DOE)" means all organizational entities which are a part of the executive department created by Title II of the DOE Organization Act, Pub. L. 95-91. This specifically excludes the Federal Energy Regulatory Commission (FERC).

(d) "Freedom of Information Officer" means the person designated to administer the Freedom of Information Act at the following DOE field offices:

(1) Alaska Power Administration, P.O. Box 50, Juneau, Alaska 88801.

(2) Albuquerque Operations Office, P.O. Box 5400, Albuquerque, New Mexico 87115.

(3) Bartlesville Energy Technology Center, P.O. Box 1398, Bartlesville, Oklahoma 74003.

(4) Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97268.

(5) Chicago Operations Office, 9800 South Cass Avenue, Argonne, Illinois 60439.

(6) Grand Forks Energy Technology Center, P.O. Box 8213, University Station, Grand Forks, North Dakota 58201.

(7) Headquarters, Department of Energy, Washington, D.C. 20545.

(8) Idaho Operations Office, 550 2nd Street, Idaho Falls, Idaho 83401.

(9) Laramie Energy Technology Center, P.O. Box 3395, University Station, Laramie, Wyoming 82070.

(10) Morgantown Energy Technology Center, P.O. Box 880, Morgantown, West Virginia 26505.

(11) Nevada Operations Office, P.O. Box 14100, Las Vegas, Nevada 89114.

(12) Oak Ridge Operations Office, P.O. Box E, Oak Ridge, Tennessee 37830.

(13) Pittsburgh Energy Technology Center, 4800 Forbes Avenue, Pittsburgh, Pennsylvania 15213.

(14) Region I, Analax Building, Room 700, 150 Causeway Street, Boston, Massachusetts 02114.

(15) Region II, 26 Federal Plaza, Room 3206, New York, New York 10007.

(16) Region III, 1421 Cherry Street, 10th Floor, Philadelphia, Pennsylvania 19102.

(17) Region IV, 1655 Peachtree Street, NE, 8th Floor, Atlanta, Georgia 30309.

(18) Region V, 175 West Jackson Boulevard, Room A-333, Chicago, Illinois 60604.

(19) Region VI, P.O. Box 35228, 2626 West Mockingbird Lane, Dallas, Texas 75235.

(20) Region VII, Twelve Grand Building, 1150 Grand Avenue, Kansas City, Missouri 64106.

(21) Region VIII, P.O. Box 26247—Belmar Branch, 1075 South Yukon Street, Lakewood, Colorado 80226.

(22) Region IX, 111 Pine Street, Third Floor, San Francisco, California 94111.

(23) Region X, 1992 Federal Building, 915 Second Avenue, Seattle, Washington 98174.

(24) Richland Operations Office, P.O. Box 550, Richland, Washington 99352.

(25) San Francisco Operations Office, 1333, Broadway, Wells Fargo Building, Oakland, California 94612.

(26) Savannah River Operations Office, P.O. Box "A", Aiken, South Carolina 29801.

(27) Southeastern Power Administration, Elberton, Georgia 30635.

(28) Southwestern Power Administration, P.O. Box Drawer 619, Tulsa, Oklahoma 74101.

(29) Western Power Administration, P.O. Box 3402, Golden, Colorado 80401.

(e) "General Counsel" means the General Counsel provided for in section 202(b) of the DOE Organization Act, or any DOE attorney designated by the General Counsel as having responsibility for counseling the Department on Freedom of Information Act matters.

(f) "Headquarters" means all DOE facilities functioning within the Washington metropolitan area except FERC.

(g) "Office" means any administrative or operating unit of the DOE, including those in field offices.

(h) "Secretarial Officer" means the DOE Secretary; the Deputy Secretary; the Under Secretary; Assistant Secretaries; the Administrators of the Energy Information Administration and the Economic Regulatory Administration; the Inspector General; the General Counsel; the Director, Office of Hearings and Appeals; the Director, Office of Energy Research; the Director of Administration; the Director of Procurement and Contracts Management; and the Controller.

§ 1004.3 Public reading facilities.

(a) The DOE Headquarters will maintain, in public reading facilities, the materials which are required by 5 U.S.C. 552(a)(2) to be made available for public inspection and copying. The principal public reading facility will be located at the Freedom of Information Office, 1000 Independence Avenue, SW, Washington, D.C. A complete listing of other facilities is available from Headquarters Freedom of Information Officer.

(b) Each of the designated field offices will maintain in public reading

facilities certain materials maintained in the Headquarters facility and other materials associated with the particular field offices.

(c) Each of these public reading facilities will maintain and make available for public inspection and copying current indices of the materials at that facility which are required to be indexed by 5 U.S.C. 552(a)(2).

§ 1004.4 Elements of a request.

(a) *Addressed to the Freedom of Information Officer.* A request for a record of the DOE which is not made available and which is not available in a public reading facility as described in § 1004.3 shall be addressed to the appropriate Headquarters or field Freedom of Information Officer, Department of Energy, at a location listed in § 1004.2(d) of this part and both the envelope and the letter shall be clearly marked "Freedom of Information Request." Except as provided in § 1004.9(c), a request which is so addressed and marked will be considered to be received by the DOE for purposes of 5 U.S.C. 552(a)(6) upon receipt by the Freedom of Information Officer. A request under 5 U.S.C. 552 which is not so addressed and marked also shall be considered to be received upon actual receipt by the appropriate Freedom of Information Officer. Requests delivered after regular business hours of the Freedom of Information Office are deemed received on the next regular business day.

(b) *Request should be in writing and for reasonably described records.* A request for access to records should be submitted in writing and should reasonably describe the records requested to enable DOE personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any DOE officers or employees who have been contacted regarding the request prior to filing a written request. If the request relates to a matter in pending litigation, the court and its location should be identified to aid in locating the documents. If the records are known to be in a particular office of the DOE, the request should so state and should identify the office concerned.

(c) *Categorical requests.*—(1) *Must meet reasonably described records requirement.* A request for all records falling within a reasonably specific category shall be regarded as conforming to the statutory requirement that records be reasonably described if it can reasonably be determined which particular records are sought in the request. The request must enable the

DOE to identify and locate the records sought by a process that is not unreasonably burdensome or disruptive of DOE operations. The Freedom of Information Officer may take into consideration problems of search which are associated with the files of an individual office within the Department and determine that a request is not one for reasonably described documents as it pertains to that office.

(2) *Assistance in reformulating non-conforming request.* If it is determined that a request does not reasonably describe the records sought, as specified in subparagraph (1) of this paragraph, the response shall specify the reasons why the request failed to meet the requirements of subparagraph (1) of this paragraph and shall extend to the requester an opportunity to confer with knowledgeable DOE personnel in an attempt to restate the request or reduce the request to manageable proportions by reformulation and by agreeing on an orderly procedure for the production of the records. If a response is given by DOE stating that additional information is needed from the requester to render records reasonably described, any reformulated request submitted by the requester shall be treated as an initial request for purposes of time for DOE response.

(d) *Nonexistent records.* (1) 5 U.S.C. 552 does not require the compilation or creation of a record for the purpose of satisfying a request for records. If a requested record is known to have been destroyed or otherwise disposed of, or if no such record was ever known to exist, the requester shall be so notified.

(2) 5 U.S.C. 552 does not require the DOE to honor a request for a record not yet in existence, even where such a document may be expected to come into existence at a later time.

(e) *Assurance of willingness to pay fees.* A request shall include assurances to pay (i) whatever fees will be assessed in accordance with § 1004.9 or (ii) those fees not exceeding some specified dollar amount, or shall otherwise address the issue of fees in accordance with § 1004.9. No request shall be deemed to have been received until the DOE has received either a reasonable deposit or some other assurance of willingness to bear fees anticipated to be associated with the processing of the request.

(f) *Requests for records or information of other agencies.* (1) Some of the records in the files of the DOE have been obtained from other Federal agencies or contain information obtained from other Federal agencies.

(2) Where an entire document originated in another Federal agency, the Authorizing Official will refer the request to the originating agency and so inform the requester. A requester who

does not object to the referral within 5 days will be deemed to have consented. When a requester objects to the referral in a timely manner, the DOE will, in consultation with the originating agency continue to process the request.

(3) Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records except that coordination will be effected by the Authorizing Official with the appropriate official of the other agency. Such coordination will be done on an expedited basis, for the purpose of determining whether the other agency official wishes to deny the request and obtaining the certification, signature, and identity of the other agency's responsible official. The notice of determination to the requester, in the event part or all of the record is recommended for denial by the other agency, shall cite the other agency denial official as well as the appropriate DOE denying official if a denial by DOE is also involved.

(4) For purposes of this section and 1004.5 of this part, the FERC shall be considered an agency other than DOE.

§ 1004.5 Processing requests for records.

(a) Freedom of Information Officers shall be responsible for processing written requests for records submitted pursuant to this part. Upon receiving such a request, the Freedom of Information Officer shall, except as provided in paragraph (c) of this section, ascertain which Authorizing Official or Officials have responsibility for, custody of, or concern with the records requested. The Freedom of Information Officer shall review the request, consulting with the Authorizing Official(s) where appropriate, to determine its compliance with § 1004.4. Where a request complies with § 1004.4, the Freedom of Information Officer shall forward the request to the Authorizing Official for action and acknowledge receipt of the request to the requester.

(b) The Authorizing Official shall promptly identify and review the records encompassed by the request (or, where the requested material consists of multiple submissions of identical items, representative samples of such items). The Authorizing Official shall prepare a written response either (1) granting the request, (2) denying the request, (3) granting it in part and denying it in part, (4) replying with a response stating that the request has been referred to another agency under § 1004.4(f) or § 1004.6(e); (5) denying the request because responsive records cannot be located or do not exist; or (6) stating that additional information is needed from the requester to meet

the reasonable described records requirement of § 1004.4(c)(1).

(c) Where a request involves records which are in the custody of or the concern of more than one Authorizing Official, the Freedom of Information Officer shall identify all Authorizing Officials and send the requests to all Authorizing Officials and forward the request for action to the Authorizing Official that can reasonably be expected to have custody of most of the responsive records. This Authorizing Official shall prepare a DOE response to the request consistent with paragraph (b) of this section, which shall identify any other Authorizing Official or Officials having responsibility for the denial of records.

(d) *Time for processing requests.* (1) Action pursuant to paragraph (b) of this section shall be taken within 10 working days of receipt of a request for DOE records ("receipt" is defined in § 1004.4(a)), except that if unusual circumstances require an extension of time before a decision on a request can be reached, and the person requesting records is promptly informed in writing by the Authorizing Official, setting forth the reasons for such extension and the date on which a determination is expected to be dispatched, then the Authorizing Official may take an extension not to exceed 10 working days.

(2) For purposes of this section and § 1004.8(b), the term "unusual circumstances" means:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the offices processing the request;

(ii) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the department having substantial subject-matter interest therein.

(3) The requester must be promptly notified in writing of the extension, the reasons for the extension, and the date on which a determination is expected to be dispatched.

(4) If no determination has been dispatched at the end of the 10-day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be dispatched within the applicable time limit, the responsible Authorizing Official shall

nevertheless continue to process the request; on expiration of the time limit he shall inform the requester of the reason for the delay, of the date on which a determination may be expected to be dispatched, and of his right to seek remedy through the courts; and he may ask the requester to forego such action until a determination is made.

(5) Nothing in this part shall preclude the Authorizing Official and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement shall be confirmed in writing and shall clearly specify the total time agreed upon for the initial determination.

§ 1004.6 Requests for classified records.

(a) All requests for classified records shall be subject to the provisions of this part with the special qualifications noted below.

(b) All requests for records made in accordance with this part, except those requests for access to classified records which are made specifically pursuant to the mandatory review provisions of Executive Order 11652 or any successor thereto, shall be automatically considered a Freedom of Information Act request under this part.

(c) Concurrence of the Director of Classification shall be required on all responses involving requests for classified records. The Director of Classification shall be informed of the request by the Freedom of Information Officer and the Authorizing Official to whom the action is assigned and shall advise the office originating the records, or having cognizance or responsibility for the records, and consult with such office or offices prior to making a determination under this section.

(d) The written notice of a determination to deny records, or portions of records, which contain both classified material and other exempt material, shall be concurred in by the Director of Classification who shall be the denying official for the classified portion of such records in accordance with § 1004.5(c) and § 1004.7(b)(2). If other DOE officials or appropriate officials of other agencies are responsible for denying any portion of the record, their names and titles or positions shall be listed in the notice of denial in accordance with § 1004.5(c) and § 1004.7(b)(2) and it shall be clearly indicated what portion or portions they were responsible for denying.

(e) Requests for DOE records containing classified information received from another agency, and requests for classified documents originating in another Federal agency, shall be coordinated with or referred to the other agency consistent with the provisions of § 1004.4(f). Coordination or referral of information or documents subject

to this section shall be effected by the Director of Classification (in consultation with the Authorizing Official) with the appropriate official of the other agency.

§ 1004.7 Response by Authorizing Officials: Form and content.

(a) *Form of grant.* When a requested record has been identified and will be made available, and where applicable fees are \$25 or less or where it has been determined that the payment of applicable fees should be waived, the records shall be made available promptly. Where the applicable fees are in excess of \$25, the records shall not be made available until all charges are paid in full.

(b) *Form of denial.* A reply denying a request for a record shall be in writing and shall be sent certified or registered mail, return receipt requested. It shall be signed by the Authorizing Official pursuant to § 1004.5(b) or (c) and shall include:

(1) *Reason for denial.* A statement of the reason for denial, containing as applicable:

(i) *Exemption category.* A reference to the specific exemption under the Freedom of Information Act authorizing and withholding of the record, and to the extent consistent with the purposes of the exemption, a brief explanation of how the exemption applies to the record withheld, and a statement of why a discretionary release is not appropriate.

(ii) *Notification that record cannot be located or does not exist.* If a request record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester shall be so notified.

(2) *Persons responsible for denial.* A statement setting forth the name and the title or position of each Denying Official and identifying the portion of the denial for which each Denying Official is responsible.

(3) *Segregation of nonexempt material.* A statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied.

(4) *Administrative appeal and judicial review.* A statement that the denial may be appealed within 30 calendar days to the Office of Hearings and Appeals, and that judicial review will be thereafter available either in the district in which the requester resides or has a principal place of business or in which the records are situated or in the District of Columbia.

§ 1004.8 Appeals from initial denials.

(a) *Appeal to Office of Hearings and Appeals.* When the Authorizing Official has denied a request for records in whole or in part or has responded that

there are no documents responsive to the request, consistent with § 1004.4(d)(1), or when the Freedom of Information Officer has denied a request for waiver of fees consistent with § 1004.9, the requester may, within 30 calendar days of its receipt, appeal the determination to the Office of Hearings and Appeals.

(b) *Elements of appeals.* The appeal shall be in writing, addressed to the Director, Office of Hearings and Appeals, Department of Energy, 2000 M Street, NW., Washington, D.C. 20461 and both the envelope and letter shall be clearly marked "Freedom of Information Appeal." The appeal should contain a concise statement of grounds upon which it is brought and a description of the relief sought. It should also include a discussion of all relevant authorities, including, but not limited to, DOE (and predecessor agency) rulings, regulations, interpretations and decisions on appeals and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination which is being appealed, shall be submitted with the appeal.

(c) *Receipt of appeal.* An appeal will be considered to be received for purposes of 5 U.S.C. 552(a)(6) upon receipt by the appeal authority.

(d) *Action within 20 working days.* (1) The appeal authority shall act upon the appeal within 20 working days of its receipt, and more rapidly if practicable, except that if unusual circumstances (as defined in § 1004.5(d)(2)) require an extension of time before a decision on a request can be reached, the appeal authority may extend the time for final action for an additional 10 working days less the number of days of any statutory extension which may have been taken by the Authorizing Official during the period of initial determination.

(2) The requester must be promptly notified in writing of the extension, setting forth the reasons for the extension, and the date on which a determination is expected to be issued.

(3) If no determination on the appeal has been issued at the end of the 20-day period or the last extension thereof, the requester may deem to have exhausted his administrative remedies, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be issued within the applicable time limit, the appeal will nevertheless continue to be processed; on expiration of the time limit the requester shall be informed of the reason for the delay, of the date on which a determination may be expected to be issued, and of his right to seek judicial review in the United States district court in the district in which he resides or has his

principal place of business, the district in which the records are situated, or the District of Columbia. The requester may be asked to forego judicial review until determination of the appeal.

(4) Nothing in this part shall preclude the appeal authority and a requester from agreeing to an extension of time for the decision on an appeal. Any such agreement shall be confirmed in writing by the appeal authority and shall clearly specify the total time agreed upon for the appeal decision.

(e) *Form of action on appeal.* The appeal authority's action on an appeal shall be in writing, and shall set forth the reasons for the decision. It shall also contain a statement that it constitutes final agency action on the request and that judicial review will be available either in the district in which the requester resides or has a principal place of business or in which the records are situated or in the District of Columbia. Documents determined by the appeal authority to be documents subject to release shall be made promptly available to the requester upon payment of any applicable fees.

(f) *Classified records.* The Secretary of Energy or his designee will make the final determination concerning appeals involving classified records.

§ 1004.9. Fees for provision of records.

(a) *When charged.* User fees pursuant to 5 U.S.C. 552, as amended, shall be charged according to the schedule contained in paragraph (b) of this section for services rendered in responding to requests for DOE records under this subpart, unless the Freedom of Information Officer determines, in conformity with the provision of 5 U.S.C. 552, as amended, that waiver of payment of such charges, or a portion thereof, is in the public interest.

(1) Such a determination shall ordinarily not be made unless the service to be performed will be of benefit primarily to the public as opposed to the requester. In making this determination, the Freedom of Information Officer, in consultation with the Authorizing Official, may consider several factors, including, but not necessarily limited to, the following:

(i) The current public interest in subject matter to which the documents pertain.

(ii) The status of the requester as a representative of the news media.

(iii) The status of the requester as a representative of a bona fide public interest group.

(iv) The status of the requester as an indigent person.

(v) The status of the requester as an historian or academician.

(vi) Whether the requester is engaged in administrative proceedings or litigation with the Government.

(vii) Whether the requester is making the request to further purely private commercial interests.

(2) Fees shall not be charged where they would amount, in the aggregate, for a request or series of related requests, to \$25 or less. Where fees in excess of \$25 are to be charged, fees will be assessed for the full amount.

(3) Ordinarily, fees for search shall not be charged if the records requested are not found, or if all of the records located are withheld as exempt. However, if the time expended in processing the request is substantial, and if the requester has been notified of the estimated cost pursuant to paragraph (c) of this section and has been specifically advised that it cannot be determined in advance whether any records will be made available, fees for search may be charged.

(b) *Services charged for, and amount charged.* For the services listed below, expended in locating or making available records or copies thereof, the following charges shall be assessed:

(1) *Copies.* For copies of documents (maximum of one (1) copy of any one document will be supplied), \$0.10 per copy of each page.

(2) *Certification.* For each certification of true copies, \$1.

(3) *Clerical searches.* Charges will be \$2.25 for each quarter hour spent by clerical personnel in searching for and producing a requested record.

(4) *Nonclerical searches.* Where a search cannot be performed by clerical personnel (for example, where the task of determining which records fall within a request and collecting them requires the time of professional or managerial personnel), charges for the search may be made at a rate in excess of the clerical rate; specifically, when higher level personnel are required, charges will be \$4.50 per each one quarter hour.

(5) *Examination and related tasks in screening records.* No charge shall be made for time spent in resolving legal or policy issues affecting access to records of known contents. In addition, no charge shall be made for the time involved in examining records to determine whether they are exempt from mandatory disclosure and should be withheld as a matter of policy.

(6) *Computerized records.* Fees for services in processing requests maintained in whole or in part in computerized form shall be in accordance with this section so far as practicable. Services of personnel in the nature of a search will be charged for at rates prescribed in paragraph (b)(4) of this section unless the level of personnel involved permits rates in accordance with paragraph (b)(3) of this section.

A charge may be made for the computer time involved, based upon the actual cost to the Government. A charge may also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon the actual cost to the Government. Nothing in this paragraph shall be construed to entitle any person, as of right, to any services in connection with computerized records, other than services to which such person may be entitled under 5 U.S.C. 552 and under the provisions, not including this paragraph (b), of this Section.

(7) *Other nonpaper records.* Fees for services in processing requests where the records are maintained on microfiche, microfilm, recording tape, or in any other nonpaper form, shall be assessed at the actual cost to the Government.

(8) *Transcripts.* Transcripts by a reporting firm under contract with DOE may be purchased directly from the reporting firm or DOE, if permitted by the reporting firm, at the cost of reproduction as provided for in the DOE contract with the reporting firm.

(9) *Copyrighted material.* Material which has been copyrighted will not be reproduced in violation of the copyright laws.

(c) *Notice of anticipated fees in excess of \$25.* Unless the requester specifically states that he is willing to pay whatever fees are assessed by DOE for meeting the request, or, alternatively, specifies an amount in excess of \$25 which he is willing to pay and which in fact covers the anticipated fees for meeting the request, a request that is expected to involve assessed fees in excess of \$25 will not be deemed to have been received until the requester is advised of the anticipated cost, agrees to bear it, and makes any advance deposit required. Such notification shall be made by the Freedom of Information Officer consistent with § 1004.4(e).

§ 1004.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in paragraph (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory records; internal procedures and communications; materials exempted from disclosure by other statutes; confidential, commercial, and financial information; and matters involving personal privacy.

(b) Specifically, the exemptions in 5 U.S.C. 552(b) will be applied consistent with § 1004.1 of these regulations to matters that are—

(1) Specifically authorized under criteria established by an executive order to be kept secret in the interest of the national defense or foreign policy and (ii) are in fact properly classified pursuant to such executive order.

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld, in particular, for example Restricted Data and Formerly Restricted Data under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), are covered by this exemption;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel;

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

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

(c) Any reasonably segregable non-exempt portion of a record will be provided to a requester. The DOE will delete portions which are exempt under the exceptions listed above only if it is determined that such deletions are required by law or are in the public interest.

§ 1004.11. Handling information of a private business, foreign government or international organization.

(a) Whenever a document submitted to the DOE contains information which may be exempt by law from public disclosure, it shall be handled in accordance with the procedures in this section. While the DOE is responsible for making the final determination with regard to the disclosure or nondisclosure of information contained in requested documents, DOE will consider the submitter's views (as that term is defined in this section) in making its determination. Nothing in this section shall preclude the submission of a submitter's views at the time of the submission of the document to which the views related, or at any other time.

(b) When the DOE may determine, in the course of responding to a Freedom of Information request not to release information submitted to DOE (as described in subsection (a) and contained in a requested document) without seeking any or further submitter's views, no notice will be given the submitter.

(c) When the DOE, in the course of responding to a Freedom of Information request, cannot make the determination described in paragraph (b) of this section without having for consideration the submitter's views, the submitter shall be promptly notified and provided an opportunity to submit his views on whether information contained in the requested document (1) is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, (2) contains information referred to in 18 U.S.C. 1905, or (3) is otherwise exempt by law from public disclosure. The DOE shall make its own determinations as to whether any information is exempt from disclosure. Notice of a determination by DOE that a claim of exemption made pursuant to this paragraph is being denied shall be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(d) When the DOE, in the course of responding to a Freedom of Information request, cannot make the determination described in paragraph (b) of this section and, without recourse to paragraph (c) of this section, previously has received the submitter's views, DOE shall consider such submitter's views and shall not be required to obtain additional submitter's views under the procedure described in paragraph (c) of this section. The DOE shall make its own determination with regard to any claim that information

be exempted from disclosure. Notice of DOE's determination to deny a claim of exemption made pursuant to this paragraph shall be given to a person making such a claim no less than seven (7) calendar days prior to its intended public disclosure.

(e) Notwithstanding any other provision of this section, DOE Offices may require a person submitting documents containing information that may be exempt by law from mandatory disclosure to (1) submit copies of each document from which information claimed to be confidential has been deleted or (2) require that the submitter's views be otherwise made known at the time of the submission. Notice of a determination by DOE that a claim of exemption is being denied shall be given to a person making such a claim no less than seven (7) calendar days prior to intended public disclosure of the information in question. For purposes of this section, notice is deemed to be given when mailed to the submitter at the submitter's last known address.

(f) *Criteria for determining the applicability of 5 U.S.C. 552(b)(4).* Subject to subsequent decisions of the Appeal Authority, criteria to be applied in determining whether information is exempt from mandatory disclosure pursuant to Exemption 4 of the Freedom of Information Act (§ 1004.10(b)(4) of this part) include:

(1) Whether the information has been held in confidence by the person to whom it pertains;

(2) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefor;

(3) Whether the information was transmitted to and received by the Department in confidence;

(4) Whether the information is available in public sources;

(5) Whether disclosure of the information is likely to impair the Government's ability to obtain similar information in the future; and

(6) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(g) When the DOE, in the course of responding to a Freedom of Information request, determines that information exempt from the mandatory public disclosure requirements of the Freedom of Information Act is to be released in accordance with 10 CFR 1004.1, DOE shall notify the submitter of the intended discretionary release no less than seven (7) days prior to intended public disclosure of the information in question.

(h) As used in this section, the term "submitter's view" means, with regard

to a document submitted to DOE, an item-by-item indication, with accompanying explanation, addressing whether the submitter considers the information contained in the document to be exempt from the mandatory public disclosure requirements of the Freedom of Information Act, to be information referred to in 18 U.S.C. 1905, or to be otherwise exempt by law from mandatory public disclosure. The accompanying explanation should specify the justification for nondisclosure of any information under consideration. If the submitter states that the information comes within the exemption in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, the submitter shall include a statement specifying why such information is privileged or confidential and, where appropriate, shall address the criteria in paragraph (f) of this section. In all cases, the submitter shall address the question of whether or not discretionary disclosure would be in the public interest.

§ 1004.12 Computation of time.

Except as otherwise noted, in computing any period of time prescribed or allowed by this part, the day of the event from which the designated period of time begins to run is not to be included; the last day of the period so computed is to be included; and Saturdays, Sundays and legal public holidays are excepted.

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