

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 2

[OGC–2022–0885; FRL 5630–02–OGC]

RIN 2025–AA38

Freedom of Information Act Regulations Update; Phase II

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA or agency) proposes revisions to the agency’s regulations under the Freedom of Information Act (FOIA or Act). This action supports the agency’s mission by updating the process by which the public may access information about EPA actions and activities.

DATES: Comments must be received on or before December 19, 2022.

ADDRESSES: You may send comments, identified by Docket ID No. OGC–2022–0885, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method). Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Office of General Counsel Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m.–4:30 p.m., Monday through Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Christopher T. Creech, Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, (2310A), Washington, DC 20460; telephone, 202–564–4286; email, creech.christopher@epa.gov.

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I. Public Participation

Submit your comments, identified by Docket ID No. OGC–2022–0885, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. The EPA may publish any comment received to its public docket. Do not submit to EPA’s docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets/> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

II. Does this action apply to me?

This discussion is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This discussion includes the types of entities that the EPA is now aware could potentially be regulated by this action. Other types of entities not included could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in 40 CFR part 2. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

III. Scope of This Action

This action proposes changes to EPA’s FOIA regulations at 40 CFR part 2. The proposed changes would alter the process by which individuals and

entities request records from EPA under the Act. EPA proposes changes to clarify certain provisions and align with the FOIA and with EPA and government-wide policy.

In the 2019 “Freedom of Information Act Regulations Update,” 84 FR 30028, July 26, 2019 (Phase I Rule), EPA stated its intention to propose a second rulemaking phase to make discretionary and modernizing changes. Consistent with that statement, EPA is seeking public comment on the changes proposed in this document.

IV. Background

This action is the second phase in a two-phase process to update the agency’s FOIA regulations. On July 26, 2019, EPA issued the Phase I Rule to “bring EPA’s regulations into compliance with nondiscretionary provisions of the amended statute and reflect changes in the agency’s organization, procedure, or practice.” 84 FR 30028.

V. Proposals for Clarity

A. Clarifying Reasonably Described Requests

EPA proposes to modify existing section 2.102(c) and move it to section 2.102(b), first, to define more clearly what it means for a FOIA request to reasonably describe the records sought and, second, to clarify how EPA would treat a FOIA request that does not reasonably describe the records sought. For the latter, this includes providing a clear timeline during which a requester may modify a submission that does not reasonably describe the records sought.

First, EPA proposes replacing “A request should reasonably describe the records the requester seeks in a way that will permit EPA employees to identify and locate them” with “Requesters should reasonably describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort” to more clearly define a request that is reasonably described. 5 U.S.C. 552(a)(3)(A) requires agencies to respond to “any request for records which (i) reasonably describes such records.” The D.C. Circuit has recognized that a FOIA request reasonably describes the records sought “if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.” *Truitt v. Department of State*, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990), quoting H.R. Rep. No. 93–876, 93d Cong., 2d Sess. 5–6 (1974).

Incorporating this definition, which is used in legislative history and supported in caselaw, would provide clarity to FOIA requesters about how EPA reviews FOIA requests and applies the FOIA's requirements. EPA does not intend that this proposal would affect the EPA's existing processes or alter the FOIA's requirements.

Request for Comment 1: EPA seeks comment on whether the addition to 2.102(c) provides sufficient clarity.

Second, EPA proposes 20 calendar days as the time in section 2.102(c) a requester would be given to respond to EPA's notice that the requester has not reasonably described the records sought. The existing regulations state that EPA will afford a requester with an opportunity to modify the request if EPA determines that the submission did not reasonably describe the records sought. However, the existing regulations do not specify how long a requester may take to modify their request before EPA closes the request. See 40 CFR 2.102(c) ("A request should reasonably describe the records the requester seeks in a way that will permit EPA employees to identify and locate them."). The agency believes that this change would provide requesters with additional guidance during this process, facilitate cooperation between the EPA and the requester, and clarify EPA's process for reviewing FOIA requests.

Based on EPA's experience, the proposed 20 calendar days timeline would be sufficient for requesters to review and modify their requests as appropriate. Although not required by the FOIA, EPA's regulations allow requesters an opportunity to modify a request that does not reasonably describe the records sought. EPA further notes that a requester may resubmit a new request reasonably describing the records sought, even after EPA closes a request upon the aforementioned 20-day deadline expiring.

Request for Comment 2: EPA seeks comments on providing a 20 calendar day timeline for a requester to modify their request after EPA has provided notice that EPA has determined that their request does not reasonably describe the records sought.

B. Readability and Useful Information

EPA also proposes and seeks comment on several provisions that EPA believes would enhance the readability, clarity, and usability of EPA's FOIA regulations.

First, EPA proposes reorganizing, but not making substantive changes to, 40 CFR 2.100(a) by moving to separate paragraphs the sentences describing other regulations relevant to the release

of information. Those sentences relate to the access to confidential business information and requests made under the Privacy Act of 1974. Both sentences are purely informational. EPA believes this change would improve readability by separately listing information that is useful but unrelated to each other. This proposal would not change EPA's processing of records under the FOIA.

Second, EPA proposes to create a new paragraph (f) in section 2.100 to direct the public to the agency's website (epa.gov/foia) for records made publicly available in compliance with 5 U.S.C. 522(a)(2)(D)(ii)(II). This change would inform the public where they may access publicly available information. EPA notes that this change would not alter the agency's practices or responsibilities under the FOIA.

Third, EPA proposes to consolidate the provisions in EPA's FOIA regulations that discuss the timing of EPA's response to FOIA requests to simplify and accurately represent EPA's obligations under the FOIA. This change would combine into section 2.104(a) existing sections 2.101(c) and 2.102(a), and EPA proposes to directly incorporate into 2.104(a), the FOIA's language on timing of response from 5 U.S.C. 552(a)(6)(A)(i). EPA believes that allowing the statutory language to speak for itself is the clearest statement of EPA's obligations and clarifies ambiguities in the regulatory text. EPA also proposes to highlight in the regulatory text that EPA will work with requesters to come to an agreement regarding alternative timeframes for processing the request when EPA provides notice pursuant to 5 U.S.C. 552(a)(6)(B)(i) and (ii).

In addition, EPA proposes to add to section 2.104(a)(2) that requests submitted after 5:00 p.m. Eastern Time would be considered received on the next business day. Existing section 2.101(d) says that "Requesters submitting requests electronically must do so before 5:00 p.m. Eastern Time for the agency to consider the request as received on that date." EPA would add on to this existing sentence, explaining how EPA would treat a request a request submitted at or after 5:00 p.m. EPA is not seeking feedback and does not propose to make changes to the existing language regarding requests and appeals received before 5:00 p.m. Eastern Time. This addition is intended to clarify the existing regulatory language and provide additional transparency to the public. Parallel to this proposal, EPA proposes modifying section 2.108(b) to state that appeals submitted after 5:00 p.m. Eastern Time would be considered received on the next business day.

Request for Comment 3: EPA seeks comment on whether the proposed reorganization, informational addition, and consolidation is clear.

C. Consistency With Government-Wide Policy

EPA proposes three changes that are intended to more closely align with the Department of Justice's *Template for Agency FOIA Regulations*. See Department of Justice, *Template for Agency FOIA Regulations* at sections VIII and IX, <https://www.justice.gov/oip/template-agency-foia-regulations> (last updated February 22, 2017). These proposed changes are found at sections 2.106, 2.108(d)(3), and 2.108(e)(1), which discuss the preservation of records, handling appeals after FOIA litigation, and the contents of adverse administrative appeals decisions. EPA does not intend that these proposals would make any substantive changes to EPA's practices or the regulatory requirements in those provisions. These proposed changes are intended to reflect existing best practices and ensure clarity of EPA's processes.

EPA proposes correcting 40 CFR 2.107(b), which discusses how requesters make fee payments. The existing regulations state that checks or money orders should be made out to the U.S. Environmental Protection Agency. The updated language would say that requesters should make checks and money orders out to the Treasury of the United States. This proposal would only affect where FOIA requesters make certain FOIA fee payments and is purely administrative in nature.

Finally, EPA also proposes revising all references to EPA's electronic submission website, FOIAonline (www.FOIAonline.gov), to a more general location, EPA's FOIA website (www.epa.gov/foia). EPA proposes this change to ensure that the location of the platform to receive FOIA submissions remains clear even after the decommissioning of FOIA Online. Instead, EPA proposes to use its FOIA web page (epa.gov/foia) to identify for requesters the new electronic FOIA request submission platform, providing a prominent and easily accessible link. Please note also that the sunset of FOIA online is not a part of this rulemaking, and EPA is neither proposing nor asking for comments on that process here.

Request for Comment 4: EPA seeks comment on whether the changes detailed above improve the readability, usefulness, and clarity of those provisions.

VI. 2019 Phase I FOIA Regulations

Citizens for Responsibility and Ethics in Washington (CREW) and Center for Biological Diversity (CBD) filed lawsuits against EPA challenging aspects of the 2019 FOIA Regulations Update. *Citizens for Responsibility and Ethics in Washington v. EPA*, 1:19-cv-02181. As part of the agreement to settle those claims, EPA agreed to seek comment on 40 CFR 2.103(b) and on whether to reinstate methods of submissions previously listed at 40 CFR 2.101(a).

A. Description of Determinations Under the FOIA

EPA proposes and seeks comment on removing the clause in 40 CFR 2.103(b) describing the term “determinations required by 5 U.S.C. 552(a)(6)(A).” Existing section 2.103(b) states, “[Listed positions within the EPA] are authorized to make determinations required by 5 U.S.C. 552(a)(6)(A), including to issue final determinations whether to release or withhold a record or a portion of a record on the basis of responsiveness or under one or more of the exemptions under the FOIA, and to issue ‘no records’ responses.” There has been some confusion regarding the meaning of this clause, which has led to inaccurate understandings of EPA’s authority regarding FOIA determination. EPA believes that removing this clause would ensure clarity and allow the Act to speak for itself.

Request for Comment 5: EPA seeks comment on whether to remove the explanatory clause in 40 CFR 2.103(b) that begins with “including” and ends with “responses.”

B. Previous Methods of Submission

EPA seeks comment on whether to reinstate any methods of FOIA request submission that the EPA removed through the issuance of the 2019 FOIA Regulations Update. *See* 2019 FOIA Regulations Update, 84 FR 30028 at 30030. EPA does not propose changes to 40 CFR 2.101(a).

The 2019 FOIA rule removed submission methods previously allowed via U.S. mail and email to the Regions, and email requests to EPA headquarters. *Id.* The 2019 FOIA Rule removed those methods of submission to “reduce the number of misdirected requests” because the “2007 Amendments also decreased the amount of time an agency may take to route a request to the appropriate component” 2019 FOIA Regulations Update, 84 FR 30028 at 30030. The 2019 FOIA Rule designated the National FOIA Office as the location to which mailed FOIA requests must be submitted; the Rule

did not centralize FOIA processing in that office.

Since the 2019 FOIA Regulations Update was implemented, EPA’s National FOIA Office has efficiently implemented centralized intake of FOIA requests providing enhanced transparency and clarity to requesters. As a result, EPA more fully realized its goal to provide first-rate service and communication to the FOIA requester community.

Request for Comment 6: EPA requests comment on whether EPA should reinstate any of the methods of submission, located at 40 CFR 2.101(a), that were removed by the 2019 FOIA Rule.

VII. General Processing Changes

A. Ordinary Search Cut-Off Date

EPA proposes to change the “ordinary” search cut-off date identified in section 2.103(a) from the date “the request was received” to “the Agency begins its search for responsive records.” A “cut-off” date delineates the scope of a FOIA request by treating records created after that date as not responsive to the FOIA request. *See Bonner v. U.S. Dep’t of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (observing that “[t]o require an agency to adjust or modify its FOIA responses based on post-response occurrences could create an endless cycle of judicially mandated reprocessing”). Under EPA’s FOIA regulations, the ordinary cut-off date identified in 40 CFR 2.103(a) informs requesters of the cut-off date that the agency most typically uses. “The Agency will inform the requester if any other date is used.” 40 C.F.R. 2.103(a).

Nothing in the existing or proposed FOIA regulations precludes the agency from evaluating the FOIA request for the most appropriate cut-off date or a FOIA requester from identifying a date range for the records sought.

Request for Comment 7: EPA seeks comment on whether to change the ordinary search cut-off date from the date the FOIA request is received to the date the agency begins the search for responsive records.

B. Aggregation of Requests

EPA proposes adding a provision stating that EPA may aggregate FOIA requests when EPA reasonably believes that multiple requests—submitted either by a requester or by a group of requesters acting in concert—constitute a single request that would otherwise give rise to unusual circumstances and the requests involve related matters.

5 U.S.C. 552(a)(6)(B)(iv) provides authority for such a provision, stating

“Each agency may promulgate regulations . . . providing for the aggregation of certain requests . . . if the agency reasonably believes that such requests actually constitute a single request[.]” Mirroring the Act, EPA would only aggregate requests that are submitted by the same requester or group of requesters and the requests involve related matters. EPA is not proposing changes to the existing provision at 40 CFR 2.107(i), which allows for aggregation for fee-avoidance reasons.

Request for Comment 8: EPA requests comment on whether to add the request aggregation provision allowed for in 5 U.S.C. 552(a)(6)(B)(iv).

C. Assigning Tracking Numbers

EPA proposes a provision stating that EPA may assign multiple tracking numbers to a request with distinct parts that will be processed by separate regions or program offices. EPA would notify the requester of the separate tracking numbers for the distinct parts of the request, which thereafter would be processed and responded to separately.

This provision would reduce unnecessary coordination on unrelated records among different EPA offices and regions when processing a single request with multiple unrelated parts. This includes communicating with the requester to clarify the request, seeking fee assurance, conducting the records search and review, and issuing interim and final responses.

D. Revised Methods of Submission of Administrative Appeals

EPA proposes modifying the methods of submission of FOIA appeals, located in the existing regulations at 40 CFR 2.104(j) and 2.108(a) in the proposed regulations, to match the methods of submission of FOIA requests. This change would streamline EPA’s receipt and handling of FOIA appeals.

VIII. Environmental Justice Expedited Processing Criteria

EPA proposes a provision to allow requesters to seek expedited processing of their request if the records sought pertain to an environmental justice-related need and will be used to inform an affected community. 5 U.S.C. 552(a)(6)(E)(i) provides that EPA may issue regulations “providing for expedited processing of requests for records (I) in cases in which the person requesting the records demonstrates a compelling need; and (II) in other cases determined by the agency.” (emphasis added). The Act defines what constitutes a “compelling need,” *id.* at

section 552(a)(6)(E)(v), and does not limit the “other cases” that they agency may determine merit expedited processing.

EPA has recognized environmental justice concerns for many decades and has defined Environmental justice (EJ) as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies. EPA recognizes the role timely access to information contained in EPA records may play in the opportunity for meaningful involvement by communities that potentially experience disproportionately high and adverse human health or environmental effects.

This provision would be in addition to and not modify the expedited processing for requests demonstrating a “compelling need,” which the FOIA provides at 5 U.S.C. 552(a)(6)(E)(i)(I). This proposed new expedited processing category would target an understood need for timely access for communities with environmental justice concerns to information, which may not be met by the statutorily provided “compelling need” categories.

Request for Comment 9: EPA seeks comment on whether to include a new expedited processing category for requests seeking environmental justice-related information and whether there is an unmet need for prompt access to information in communities affected by environment justice concerns. For example, EPA requests comment on the frequency and types of contact that occur with members of communities affected by environmental justice concerns and how information for which there is a pressing need is typically utilized by members of those communities.

EPA proposes narrowly tailored criteria to achieve the intended goal. To qualify for expedited processing under this proposed provision, a requester would need to show: (1) a pressing need; (2) to inform a community potentially experiencing disproportionately high and adverse human health or environmental effects; (3) about those effects; (4) affecting, or potentially affecting, that community.

Request for Comment 10: EPA seeks comment on whether EPA should further define or use another definition or term to more accurately identify communities for which there is a need for more rapid access to EPA records containing information regarding environmental harms affecting those communities.

In evaluating requests for expedited processing under this expedited processing category, EPA would consider the requester’s intent to effectively convey the information to members of the community that is potentially experiencing disproportionately high and adverse human health or environmental effects. EPA would not require that a requester be a member of the affected community, although membership in the community may be relevant to the requester’s intent and ability to convey the information to the community. EPA would consider the requester’s ability to effectively convey the information received about the community back to the community within a timeframe sufficient to meet the identified pressing need. EPA proposes that a requester would not have to be a formal member of the news media to qualify for this expedited processing category.

EPA further proposes that the need to inform the affected community would not include a request where the disclosure is primarily in the commercial interest of the requester. EPA intends that this criterion would help tailor the provision by focusing on requests for which the purpose of the request is to share information with members of the affected community.

Request for Comment 11: EPA seeks feedback on whether the proposed criteria properly target EPA’s stated intent.

To implement this provision, EPA could use EJSscreen’s “Supplemental Indexes” tool to assess a requester’s claim that a particular community may be experiencing disproportionately high and adverse human health or environmental effects. EJSscreen is an environmental justice mapping and screening tool that provides EPA with a nationally consistent dataset and approach for combining environmental and demographic indicators. EJSscreen provides a way to display this information and includes a method for combining environmental and demographic indicators into EJ indexes. EJSscreen’s “Supplemental Indexes” are twelve indexes calculated by combining twelve environmental indicators and a five-factor demographic index. The five socioeconomic indicators considered are percent low-income, percent limited English-speaking, percent less than high school education, percent unemployed, and low life expectancy. EJSscreen may also be a valuable tool for requesters to assess whether the community about which they are seeking records may be affected by disproportionately high and adverse human health or environmental effects. More information regarding

EJSscreen is available here: <https://www.epa.gov/ejscreen/environmental-justice-indexes-ejscreen>.

Request for Comment 12: EPA seeks comment on whether EPA should require requesters to identify in a particular manner the relevant community with environmental justice concerns. EPA also seeks comment on methods and approaches to evaluating whether a particular community is potentially experiencing disproportionately high and adverse human health or environmental effects.

EPA also proposes that if the agency grants a request for expedited processing under the environmental justice expedited processing category, the agency will also grant the requester a fee waiver for the request under 5 U.S.C. 552(a)(4)(A)(iii), and EPA’s FOIA regulations, at section 2.107(l) of the existing regulations and section 2.107(n) of the proposed regulations. EPA believes that meeting the standard and factors provided in the proposed new expedited processing criteria would result in the requester having met the burden set forth by the FOIA to qualify for a waiver of fees. 5 U.S.C. 552(a)(4)(A)(iii) (“[D]isclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”). EPA also recognizes the potential efficiencies for both requesters and the agency in this approach.

Request for Comment 13: EPA seeks comment on whether EPA should provide fee waivers to requests that qualify for the proposed environmental justice expedited processing provision.

IX. Fee-Related Changes

A. Fee Rates Update

EPA proposes modernizing its fee rates by establishing fee rates tied to the U.S. Office of Personnel and Management’s General Schedule (GS) scale. EPA proposes two rates for agency personnel time spent processing FOIA requests, with one rate for grades GS–12 and below and a second rate for those with grades GS–13 and above, both adjusted for the value of benefits, expressed in quarter-hour rates, and rounded to the nearest \$1 increment. As of the date of signature, the proposed rates would be calculated as such:

Employees GS–12 and Below
Average Quarter-Hour Rate for GS–9 to 12 (\$8.83) + Benefits (16% or \$1.41) = \$10.24 = (rounded to the nearest \$1 increment) \$10.00/quarter hour

Employees GS–13 and Above
Average Quarter-Hour Rate for GS–13 to 15 (\$15.24) + Benefits (16% or \$2.43) = \$17.67 = (rounded to the nearest \$1 increment) \$18.00/quarter-hour

The FOIA directs agencies to issue FOIA regulations “specifying the schedule of fees applicable to the processing of requests[.]” 5 U.S.C. 522(a)(4)(A)(i). The Office of Management and Budget’s (OMB’s) Fee Guidelines provide that agencies may charge for the direct costs of expenditures that the agency incurs, including staff time spent on search, duplication, and review of records. See OMB, *Uniform Freedom of Information Act Fee Schedule Guidelines*, 52 FR 10012, 10017, March 27, 1987 (hereinafter OMB Fee Guidelines). The OMB Fee Guidelines also provide that staff time can be quantified by using the salary of the employee plus 16% to cover benefits. *Id.*

Raising the fee rates and tying them to the GS-scale will more accurately reflect the EPA’s costs and align with the OMB Fee Guidelines. *Id.* at 10018 (“Agencies should charge fees that recoup the full allowable direct costs they incur.”). Fee rates in existing EPA’s regulations include three categories: clerical (\$4/quarter-hour); professional (\$7/quarter-hour); and managerial (\$10.25/quarter-hour). See 40 CFR 2.107(c)(2)(i)(B). EPA’s existing fee rates have not been updated since at least 2002. Consequently, the existing rates no longer recoup the cost of processing a FOIA request and the clerical rate is obsolete as it is rarely used given the substantial transition to digital records and electronic processing and response mechanisms.

EPA proposes that its fee rates would automatically update with OPM’s publication in the **Federal Register** of new GS-scale rates. See OPM, *January 2022 Pay Schedules*, 87 FR 26376, May 4, 2022. This practice is consistent with the OMB Fee Schedule and the practices of other Federal agencies. EPA anticipates that this approach would be a predictable and efficient approach to establishing a fee rate. Alternatively, EPA could set a stagnant rate that would not automatically update with changes to the GS-scale. EPA expects that the stagnant rate alternative would be more burdensome than the proposed approach because EPA would need to update its FOIA regulations regularly to ensure that it is charging FOIA fees to recoup its costs. EPA recognizes that the stagnant rate approach may provide more clarity for requesters by not requiring a calculation of the

adjustment. To mitigate this, if it finalizes the automatically adjusting rate as proposed, EPA intends to publish the current fee rate on its FOIA website (epa.gov/foia) and will update that publication as the GS-scale changes.

Request for Comment 14: EPA requests comment on whether to modernize the fee schedule to two categories based on average GS levels.

B. Minimum Fee Threshold

EPA proposes increasing the minimum fee threshold to an amount calculated by formula, which, as of the publication of this rulemaking is \$250. The formula would enable the minimum fee threshold to reflect EPA’s costs as they increase in the futures. FOIA prohibits collection of fees if processing the payment is costlier than the fee itself. See 5 U.S.C. 552(a)(4)(A)(iv)(I). Existing EPA regulations, section 2.107(d)(4), have a minimum fee threshold of \$14, meaning that EPA will charge FOIA fees if the total chargeable fees sum to more than \$14. However, EPA calculates that the existing cost to process a payment is around \$90. Thus, raising the minimum fee threshold will ensure that EPA is only charging for fees that are more than EPA’s cost to process the fees.

Raising the minimum fee threshold to \$250 would reduce the burden and tasks associated with processing fees and seeking assurance of payment and advanced payment. Alternatively, EPA could set a minimum fee threshold to an amount calculated by formula, which, as of the publication of this rulemaking is \$90, the estimated cost of processing payment.

To achieve an automatically adjusting minimum fee threshold, which is currently calculated as \$250, EPA proposes to utilize a formula that applies a fourteen (14) times multiplier to the rate set in 40 CFR 2.107(e)(2)(ii)(B). This ties the minimum fee threshold to the fee rate, which is itself based on the GS-scale. OPM adjusts the GS-scale annually. This proposal would allow for a minimum fee threshold that is sustainable and remains effective as fee rates and personnel costs increase, without the need to publish updates to the regulations. This number will be on the EPA website and updated as there are increases to the GS-scale. For more information about how the fee rate is calculated see section VII.A. of this preamble. As of the date of signature, the proposed minimum fee threshold would be calculated as follows:

Fee rate listed in 40 CFR
2.107(f)(2)(ii)(B) (\$18.00) × 14 =

\$252 = (rounded to the nearest \$5 increment) \$250

Request for Comment 15: EPA requests comment on whether to increase the minimum fee threshold to an amount calculated by formula, which, as of the publication of this rulemaking is \$250.

C. Automatic Agreement To Pay Fees

EPA proposes removing the automatic agreement to pay fees provision from the EPA’s FOIA regulations. Submission of a request is considered an agreement to pay fees up to \$25 in the existing EPA FOIA regulations. Because of the proposal to raise the minimum fee threshold to an amount calculated by formula, which, as of the publication of this rulemaking is \$250, EPA would also need to adjust the existing automatic agreement to pay fees threshold.

EPA proposes to remove the automatic agreement to pay fees provision and instead seek assurance of payments from requesters if the actual or anticipated fees for the request equal or exceed the minimum fee threshold. EPA notes that the FOIA does not require agency FOIA regulations to include an automatic agreement to pay fees provision.

Alternatively, EPA could consider the submission of a FOIA request an automatic agreement to pay fees up to some amount above \$250. EPA recognizes that an automatic agreement to pay \$250 or some higher amount may be a deterrent to submitting a FOIA request for some members of the public, whether or not they are ultimately charged fees, and that a better practice will be for EPA to notify requesters when EPA’s chargeable costs are anticipated to go above the minimum fee threshold and to seek an assurance of payment as described below.

Request for Comment 16: EPA requests comment on whether to remove the automatic agreement to pay fees provision from the FOIA regulations. EPA also requests comment on whether to increase the automatic agreement to pay fees commensurate with the minimum fee threshold.

D. Assurance of Payment Threshold

EPA proposes raising the assurance of payment threshold to an amount calculated by formula, which, as of the publication of this rulemaking is \$250. When EPA estimates fees or accumulates actual fees equaling or exceeding the assurance of payment threshold, EPA seeks from a requester an assurance that the requester will pay the fees associated with the FOIA request.

Existing EPA regulations require assurance of payment when the estimated or actual fees are at or above \$25. As noted above, EPA also proposes to raise the minimum fee threshold to \$250. As such, keeping an assurance of payment threshold of \$25 would be inconsistent with that proposal.

EPA proposes tying the assurance of payment threshold to the minimum fee threshold. EPA would directly referencing the minimum fee threshold citation to accomplish this. The intent of this approach would be to ensure that, as explained above, the assurance of payment threshold rises commensurate with the minimum fee threshold and the fee rate. This proposal could reduce confusion for the requester and set clear steps and guideposts for assessing fees.

Request for Comment 17: EPA requests comment on whether to set the assurance of payment threshold to the same amount as the minimum fee threshold.

E. Advanced Payment Threshold

EPA proposes increasing the advanced payment threshold to an amount that would currently calculate to \$425 and proposes a formula for calculating the advance payment threshold that will be self-escalating as EPA's costs increase in future years. When EPA estimates fees or accumulates actual fees equaling or exceeding the advanced payment threshold, EPA may seek advanced payment from a requester of the estimated or actual fees associated with the FOIA request.

The FOIA provides that agencies can establish guidelines for when and describes when agencies can require advanced payment of fees from requesters. *See* 5 U.S.C.

552(a)(4)(A)(v)(c). The FOIA specifies two situations in which an agency may require advanced payment: "the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250." *Id.* The advanced payment threshold, as described here, references that second criteria, the estimated or actual fee. EPA is not proposing modification to the advanced payment requirements for requesters who have failed to pay fees in a timely fashion.

Similar to the minimum fee threshold, EPA would tie the advanced payment threshold to the fee rate and round that amount to the nearest \$5 increment. This means that the advance payment threshold would be calculated based on the fee rate, which is itself based on the GS-scale that is adjusted annually.

EPA chose a twenty-five (25) times multiplier to achieve an initial advanced payment threshold of \$450. \$450 represents a proportional increase with the fee rate. The fee rate, as explained above, reflects agency personnel costs. The proposed advanced payment threshold thus represents a level at which EPA believes it would begin to see administrative burdens in processing a request that continues to accumulate uncollected fees.

As of the date of signature, the proposed advanced payment threshold would be calculated as follows:

Fee rate listed in proposed 40 CFR 2.107(f)(2)(ii)(B) (\$18.00) × 25 = \$450

Request for Comment 18: EPA requests comment on whether to increase the minimum fee threshold to an amount calculated by formula, which, as of the publication of this rulemaking is \$450, and automatically adjusting with the proposed fee rate.

EPA proposes to reorganize the 40 CFR 2.107. EPA does not intend that this reorganization make any substantive modifications to the regulatory or statutory requirements. The intent of these changes is to consolidate duplicative information and place related provisions in close proximity to improve readability and provide clarity. For example, EPA's proposal would move information regarding the type of fees, the types of requests, what fees the agency may assess for types of requests, and how EPA calculates those fees into two subsections: (1) types of requests and types of fees that may be assessed to those requests and (2) types of fees and how EPA calculates those fees.

Request for Comment 19: EPA requests comment on reorganizing and removing duplicative information from EPA's FOIA regulations.

F. Estimated or Actual Fee Assessment

EPA proposes adding language stating that EPA's reassessment of actual or estimated fees may result in EPA re-seeking assurance of payment or advanced payment. Adding this provision would provide clarity and inform the public regarding EPA's practices. The intent of this proposal is to describe a scenario where EPA has previously informed the requester of the amount of actual or estimated fees and, after further processing, EPA has updated its actual or estimated fee assessment.

EPA notes that providing a requester with the most up-to-date fee calculations leads to transparency for the requester. Advancement through

processing steps may result in new or revised circumstances. For example, EPA may perform a search that returns more or less records than initially estimated. If this is the case, EPA would inform the requester of the changed circumstances and latest information and accordingly, if appropriate, seek additional fee guarantees from the requester.

Request for Comment 20: EPA requests comment on whether to state that a reassessment of actual or estimated fees may trigger a need for advanced payment or assurance of payment.

G. Failure To Pay Charged Fees

EPA proposes editing for clarity and revising the provisions applicable to delinquent requesters. Existing EPA regulations discuss failure to pay fees in several separate locations. EPA would consolidate these provisions into 40 CFR 2.107(k). EPA would also add a sentence stating that the agency may share information regarding delinquent requesters with other Federal agencies.

Request for Comment 21: EPA requests comments on editing for clarity and revising the provisions applicable to delinquent requesters.

H. Requests for Waiver and Reduction of Fees

EPA proposes to incorporate a requirement that a requester must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for the fee waiver request. Existing EPA regulations require that requests for expedited processing must be made through a statement certified to be true and correct. *See* 5 U.S.C. 552(a)(6)(E)(vi). Aligning these requirements could streamline the practice and ensure the information a requester submits to EPA presents an accurate representation.

Request for Comment 22: EPA requests comments on incorporating a requirement that a requester must submit a statement, certified to be true and correct to the best of the requester's knowledge and believe, explaining in detail the basis for the fee waiver request.

X. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Submission of a FOIA request is a voluntary action that any member of the public, including small entities, can elect to do and the rule relates to the procedures for submitting and processing a FOIA request for EPA records.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandates as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on Indian Tribal governments or on the relationship between the national government and the Indian Tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that

EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations.

The EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. Although this action does not concern human health or environmental conditions, the EPA identifies and addresses environmental justice concerns by proposing a provision to allow requesters to seek expedited processing of their request if the records sought pertain to an environmental justice-related need and will be used to inform an affected community. See section VII of this preamble.

List of Subjects in 40 CFR Part 2

Environmental protection, Administrative practice and procedure, Confidential business information,

Freedom of information, Government employees.

Michael S. Regan,
Administrator.

For the reasons set out in the preamble, title 40 of the Code of Federal Regulations, part 2, is proposed to be amended as follows.

PART 2—PUBLIC INFORMATION

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 552, 552a, 553; 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717.

■ 2. Subpart A of Part 2 is revised to read as follows:

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

Sec.

- 2.100 General provisions.
- 2.101 Where to file requests for records.
- 2.102 Procedures for making requests.
- 2.103 Responsibility for responding to requests.
- 2.104 Responses to requests.
- 2.105 [Reserved]
- 2.106 Preservation of records.
- 2.107 Fees.
- 2.108 Administrative appeals.
- 2.109 Other rights and services.

Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

§ 2.100 General provisions.

(a) *General.* This Subpart contains the rules that the Environmental Protection Agency (EPA or Agency) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Information routinely provided to the public as part of a regular EPA activity may be provided to the public without following this Subpart.

(b) *Other Regulatory Provisions.* (1) 40 CFR Subpart B contains requirements pertaining to the confidentiality of business information.

(2) 40 CFR part 16 contains requirements pertaining to Privacy Act requests.

(c) *Statutory-based fee schedule programs.* EPA will inform the requester of the steps necessary to obtain records from agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service.

(d) *National FOIA Office.* The Chief FOIA Officer designates the office that performs the duties of the National FOIA Office. The National FOIA Office reports to the Chief FOIA Officer.

(e) *FOIA Public Liaison.* The Chief FOIA Officer designates the FOIA Public Liaisons. The FOIA Public Liaisons report to the Chief FOIA Officer. A FOIA Public Liaison is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. A FOIA Public Liaison is an official to whom a requester can raise concerns about the service the requester received from the FOIA Requester Service Center. The public can find more information about the FOIA Public Liaisons at EPA's website.

(f) *Other record availability.* Records required by FOIA to be made available for public inspection and copying are accessible through EPA's FOIA website, <http://www.epa.gov/foia>. EPA also proactively discloses records and information through the Agency's website, www.epa.gov.

§ 2.101 Where to file requests for records.

(a) Requesters must submit all requests for records from EPA under the FOIA in writing and by one of the following methods:

(1) EPA's FOIA submission website, linked to at www.epa.gov/foia;

(2) An electronic government submission website established pursuant to 5 U.S.C. 552(m), such as *FOIA.gov*;

(3) U.S. Mail sent to the following address: National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW (2310A), Washington, DC 20460; or

(4) Overnight delivery service to National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania NW, Room 7309C, Washington, DC 20460.

(b) EPA will not treat a request submitted by any method other than those listed in § 2.101(a) as a FOIA request, and the Agency will not re-route such a request.

(c) The requester or requester organization must include the full name of their point of contact and their mailing address for EPA to process the request. For all requests, requesters should provide an email address and daytime telephone number whenever possible. For requests submitted through EPA's FOIA submission website or as provided by an electronic government submission website established pursuant to 5 U.S.C. 552(m), requesters must include an email address. For requests submitted through U.S. Mail, the requester must mark both the request letter and envelope "Freedom of Information Act Request."

(d) EPA provides access to all records that the FOIA requires an agency to make regularly available for public inspection and copying. Each office is responsible for determining which of the records it generates are required to be made publicly available and for providing access by the public to them. The Agency will also maintain and make available for public inspection and copying a current subject matter index of such records and provide a copy or a link to the respective website for Headquarters or the Regions. Each index will be updated regularly, at least quarterly, with respect to newly-included records.

(e) All records created by EPA on or after November 1, 1996, which the FOIA requires an agency to make regularly available for public inspection and copying, will be made available electronically through EPA's website, located at <http://www.epa.gov>, or, upon request, through other electronic means. EPA will also include on its website the current subject matter index of all such records.

§ 2.102 Procedures for making requests.

(a) EPA employees may attempt in good faith to comply with oral requests for inspection or disclosure of EPA records that are publicly available under § 2.201(a) and (b), but such requests are not subject to the FOIA or this Part.

(b)(1) Requesters should reasonably describe the records sought in sufficient detail to enable agency personnel to locate them with a reasonable amount of effort.

(2) If EPA determines that the request does not reasonably describe the requested records, EPA will tell the requester either what additional information the requester needs to provide or why the request is otherwise insufficient. EPA will also give the requester an opportunity to discuss and modify the request to meet the requirements of § 2.102(b)(1). If the requester fails to modify the request to reasonably describe the requested records sought within 20 calendar days, EPA will not process the submission and close the request. If the requester does modify the submission to reasonably describe the requested records, EPA will consider the request received as of the date the modification is received by EPA.

(3) Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, the requester should include any file designations or descriptions for the records that the requester wants. The

more specific the requester is about the records or type of records that the requester wants, the more likely EPA will be able to identify and locate records responsive to the request.

§ 2.103 Responsibility for responding to requests.

(a) *In general.* Upon receipt of a FOIA request under § 2.101(a), the National FOIA Office will assign the request to an appropriate office within the Agency for processing. To determine which records are within the scope of a request, an office will ordinarily include only those records in the Agency's possession as of the date that the Agency begins its search. The Agency will inform the requester if any other date is used.

(b) *Authority to issue final determinations.* The Administrator, Deputy Administrators, Assistant Administrators, Deputy Assistant Administrators, Regional Administrators, Deputy Regional Administrators, General Counsel, Deputy General Counsels, Regional Counsels, Deputy Regional Counsels, and Inspector General or those individuals' delegates, are authorized to make determinations required by 5 U.S.C. 552(a)(6)(A).

(c) *Authority to grant or deny fee waivers or requests for expedited processing.* EPA's Chief FOIA Officer or EPA's Chief FOIA Officer's delegates are authorized to grant or deny requests for fee waivers or requests for expedited processing.

(d) *Consultations and referrals.* When a request to EPA seeks records in EPA's possession that originated with another Federal agency, the EPA office assigned to process the request shall either:

(1) In coordination with the National FOIA Office, consult with the Federal agency where the record or portion thereof originated and then respond to the request, or

(2) With the concurrence of the National FOIA Office, refer any record to the Federal agency where the record or portion thereof originated. The National FOIA Office will notify the requester whenever all or any part of the responsibility for responding to a request has been referred to another agency.

(e) *Law enforcement information.* Whenever a requester makes a request for a record containing information that relates to an investigation of a possible violation of law and the investigation originated with another agency, the assigned office, with the concurrence of the National FOIA Office, will refer the record to that other agency or consult with that other agency prior to making any release determination.

(f) *Assigning tracking numbers.* EPA may assign multiple tracking numbers to a FOIA request that contains unrelated parts that will be processed separately by multiple regions or headquarters program offices.

§ 2.104 Responses to requests.

(a) *Timing of response.* (1) Consistent with 5 U.S.C. 552(a)(6)(A) and upon any request for records made pursuant to this subpart, EPA shall determine within 20 working days after receipt of any such request whether to comply with such request and shall immediately notify the person according to this section.

(2) A requester submitting a request electronically must do so before 5:00 p.m. Eastern Time for the Agency to consider the request as received on that date, and a request submitted electronically at or after 5:00 p.m. Eastern Time will be considered received by the National FOIA Office on the next business day.

(3) The timeframe for response may be extended if unusual circumstances exist per paragraph (f) of this section, including when EPA asserts unusual circumstances and arranges an alternative timeframe with the requester, or exceptional circumstances exist per paragraph (g) of this section. The timeframe for response may be tolled per paragraph (e) of this section.

(b) *Agency failure to respond.* If EPA fails to respond to the request within the statutory time-period, or any authorized extension of time, the requester may seek judicial review to obtain the records without first making an administrative appeal.

(c) *Acknowledgment of request.* On receipt of a request, the National FOIA Office ordinarily will send a written acknowledgment advising the requester of the date the Agency received the request and of the processing number assigned to the request for future reference.

(d) *Multitrack processing.* The Agency uses three or more processing tracks by distinguishing between simple and complex requests based on the amount of work, time needed to process the request, or both, including limits based on the number of pages involved. The Agency will advise the requester of the processing track in which the Agency placed the request and the limits of the different processing tracks. The Agency may place the request in a slower track while providing the requester with the opportunity to limit the scope of the request to qualify for faster processing within the specified limits of a faster track. If the Agency places the request

in a slower track, the Agency will contact the requester.

(e) *Tolling the request.* EPA shall not toll the processing time-period except:

(1) The Agency may toll the processing time-period one time while seeking clarification from the requester; or

(2) The Agency may toll the processing time-period as many times as necessary to resolve fee issues.

(f) *Unusual circumstances.* (1) When the Agency cannot meet statutory time limits for processing a request because of “unusual circumstances,” as defined in the FOIA, and the time limits are extended on that basis, the Agency will notify the requester in writing, as soon as practicable, of the unusual circumstances and of the date by which processing of the request should be completed.

(2) If the 20 working-day period is extended, EPA will give the requester an opportunity to limit the scope of the request, modify the request, or agree to an alternative time-period for processing, as described by the FOIA.

(3) EPA will provide contact information for its FOIA Public Liaison to assist in the resolution of any disputes between the requester and the Agency, and the Agency will notify the requester of their right to seek dispute resolution services from the Office of Government Information Services within the National Archives and Records Administration.

(g) *Expedited processing.* (1) EPA will take requests or appeals out of order and give expedited treatment whenever EPA determines that such requests or appeals involve a compelling need, an environmental justice-related need, or both.

(i) A compelling need is defined as either:

(A) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) An urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person primarily engaged in disseminating information to the public.

(ii) For purposes of this provision, an environmental justice-related need means a pressing need to inform a community that is potentially experiencing disproportionately high and adverse human health or environmental effects.

(A) The Agency will consider whether the requested records relate to actual or alleged Federal government activity,

including environmental information or data.

(B) The Agency will consider the requester’s ability and intention to effectively convey the information to members of the affected community, taking into account, for example, the requester’s relationship to the community or its members, expertise in the subject matter, or other relevant knowledge and experiences.

(C) A pressing need to inform an affected community does not include requests where the disclosure is primarily in the commercial interest of the requester.

(D) If the Agency grants a request for expedited processing under paragraph (g)(1)(ii) of this section, the Agency will also waive fees established under § 2.107(f) for the request.

(2) Requesters must make a written request for expedited processing at the time of the initial request for records or at the time of appeal.

(3) If the requester seeks expedited processing, the requester must submit a statement, certified to be true and correct to the best of the requester’s knowledge and belief, explaining in detail the basis for the request.

(i) For example, if the requester fits within the category described in paragraph (g)(1)(i)(B) of this section and is not a full-time member of the news media, the requester must establish that they are a person whose primary professional activity or occupation is information dissemination, although it need not be the requester’s sole occupation.

(ii) If the requester fits within the category described in paragraph (g)(1)(i)(B) of this section, the requester must also establish a particular urgency to inform the public about the government activity involved in the request, beyond the public’s right to know about government activity generally.

(4) Within 10 calendar days from the date of the request for expedited processing, the Chief FOIA Officer, or the Chief FOIA Officer’s delegates, will decide whether to grant the request and will notify the requester of the decision. If the Agency grants the request for expedited processing, the Agency will give the request priority and will process the request as soon as practicable. If the Agency denies the request for expedited processing, the Agency will act on any appeal of that decision expeditiously.

(h) *Grants of requests.* Once the Agency determines to grant a request in whole or in part, it will release the records or parts of records to the requester and notify the requester of any

applicable fee charged under § 2.107. The office will annotate records released in part, whenever technically feasible, with the applicable FOIA exemption or exemptions at that part of the record from which the exempt information was deleted.

(i) *Adverse determinations of requests.* When the Agency makes an adverse determination, the Agency will notify the requester of that determination in writing. Adverse determinations include:

(1) A decision that the requested record is exempt from disclosure, in whole or in part;

(2) A decision that the information requested is not a record subject to the FOIA;

(3) A decision that the requested record does not exist or cannot be located;

(4) A decision that the requested record is not readily reproducible in the form or format sought by the requester;

(5) A determination on any disputed fee matter, including a denial of a request for a fee waiver; or

(6) A denial of a request for expedited processing.

(j) *Content of final determination letter.* The appropriate official will issue the final determination letter in accordance with § 2.103(b) and will include:

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

(2) A brief statement of the reason or reasons for the denial, including an identification of records being withheld (either individually or, if a large number of similar records are being denied, described by category) and any FOIA exemption applied by the office in denying the request;

(3) An estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through annotated deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that an adverse determination may be appealed under § 2.108 and description of the requirements for submitting an administrative appeal; and

(5) A statement that the requester has the right to seek dispute resolution services from an EPA FOIA Public Liaison or the Office of Government Information Service.

§ 2.105 [Reserved]

§ 2.106 Preservation of records.

The Agency will preserve all correspondence pertaining to the FOIA requests that it receives, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 4.2. Records shall not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 2.107 Fees.

(a) *In general.* The Agency will charge for processing requests under the FOIA in accordance with this section, except where fees are limited under paragraph (g) of this section or where a waiver or reduction of fees is granted under paragraph (n) of this section.

(b) *How to pay fees.* Requesters must pay fees electronically at <https://www.pay.gov/> by check or money order made payable to the Treasury of the United States.

(c) *Contractor rates.* When any search, review, or duplication task is performed by a contractor, EPA will charge for staff time at the contractor's actual pay rate, but not exceeding the rates set under paragraph (f)(2)(ii) of this section.

(d) *Rounding staff time.* Billable staff time is calculated by rounding to the nearest quarter-hour.

(e) *Types of requests for fee purposes.* For purposes of this section, the five types of request categories are defined in paragraphs (e)(1) through (5) of this section. These request categories will be charged for the types of fees as noted, subject to the restrictions in paragraph (g) of this section and unless a fee waiver has been granted under paragraph (n) of this section. Paragraph (f) of this section defines and explains how the Agency calculates each type of fee.

(1) *Commercial-use Request.* (i) Commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers the requester's commercial, trade, or profit interests, which can include furthering those interests through litigation. The Agency will determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the Agency has reasonable cause to doubt a requester's stated use, the Agency will provide the

requester a reasonable opportunity to submit further clarification.

(ii) For a commercial-use request, the Agency will charge the requester for search, review, and duplication.

(2) *Educational institution request.* (i) Educational institution means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(ii) For an educational institution request, the Agency will charge the requester for duplication, except that the Agency will furnish the first 100 pages of duplication at no charge.

(3) *Noncommercial scientific institution request.* (i) Noncommercial scientific institution means an institution not operated on a "commercial" basis, as defined in paragraph (e)(1) of this section, and that is operated solely for conducting scientific research that is not intended to promote any particular product or industry. To be in this category, a requester must show that a qualifying institution authorizes the request, that the requester makes the request under the auspices of the qualifying institution, and that the requester does not seek the records for a commercial use but to further scientific research.

(ii) For a noncommercial scientific institution request, the Agency will charge the requester for duplication, except that the Agency will furnish the first 100 pages of duplication at no charge.

(4) *Representative of the news media requests.* (i) Representative of the news media has the meaning provided at 5 U.S.C. 552(a)(4)(A)(ii).

(ii) For representative of the news media requests, the Agency will charge a requester for duplication, except that the Agency will furnish the first 100 pages of duplication at no charge.

(5) *Other requests.* (i) Other requesters are requesters that are not commercial-use requesters, educational institutions, noncommercial scientific institutions, or representatives of the news media.

(ii) The Agency will charge other requesters for search and duplication, except that the Agency will furnish without charge the first two hours of search time and the first 100 pages of duplication.

(f) *Types of fees.* Paragraphs (f)(1) through (4) of this section are definitions of the types of fees and explanations of how the Agency calculates each type of fee.

(1) *Direct costs.* Direct costs means those expenses that the Agency actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work and the cost of operating duplication equipment. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(2) *Search.* (i) Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Offices will ensure that searches are done in the most efficient and least expensive manner reasonably possible. For example, offices will not search line-by-line where duplicating an entire document would be quicker and less expensive. The Agency will charge for time spent searching even if no responsive records are found or if the records are located but are determined to be exempt from disclosure.

(ii) Search fees will equal the direct costs of search. Personnel will bill their time at the following rates using the current Office of Personnel Management General Schedule (GS) pay table for Washington-Baltimore-Arlington, DC-MD-VA-WV-PA. The current calculations of these rates may be found at www.epa.gov/foia.

(A) GS-12 level or below (or equivalent pay scale): The average of GS-9 to GS-12 (Step 5), plus 16 percent, rounded to the nearest \$1 increment per quarter hour.

(B) GS-13 level or above (or equivalent pay scale): The average of GS-13 to GS-15 (Step 5), plus 16 percent, rounded to the nearest \$1 increment per quarter hour.

(iii) For requests that require the retrieval of records stored by an agency at a Federal Records Center operated by NARA, additional costs will be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(3) *Review.* (i) Review means the examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure. It also includes processing any record for disclosure (for example,

doing all that is necessary to redact it and prepare it for disclosure). Review costs are recoverable even if a record ultimately is not disclosed. Review time includes time spent considering any formal objection to disclosure made by a business submitter requesting confidential treatment but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(ii) The Agency will charge review fees only for the initial record review (that is, the review done when an office is deciding whether an exemption applies to a particular record or portion of a record at the initial request level). The Agency will not charge for review at the administrative appeal level for an exemption already applied. However, the Agency may again review records or portions of records withheld under an exemption that the Agency subsequently determines not to apply to determine whether any other exemption not previously considered applies; the Agency will charge costs of that review when a change of circumstances makes it necessary. The Agency will charge review fees at the same rates as those charged for a search under paragraph (f)(2)(ii) of this section.

(4) *Duplication.* (i) Duplication means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape, disk, or compact disk), among others. The Agency will honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

(ii) For either a photocopy or a computer-generated printout of a record (no more than one copy of which need be supplied), the fee will be fifteen (15) cents per page. For electronic forms of duplication, other than a computer-generated printout, offices will charge the direct costs of that duplication. Such direct costs will include the costs of the requested electronic medium on which the copy is to be made and the actual operator time and computer resource usage required to produce the copy, to the extent they can be determined. The Agency will charge operator time at the same rates as those charged for search under paragraph (f)(2)(ii) of this section.

(g) *Limitations on charging fees.*

(1) The Agency will charge no fee when a total fee calculated under paragraph (c) of this section is less than fourteen times the rate in paragraph (f)(2)(ii)(B) of this section rounded to the nearest \$5.00 increment for any request.

The current calculation of this threshold may be found at www.epa.gov/foia.

(2) The restrictions in paragraphs (e)(1)(ii), (2)(ii), (3)(ii), (4)(ii), and (5)(ii) and minimum fee threshold in (g)(1) of this section work together. This means that for requesters other than those seeking records for a commercial use, the Agency will charge no fee unless the cost of search more than two hours plus the cost of duplication in excess of 100 pages totals more than fourteen times the rate in paragraph 2.107(f)(2)(ii)(B) of this section rounded to the nearest \$5.00 increment. The current calculation of this threshold may be found at www.epa.gov/foia.

(3) If EPA fails to comply with the FOIA's time limits for responding to a request, EPA will not charge search fees, or, in the instance of requesters described in paragraphs (e)(1) through (5) of this section, duplication fees, except as follows:

(i) If EPA determined that unusual circumstances as defined by the FOIA apply and the Agency provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 working days;

(ii) If EPA determined that unusual circumstances as defined by the FOIA apply and more than 5,000 pages are necessary to respond to the request, EPA may charge search fees, or, in the case of requesters described in paragraphs (e)(1) through (5) of this section, may charge duplication fees, if the following steps are taken: EPA must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the EPA must have discussed with the requester by written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii), which includes notification to the requester of the availability of the FOIA Public Liaison and the right to seek dispute resolution services from the Office of Government Information Services. If this exception is satisfied, EPA may charge all applicable fees incurred in the processing of the request; or

(iii) If a court determines that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(h) *Assurance of payment and advanced payment of fees.* (1) If EPA determines that the actual or estimated fees exceed the amount in paragraph

(g)(1) of this section, the Agency will notify the requester of the actual or estimated amount, toll the processing clock, and will do no further work on the request until the requester agrees in writing to pay the anticipated total fee.

(2) If EPA determines that the actual or estimated fees exceed twenty-five times the amount in paragraph (f)(2)(ii)(B) of this section, the Agency will notify the requester of the actual or estimated amount, and may toll the processing clock and do no further work on the request until the requester pays the estimated or actual fee. The current calculation of this amount may be found at www.epa.gov/foia.

(3) After providing the requester with estimated fee amounts, EPA will provide the requester with an opportunity to discuss with the Agency how to modify the request to meet the requester's needs at a lower cost.

(4) EPA calculates the estimated or actual fee cumulatively for multi-component requests. If only a part of the fee can be estimated readily, the Agency will advise the requester that the estimated fee may be only a portion of the total fee.

(5) If, after the requester provided an assurance of payment or paid an initially estimated or actual amount of fees, the Agency increases the estimated or actual amount of fees, the Agency will notify the requester, stop further processing of the request, and toll any deadline for responding to the request. Once the requester provides assurance of payment or pays the fees, the time to respond to the request will resume from where it was at the date of the tolling notification.

(i) *Charges for other services.* Although not required to provide special services, if EPA chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged to the requester. Examples of such services include certifying that records are true copies, sending records by other than EPA's electronic FOIA management system or U.S. Mail, or providing multiple copies of the same document.

(j) *Charging interest.* EPA may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. The Agency will assess interest charges at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until the Agency receives payment. EPA will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset. The Agency will assess no penalty against

FOIA requesters for exercising their statutory right to ask the Agency to waive or reduce a fee or to dispute a billing. If a fee is in dispute, the Agency will suspend penalties upon notification.

(k) *Delinquent requesters.* (1) If a requester fails to pay all fees charged to the requester under the FOIA by EPA or any other Federal agency within 60 calendar days of the date the fees were billed, the Agency will treat the requester as delinquent. The Agency may share information regarding delinquent requesters with other Federal agencies.

(2) Before EPA continues processing a pending FOIA request or begins processing any new FOIA requests from a delinquent requester, the delinquent requester must pay the full amount due, plus any applicable interest, on that prior request and make an advance payment of the full amount of any anticipated fee.

(3) When the Agency requires payment under paragraph (h)(2) of this section, the request will not be considered received until the required payment is made. If the requester does not pay the outstanding balance and the advance payment within 30 calendar days after the date of EPA's fee determination, the request will be closed.

(l) *Aggregating requests.* If a requester or a group of requesters acting in concert submit two or more requests that involve related matters and paragraphs (l)(1), (l)(2), or both of this section, apply then the Agency may aggregate those requests and charge fees accordingly. Multiple FOIA requests involving unrelated matters shall not be aggregated. An aggregated group of FOIA requests will be treated as a single FOIA request under this subpart, including evaluation of whether unusual circumstances exist.

(1) The Agency reasonably believes that if the requests constituted a single request, such a request would result in unusual circumstances pursuant to § 2.104(f); or

(2) The Agency reasonably believes that the requester or requesters acting together are attempting to divide a request into a series of requests for the purpose of avoiding fees. The Agency may presume that such requests have been submitted to avoid fees if submitted within a 30-day period. When requests are submitted by a period greater than 30 days, the Agency will aggregate them only if there exists a solid basis for determining that aggregation is warranted under all the circumstances involved.

(m) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any other statute that specifically requires an agency to set and collect fees for particular types of records. When records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, EPA will inform requesters of the steps for obtaining records from those sources so that they may do so most economically.

(n) *Waiver or reduction of fees.* (1) A request for a waiver or reduction of FOIA fees must be made at the time of the initial submission of a FOIA request. An untimely request for a waiver or reduction of fees will be denied. If the requester seeks a waiver or reduction of fees, the requester must submit a statement, certified to be true and correct to the best of the requester's knowledge and belief, explaining in detail the basis for making the request for such a fee waiver or reduction.

(2) Requests for the waiver or reduction of fees must address the factors listed in paragraphs (n)(4) through (6) of this section, as far as they apply to each request. EPA components will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in deciding whether to grant waivers or reductions of fees and will consult the appropriate EPA components as needed. Requesters must submit requests for the waiver or reduction of fees along with the request.

(3) When only some of the requested records satisfy the requirements for a waiver of fees, the Agency will grant a waiver for only those records.

(4) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section when the Agency determines, based on all available information, that disclosure of the requested information is in the public interest because it is:

- (i) Likely to contribute significantly to public understanding of the operations or activities of the government, and
- (ii) Is not primarily in the commercial interest of the requester.

(5) To determine whether the request meets the first fee waiver requirement, the Agency will consider the following factors:

(i) *The subject of the request.* Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the Federal government, with a

connection that is direct and clear, not remote.

(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 the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public’s understanding.

(iii) The contribution to an understanding of the subject by the public is likely to result from the disclosure. Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The Agency will consider a requester’s expertise in the subject area and ability and intention to effectively convey information to the public. The Agency presumes that a representative of the news media will satisfy this consideration.

(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 in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The Agency will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.

(6) To determine whether the request meets the second fee waiver requirement, the Agency will consider the following factors:

(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 Agency will consider any commercial interest of the requester (with reference to the definition of “commercial use request” in paragraph (e)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the

requested disclosure. The Agency will give the requester an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure.* Whether any 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 justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The Agency ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. The Agency will not presume that disclosure to data brokers or others who merely compile and market government information for direct economic return is to primarily serve the public interest.

§ 2.108 Administrative appeals.

(a) *Appeals of adverse determinations.* To appeal an adverse determination, a requester must submit an appeal in writing within 90-calendar days from the date of the letter communicating the Agency’s adverse determination, and by one of the following methods:

(1) EPA’s FOIA submission website, linked to at www.epa.gov/foia;

(2) U.S. Mail sent to the following address: National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW (2310A), Washington, DC 20460; or

(3) Overnight delivery service to National FOIA Office, U.S. Environmental Protection Agency, 1200 Pennsylvania NW, Room 7309C, Washington, DC 20460.

(b) Requesters submitting appeals electronically must do so before 5:00 p.m. Eastern Time for the Agency to consider the appeal as received on that date, and appeals submitted electronically at or after 5:00 p.m. Eastern Time will be considered received by the National FOIA Office on the next business day.

(c) The appeal letter may include as much or as little related information as the requester wishes. The appeal letter must clearly identify the office’s determination that is being appealed and the assigned request tracking number. For quickest handling, the requester must mark their appeal letter and its envelope with “Freedom of Information Act Appeal.”

(d) *Authority to make decision on appeal.* Unless the Administrator directs otherwise, the General Counsel or the General Counsel’s delegate will act on behalf of the Administrator on all appeals under this section, except that:

(1) The Counsel to the Inspector General will act on any appeal where the Inspector General or the Inspector General’s delegate has made the final adverse determination; however, if the Counsel to the Inspector General has signed the final adverse determination, the General Counsel or the General Counsel’s delegate will act on the appeal;

(2) An adverse determination by the Administrator on an initial request will serve as the final action of the Agency; and

(3) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(e) *Timing of decision on appeal.* EPA will make the decision on the appeal in writing, normally within 20 working days of its receipt by the National FOIA Office.

(1) A decision affirming an adverse determination in whole or in part will contain a statement of the reason or reasons for the decision, including any FOIA exemption or exemptions applied, inform the requester of dispute resolution services offered by the Office of Government Information Service of the National Archives and Records Administration, and inform the requester of the FOIA provisions for judicial review of the decision.

(2) If the Agency reverses or modifies the adverse determination on appeal, the Agency will attach the requested information that the Agency determined on appeal to be releasable, or the Agency will return the request to the appropriate office so that the office may reprocess the request in accordance with the appeal decision.

(f) *When appeal is required.* If the requester wishes to seek judicial review of any adverse determination, the requester must first appeal that adverse determination under this section, except when EPA has not responded to the request within the applicable time-period. In such cases, the requester may seek judicial review without making an administrative appeal.

§ 2.109 Other rights and services.

Nothing in this Subpart shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

[FR Doc. 2022–24678 Filed 11–16–22; 8:45 am]

BILLING CODE 6560–50–P