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Office of
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Secretariat

Freedom of Information



EPA

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CONTENTS

	<u>Tab/Page</u>
<u>CHAPTER 1: GENERAL INFORMATION</u>	A 1-1
1. Purpose	1-1
2. Policy	1-1
3. Authority	1-1
4. Definitions and Options	1-1
5. Time Requirements	1-3
6. Responsibilities	1-4
7. Delegation of Authority	1-5
8. Accountability	1-6
9. Overview of the FOIA Process	1-7
<u>CHAPTER 2: LOGGING, ROUTING AND FILE-KEEPING OF FOIA REQUESTS</u>	B 2-1
1. FOI Office Procedures for Initial Handling of Requests	2-1
2. Requests Addressed Directly to Action/Field Offices	2-2
3. FOIA Files and Request Log.....	2-3
<u>CHAPTER 3: GUIDANCE TO ACTION OFFICES ON INITIAL RESPONSE TO REQUESTS</u>	C 3-1
1. Make Sure the Request Falls Under FOIA	3-1
a. Guidelines	3-1
b. Oral Requests	3-1
c. Requests from Other Federal Agencies	3-2
d. Requests from Congress	3-2
e. Requests from General Accounting Office	3-2
f. Future Records	3-2
g. Personal Records of Employees ...	3-3
2. Responding to FOIA Requests	3-6
a. Description of the Records	3-6
b. Voluminous Records.....	3-6
c. Locate the Records	3-6

CONTENTS
(continued)

	<u>Tab/Page</u>
<u>CHAPTER 4: FEES AND FEE WAIVERS</u>	D 4-1
1. General Procedures	4-1
a. Initial Review	4-1
b. Categories of Request.....	4-2
c. Determining the Request Category ..	4-2
d. Fees to be Charged.....	4-3
e. Evaluating the Determination.....	4-4
f. Calculating the Fees.....	4-5
g. Costs Not Chargeable.....	4-7
h. Assuring Payment	4-8
i. Prepayment of Fees.....	4-8
j. Billing	4-9
2. Public Interest Fee Waivers or Reductions	4-14
a. General Requirement	4-14
b. Policy	4-14
c. Procedures	4-14
d. Assistance in Making Decisions	4-16
e. Criteria	4-16
f. Reduction in Fees	4-21
g. Public Participation Requirements	4-22
h. Appeals	4-22
i. Court Review of Denials	4-23
3. Administrative Fee Waivers	4-23
4. Delinquent Requesters	4-23
<u>CHAPTER 5: RELEASING RECORDS</u>.....	E 5-1
1. Who May Release	5-1
2. What May Be Released	5-1
3. Time Frame	5-2
4. Preparing Release Letters	5-3
5. Recordkeeping	5-4
<u>CHAPTER 6: WITHHOLDING RECORDS</u>	F 6-1
1. Who May Withhold	6-1
2. What May Be Withheld	6-1

CONTENTS
(continued)

	<u>Tab/Page</u>
3. Prior Disclosure	6-2
4. Time Frame	6-3
5. Denial Letter	6-4
6. Partial Denial	6-6
7. Recordkeeping	6-7
<u>CHAPTER 7: EXEMPTIONS AND EXCLUSIONS</u>	G 7-1
1. Overview	7-1
2. The Nine Exemptions	7-2
a. Exemption 1 National Defense/ Foreign Policy	7-2
b. Exemption 2 Internal Agency Rules.	7-2
c. Exemption 3 Information Exempt under Other Statutes	7-3
d. Exemption 4 Trade Secrets/Commercial Financial Information	7-3
e. Exemption 5 Inter- and Intra-Agency Memoranda	7-3
f. Exemption 6 Personal Privacy	7-8
g. Exemption 7 Records Compiled for Law Enforcement Purposes	7-12
h. Exemption 8 Records of Financial Institutions	7-14
i. Exemption 9 Geological/Geophysical Information	7-14
3. Exclusions	7-14
<u>CHAPTER 8: BUSINESS CONFIDENTIALITY</u>	H 8-1
1. Authority	8-1
2. Introduction	8-1
3. Action by EPA Office to Determine Confidentiality	8-2
4. Final Confidentiality Determination by EPA Legal Office	8-5
5. Previous Confidentiality or Class Determination	8-6
6. Disclosure with Consent of Affected Business	8-6
7. Disclosure of CBI Other than Under FOIA	8-7

CONTENTS
(Continued)

	<u>Tab/Page</u>
<u>CHAPTER 9: DISCRETIONARY RELEASE</u>	I 9-1
1. When to Use	9-1
2. When Not to Use	9-1
3. Discretionary Release on Appeal	9-1
<u>CHAPTER 10: APPEALS</u>	J 10-1
1. Right to Appeal	10-1
2. Time Frame for Receiving Appeals.....	10-1
3. Time Frame for Responding to Appeals..	10-1
4. Procedure.....	10-2
5. Issuing Determinations.....	10-3
6. Judicial Review.....	10-4
<u>CHAPTER 11: ANNUAL REPORT AND RECORDKEEPING</u>	K 11-1
1. Annual Report to Congress	11-1
2. Evaluations	11-3
3. Records Retention Schedules	11-4
<u>APPENDIX I: SAMPLE LETTERS/MEMOS</u>	L
<u>APPENDIX II: SAMPLE FORMS</u>	M
<u>APPENDIX III: FOIA STATUTE</u>	N
<u>APPENDIX IV: EPA REGULATIONS</u>	O
<u>APPENDIX V: RECORDS RETENTION SCHEDULES</u>	P
<u>APPENDIX VI: CONTACT LIST OF FOI PERSONNEL AT</u> <u>EPA</u>	Q

CHAPTER 1: GENERAL INFORMATION**1. PURPOSE**

This manual provides guidance on policy and procedures for implementing EPA's Freedom of Information Act (FOIA)/Public Information Regulations (Title 40 CFR, Chapter 1, Part 2).

2. POLICY

It is the Agency's policy to make the fullest possible disclosure of information without unjustifiable expense or unnecessary delay to any requester.

All documents containing policies, procedures and guidance relating to public access to Agency records must be submitted to the Agency Freedom of Information (FOI) Officer for review and concurrence prior to issuance and implementation.

3. AUTHORITY

- a. The Freedom of Information Act is found at 5 U.S.C. 552.
- b. EPA's regulations concerning implementation of FOIA are found in Title 40, Code of Federal Regulations, Chapter 1, Part 2.

4. DEFINITIONS & OPTIONS**a. Definitions**

- 1) What is a FOIA request? A FOIA request is a written request for records held or believed to be held by EPA. The request need not specifically refer to the Freedom of Information Act.
- 2) What is an agency record? "Record" means any document, writing, photograph, sound or magnetic recording, drawing, computerized records (e.g. floppy disks, databases, etc.), or other similar thing by which information has been preserved, from which the information can be retrieved and copied, and over which EPA has possession or control. It may include

copies of the records of other Federal agencies. The term includes draft documents and may include handwritten notes (except personal notes, see Chapter 3, Section 1.g).

- 3) Who can make a FOIA request? Requesters under FOIA can include any individual (including non-U.S. citizens), corporation or association, public interest group, and local, State or foreign government.
- 4) What requests are not treated under FOIA. Requests from Federal agencies, the General Accounting Office, or the Congress (i.e., the Speaker of the House, the President of the Senate, or the Chair of a committee or subcommittee) are not FOIA requests (see Chapter 3, Section 1 for more information).

b. **Options for Handling FOIA Requests.** Generally speaking, an office has four options in handling a FOIA request for existing, located records. These options may be applied singularly or in combination for a given request:

- 1) Releasing documents. All EPA records will be made available to the requester upon receipt of a request (see Chapter 5) unless they fall under one of the nine exemptions or the exclusion section of FOIA.
- 2) Withholding documents. An office may withhold records only if they fall under one of the nine exemptions or the exclusion section of FOIA (see Chapter 7).
- 3) Partial withholding of documents. If documents contain both exempt and non-exempt information, the non-exempt information must be disclosed if the exempt material is "reasonably segregable" and the necessary deletions can be made without making the document unintelligible (see Chapter 6, Section 6).
- 4) Discretionary release. An office may release requested records that fall under Exemptions 2, 5, and 7 (with the exception of 7(C) or (D)) of FOIA (e.g. internal agency rules, inter- and intra-agency

memos, and records or information compiled for law enforcement purposes). As a matter of policy, the Agency encourages disclosure of these records if no important Agency purpose is served by withholding, (i.e., release would not cause significant harm to the Agency). (See Chapter 9.)

5. TIME REQUIREMENTS

a. **Initial Determinations.** Ordinarily, there is a 10-workday time limit in which to make an initial determination on whether to release or withhold records requested under FOIA, with the first day being the date when the Agency or Regional FOI Office receives the request. Excluded from that period is any time taken by the requester to provide EPA with additional information needed to identify the records or the time required by the Agency to secure prepayment of fees or assurance of payment.

b. **Appeals.** Any person whose request for one or more existing, located EPA records has been denied in whole or in part has a right to appeal the determination. This appeal should be mailed to the Agency FOI Office no later than 30 calendar days after the day the requester receives the Agency's denial. The Office of General Counsel (OGC) then has 20 workdays to review the appeal and to determine whether the records were properly withheld.

c. **Extensions.** An extension of up to 10 workdays total may be taken on the due date for the initial determination or appeal determination. For the initial determination, an extension may be taken only if the search involves extensive records, physically distant records, or consultation with another agency or another office within the Agency. Total extension time taken on initial determinations and appeal determinations may not exceed 10 workdays.

For example, if an extension of three workdays is taken for issuing the initial determination, an extension taken during the appeal period can only be for seven workdays or less. If an initial determination cannot be issued in 10 workdays, the action office should provide written notice to the requester concerning the status of the request by the tenth day. The written notice should inform the requester that an extension is being taken,

cite the reasons for the extension, and give the date by which the Agency reply will be made.

6. RESPONSIBILITIES

a. **Agency FOI Office.** Coordinates and oversees the Agency FOIA program, develops and reviews FOIA procedures, policies and guidance, provides advice to Agency FOI personnel in the program and Regional offices, coordinates initial fee waiver decisions, prepares the Annual FOIA Report to Congress, routes and tracks FOIA requests, monitors Agency FOIA activities, maintains official and public FOIA files, monitors quality and timeliness of responses, and provides training or training opportunities to Agency FOI personnel.

b. **Office of General Counsel (OGC).** Provides legal advice and training on FOIA, issues appeal determinations, final confidentiality determinations, and fee waiver appeal determinations, drafts FOIA regulations, provides concurrence on application of "Glomar" responses and reliance on FOIA exclusions and serves as liaison between EPA and the Department of Justice on FOIA litigation.

c. **Office of Communications, Education and Public Affairs.** Makes discretionary release determinations on Agency documents on appeal.

d. **Program Office FOI Coordinators.** Route requests to appropriate action offices within their program, track FOIA requests as to timeliness, monitor quality of response, and provide guidance to program personnel (with help if needed from the Agency FOI Office or OGC).

e. **Regional FOI Offices.** Route requests to appropriate action offices within their Region, track FOIA requests, provide guidance to Regional personnel (with help if needed from the Agency FOI Office), coordinate initial fee waiver decisions, submit materials for the annual FOIA report, keep official FOIA files, monitor quality and timeliness of responses, and provide training and current information to Regional FOI personnel.

f. **Offices of Regional Counsel.** Provide legal advice and guidance on FOIA questions and initial fee waiver decisions to regional personnel, issue final determinations on business

confidentiality in cases where authority has been delegated to them and provide legal counsel on FOIA litigation.

g. **Action Offices.** Analyze requests, locate records, contact requester as needed, examine records, delete exempt material, prepare and issue responses, release records, and when appropriate, prepare and issue Bill for Collection, and issue initial fee waiver decisions.

h. **Financial Management Offices.** Ensure all bills for collection related to FOIA requests are recorded promptly. Prepare follow-up billing for all uncollected FOIA requests. Reconcile FOIA receivables against information provided by FOI Offices. Collect fees related to FOIA requests.

7. DELEGATION OF AUTHORITY

a. **Authority to Issue FOIA Policies and Procedures.** The Agency Freedom of Information Officer is the Agency official authorized to issue policies, procedures and guidance relating to the Freedom of Information Act Program. All Headquarters and Regional Program documents containing policies, procedures and guidance relating to public access to Agency records must be submitted to the Agency FOI Officer for review and concurrence prior to issuance and implementation.

b. **Authority to Issue Initial Determinations.** The authority to make initial determinations regarding the release or withholding of materials, waiver of fees, or extension of due dates for responses is delegated to the:

- o Deputy Administrator;
- o Assistant and Associate Administrators;
- o Heads of HQ Staff Offices;
- o Regional Administrators;
- o General Counsel; and
- o Inspector General.

This authority (found in 40 CFR 2.113(b) and EPA Delegation 1-30) may be redelegated to all EPA employees, with the exception that the authority to issue initial denials of records may not be redelegated below the Division Director or equivalent level. However, the authority to issue denials based solely on a determination by the action office that the information requested

may be entitled to confidential treatment (40 CFR 2.204(d)(1)) may be redelegated to any Agency employee.

Any redelegation of authority must be written and copies of the official redelegation must be kept on file at the Agency or Regional FOI Office and with the FOI Coordinator (if appropriate). An example of a redelegation memorandum is available from the Agency FOI Office.

c. Authority to Issue Determinations on Appeals

- 1) The General Counsel is the Agency Official authorized to make legal determinations on written appeals of initial denials of records and fee waiver denials. This authority has been redelegated in writing to the Deputy General Counsel and to the Associate General Counsel for Contracts, Information and General Law. These redelegations are on file in the Office of General Counsel and the Agency FOI Office.
- 2) The Associate Administrator for the Office of Communications Education and Public Affairs is the Agency official authorized to review records for discretionary release on appeal as required (see Chapter 9). This authority may be redelegated to the Deputy Associate Administrator for the Office of Communications, Education and Public Affairs.

8. ACCOUNTABILITY

Agency employees will be held accountable for their decisions with respect to the release or withholding of information, the waiver of payment, and/or the appeals process. The FOIA provides a special procedure whenever a court orders the production of EPA records improperly withheld from the complainant and issues a written finding that the circumstances surrounding the withholding raise questions of whether the responsible employees acted arbitrarily or capriciously. Under this procedure the Special Counsel of the Merit Systems Protection Board will promptly initiate a proceeding to determine whether disciplinary action is warranted against the employee primarily responsible for the withholding.

The Whistleblower Protection Act of 1989 also provides that the Special Counsel of the Merit Systems Protection Board will investigate arbitrary and capricious withholding under the FOIA. This provision does not require an administrative or court decision prior to investigation. Sanctions for violation of this provision may include removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000.

9. OVERVIEW

This section provides a checklist for responding to EPA's FOIA process. Offices may find this useful as a summary of the steps in the process.

a. Checklist for Responding to a FOIA Request

1) Read the request.

- o Is it a request for records (i.e., a FOIA request) or is it a request for information (i.e., a public inquiry)?
- o Does it "reasonably describe" the record(s) sought? That is, do you know what the requester wants?
- o Is the request overly broad in scope or is it well defined?
- o Would discussion with the requester help to define, clarify or narrow the scope of the request?

2) Determine the Category of the Request.

- o Is the identity of the requester clear?
- o How will the requester use the records requested?

- o Does the identity of the requester or the use of the documents requested need further clarification?
- 3) Resolve questions about fees with the requester.
- o Has the requester indicated a willingness to pay the cost of searching for, reviewing and copying records, as appropriate?
 - o Has the requester asked for a fee waiver?
 - o Should you obtain prepayment or an assurance of payment?
 - o Have you charged the appropriate fees for the assigned category?
- 4) Identify and locate the records.
- o Do the records exist?
 - o Are the records in the Agency's possession and control?
 - o Should another agency be consulted and/or deferred to?
 - o Was your search for the records adequate to ensure that all records within the scope of the request were identified and located?
 - o If your office and another EPA office both have copies of the records, which one would be the more appropriate office to determine the release status of the records?
- 5) Review the records.
- o Are there any exempt records or portions of records?
 - o Do any of the records contain confidential business information (CBI)?

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- 6) Prepare the response.
 - o Itemize records or portions of records to be disclosed.
 - o Itemize records or portions of records to be withheld and cite the statutory authority for withholding them (i.e., applicable exemption(s)).
 - o Include names and titles or positions of each person responsible for the denial.
 - o Include procedures for appealing the denial.
- 7) Purge exempt portions of information.
 - o Prepare the records for disclosure/non-disclosure, segregating exempt records or portions of records from non-exempt portions.
- 8) Prepare the Bill for Collection Form (if the fee equals \$25.00 or more).
- 9) Issue the response, enclosing records to be disclosed and the Bill for Collection Form (if appropriate).
 - o Maintain one copy of the response and bill (if appropriate) for the action office file.
 - o Send two copies of the response and one copy of the bill (if appropriate) to the FOI Officer.
 - o Send one copy of the response to the FOI Coordinator (if appropriate).
 - o Promptly send three copies of the bill (if appropriate) to the Servicing Financial Office, along with a copy of the initial request and response.
 - o Maintain a copy of the withheld records for 60 days so they can be made available promptly upon request to the Office of General Counsel in the event of an appeal.

**Tab B - Logging, Routing
and File-Keeping of
FOIA Requests**

**CHAPTER 2: LOGGING, ROUTING AND FILE-KEEPING OF
FOIA REQUESTS****1. PROCEDURES FOR AGENCY FOI OFFICES REGARDING INITIAL HANDLING
OF REQUESTS**

a. **Log the Request.** A request delivered to either the Agency or Regional FOI Office is:

- o date stamped,
- o assigned a Request Identification Number (RIN),
- o assigned a due date for response,
- o assigned a fee category,
- o entered on the FOIA Request Log,
- o attached to a completed FOIA Control Form,
- o attached to a Bill for Collection Form, and
- o delivered within 24 hours (preferably handcarried) to the office responsible for preparing the reply.

b. **Acknowledge the Request.** Upon receipt of a FOIA request, the Agency or Regional FOI Office should acknowledge receipt of the request to the requester immediately after carrying out the log-in procedures described above. The acknowledgement informs the requester of the date of receipt and the assigned RIN number.

c. **Multiple Responsible Offices.** If more than one office will provide material for a reply, the Agency or Regional FOI Office may coordinate the overall response, designate a lead action office to coordinate the reply and billing, or instruct each office to prepare separate replies.

d. **Route the Request.**

- 1) **Route a Request from HQ to Regional Offices.** When a request is routed from HQ to the Regional FOI Office, the Agency FOI Office takes the steps outlined in 1.a and 1.b above (assigning the RIN number, logging and acknowledging the request) and telecopies the request to the Regional FOI Office for proper routing within the Region. The Regional Office should not assign

the request a Regional RIN number, since the Agency FOI Office has already assigned a RIN number and two different RIN numbers would confuse the requester and complicate tracking.

NOTE: In instances where a separate but identical request is received by both the Region and HQ, the HQ and Regional RIN numbers may both be carried on the request.

- 2) Route a Request from Regional Offices to HQ. If a Regional FOI Office receives a request for records that are held only in Headquarters, another Regional Office, or a field office, the office should immediately remove the request from its tracking system and telecopy the request to the Agency FOI Office. At the same time, the requester must be notified that the request is being transferred to the Agency FOI Office for response.

NOTE: If a Regional Office receives a request for records, some of which are held in the Region and some of which are held in HQ or a field office, it should respond as follows: 1) promptly forward the request to the Agency FOI Office, noting which records will be sent from the Region; 2) process the request for those records held in the Region (using a Regional RIN); and 3) send those records to the requester and notify him/her that the remainder of the request was forwarded to the Agency FOI Office. The Agency FOI Office will assign a RIN number and process the remainder of the request.

- 3) Never Re-Route Between Program Offices. Offices should never re-route requests directly to other Program Offices. All re-routing should be through the Agency or Regional FOI Office as appropriate.

2. REQUESTS ADDRESSED DIRECTLY TO ACTION/FIELD OFFICES

a. **Action Offices.** If an organizational unit or EPA official receives correspondence directly that is identifiable as a FOIA request, the recipient should immediately handcarry the request to the Program FOI Coordinator. The FOI Coordinator in turn promptly handcarries the request to the appropriate FOI Office. **NOTE:** No response should be sent out until the office is actually assigned responsibility by the FOI Office to respond to the request.

b. **Field Offices.** If a field office located outside the geographical area of the Agency or Regional FOI Office receives a FOIA request directly, it should telephone the appropriate FOI Office on the same day to obtain a RIN number. Once the FOI Office assigns a RIN number, it will forward a completed control slip to the field office. Upon completion of the action, the field office forwards two copies of the FOIA request and the response, and one copy of the Bill for Collection Form (if appropriate), to the proper FOI Office. Copies of the Bill for Collection Form, initial request and response should be sent to the appropriate Financial Management Office.

3. FOIA FILES

EPA's FOIA files constitute a system of records under the Privacy Act and must be maintained under the requirements of that Act, EPA's Privacy Act regulations, the Federal Register Notice describing this system of records, and the Agency's Privacy Act Manual.

a. **Types of Files.**

- 1) Official Files. The Agency and Regional FOI Offices maintain an official file on each FOIA request they receive. The official file includes copies of the incoming request, the FOIA Control Form, the Agency's response, the Bill for Collection Form (if appropriate), follow-up correspondence, any appeal and appeal determinations, and any intra-agency communications concerning the request.
- 2) Public File. Each FOI Office may maintain, at its own option, a separate public file to help facilitate processing responses for FOIA requests for Agency FOIA files. The public file shall include only the copies of each FOIA request, the Agency's response, and any appeal and appeal determination. These documents shall be purged of any personal information.
- 3) FOI Coordinators' Files. FOI Coordinators may keep files to facilitate their responsibilities for routing and tracking requests assigned to action offices. However, Coordinators' files are not a substitute for official files.
- 4) Request Log. Each FOI Office shall maintain a FOIA Request Log with personal information purged.

- 5) Action Office Files. Each action office shall maintain the incoming request, FOIA Control Form, a copy of the response, a copy of the withheld documents or a list adequate to identify the records, the Bill for Collection Form, follow-up correspondence and any communications concerning the request which may be needed in the event of an appeal or litigation.

b. Disclosure of FOIA Files to the Public.

- 1) Rule. FOIA files may not be made available to a member of the public without a written request from the person seeking the records.
- 2) Background. The Privacy Act prohibits the disclosure of information in systems of records to the public unless the FOIA requires disclosure. The FOIA requires disclosure of certain Agency FOIA files which have been purged of personal information (e.g., Public File, Request Log). Under current case law, the Privacy Act provision permitting disclosure if the records are required to be disclosed under FOIA has been construed to mean that there must be an actual FOIA request for the specific records before an agency may disclose Privacy Act records.
- 3) Purging FOIA Files. Before disclosing FOIA files, the files must be reviewed and purged of:
 - o Home addresses and phone numbers and other personal information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy within the meaning of Exemption 6 of the FOIA (see Chapter 7, Section 2.f).
 - o Any other information, such as confidential business information or internal communications reflecting Agency deliberations, which is exempt from disclosure under the FOIA (see Chapter 7).

NOTE: Corporate account numbers should also be purged.

**Tab C - Guidance to Action
Offices on Initial Response
to Requests**

**CHAPTER 3: GUIDANCE TO ACTION OFFICES ON INITIAL
RESPONSE TO REQUESTS**

1. MAKE SURE THE REQUEST FALLS UNDER FOIA

a. **General Guidelines.** Always contact the Agency or Regional FOI Office as appropriate when there is doubt with respect to the cases described below.

- 1) Inquiries for Documents that are not Agency Records. Requests for records that are published by non-federal organizations and are readily available to the public are generally not handled under FOIA. The response to the requester should indicate that the documents are not Agency records.
- 2) Inquiries for Answers to Specific Questions. If the requester seeks answers to specific questions, the Agency is not required to respond under FOIA. However, if the questions can fairly be read as constituting a request for access to records, the action office should process the request under FOIA.

b. **Responding to Oral Requests.** Requests made orally (either by telephone or in person) are not FOIA requests. However, in certain cases, offices should ask that oral requests be put in writing and treated as FOIA requests. Those special circumstances are discussed below. In general, an EPA office that receives an oral request for records should: (1) determine whether the requested record may be released (see Chapters 5 and 6), and (2) determine whether the record is readily available or whether substantial search time will be needed to locate it. NOTE: Requests for documents in a Privacy Act system of records must be in writing.

- 1) If the record is unquestionably releasable and readily available, (e.g., EPA publications, press releases, information sheets prepared for general distribution), release the record but do not treat it as a FOIA request. Fees shall be assessed in accordance with the FOIA policy and billing procedures (see Chapter 4).
- 2) If the record (or part of the record) may be subject to withholding and/or is not readily available, ask the requester to submit a written request to the appropriate Agency or Regional FOI Office.

NOTE: Whenever there is any doubt about the releasability or the availability of information requested orally, ask that the request be made in writing.

c. **Responding to Requests from Other Federal Agencies.** EPA's policy is to expedite the flow of information to other Federal agencies but not to treat requests from them as FOIA requests. If the request is clearly an official request for information, respond to the other Agency but not under FOIA. If the request cites FOIA, notify the other Agency that the request is being processed, but not under FOIA.

NOTE: If the records being requested would normally be withheld under FOIA, or if they may contain Confidential Business Information, contact the appropriate legal office.

d. **Responding to Congressional Requests.** Congressional requests are of two types: (1) requests from an individual Member of Congress or (2) duly authorized requests from the Congress. In all cases the action office should work with the Congressional Liaison Office and Congressional Correspondence Office.

- 1) A written request from an individual Member of Congress is treated as a FOIA request (see Contact List, Appendix VI).
- 2) A request from the Congress is a written request signed by the Speaker of the House, President of the Senate, or chair of a committee or subcommittee concerning matters within their jurisdiction. Such requests are not processed as FOIA requests.

e. **Responding to Requests from the General Accounting Office (GAO).** Requests from GAO are not FOIA requests. All responses should be coordinated with EPA's GAO Liaison Office (see Contact List, Appendix VI).

f. **Future Records.** FOIA only establishes requirements for disclosure of existing records. It does not require the Agency to place a requester's name on a distribution list for records as they become available. However, requesters may submit requests to ascertain whether such records have been created and are available. Such requests should reference the period of time for which records are requested. Sample letter A provides language for responding to requests for future records.

g. Personal Records of Employees. The Freedom of Information Act only applies to Agency records, not to the personal records of individual Agency employees. If personal records are responsive to a FOIA request, the Agency should notify the requester that the personal records exist but are not covered by FOIA since they are not Agency records, and accordingly are not being provided.

- 1) "Personal Record" Considerations. In determining whether documents are personal records, the Department of Justice suggests that the following criteria be considered. These considerations are closely related and in some instances overlap. Employees should review each document in the context of all these criteria.
 - o Creation - Was the document created by an Agency employee on Agency time, with Agency materials, at Agency expense? If not, then it probably is not an Agency document on that basis alone.
 - o Content - Does the document contain substantive information? If not, then it probably is not an Agency record, on that basis alone.
 - o Purpose - Was the document created solely for an individual's personal convenience? Alternatively, to what extent was it created to facilitate Agency business?
 - o Distribution - Was the document distributed to anyone else for any reason, such as for a business purpose? How wide was the circulation?
 - o Use - To what extent did the document's author actually use it to conduct Agency business? Did others use it?
 - o Maintenance - Was the document kept in the author's possession, or was it placed in an official Agency file?
 - o Disposition - Was the document's author free to dispose of it at his or her personal discretion? What was the actual disposal practice?

- o Control - Has the Agency attempted to exercise control over the document by requiring that it be retained on file for a specified time? Did it do so by requiring the document be created in the first place? If so, such records are always Agency records.
- o Segregability - Is there any practical way to segregate any personal information in the document from official business information?
- o Revision - Was the document revised or updated after the fact for recordkeeping purposes?

2) Application of the Considerations. The following examples illustrate the analysis and application of the considerations to be made.

- o Example 1. An employee brings a paper to the office that has been prepared for a class she is attending at a local university. The employee shows the paper to her friends during lunch and asks for their comments. The subject matter of the paper relates to her work at EPA.

The paper is a personal record and not an Agency record. The document was not created on Agency time, with Agency materials nor at Agency expense. While the content relates to Agency matters, it was not created to facilitate Agency business nor was it relied upon or used in conducting Agency business. The distribution was limited to friends and was not for any business purpose. The record was not placed in Agency files, and the employee was free to remove it from the Agency's offices and to dispose of it at her discretion.

- o Example 2. An employee keeps old yellow telephone message slips that indicate the names of the callers, the dates and times of the calls, and the telephone numbers where the callers can be reached.

The message slips, in this instance, are not Agency records. Although created by the employee's secretary at Agency expense, the documents contain no substantive information,

i.e., why the call was made. The documents were created solely for the employee's personal convenience and were not used by anyone other than the employee. The message slips, in this instance, were retained by the employee and not placed in Agency files. The employee was free to destroy the notes at his or her discretion.

- o Example 3. A supervisor keeps an appointment calendar on her desk on which she notes upcoming meetings. On occasion, she notes personal meetings. Her secretary notes appointments that have been scheduled for her supervisor.

The calendar is not an Agency record. As in the previous example, the record was created by Agency employees on Agency time and at Agency expense. However, the calendar contains little, if any, substantive information. The calendar was created for the supervisor's personal convenience so that she could organize both her personal and business appointments. It was not intended for use by other office employees and was not distributed to other employees. The Agency did not require the supervisor to maintain the appointment calendar. The calendar could be destroyed at any time by the supervisor.

NOTE: When calendars are maintained on a Local Area Network (LAN) and can be accessed by others, the calendars are Agency records.

- o Example 4. An Office Director has a daily agenda prepared listing the activities for each day of the upcoming week. The agenda is circulated to his staff to inform them of the schedule.

The daily agenda is an Agency record. The document, created at Agency expense by an Agency employee, was in fact circulated to the staff for a business purpose. It was created for the express purpose of facilitating the daily activities of the office. Any personal matters could be easily segregated from the business material.

NOTE: The Administrator has made copies of his official appointment calendar available to the public. He has also directed the Deputy Administrator, Assistant Administrators, Associate Administrators, Regional Administrators, the General Counsel, and Staff Office Directors, to make their official calendars available to the public. Since these calendars are created, in part, to inform the public of what meetings these individuals have held, they are to be treated as Agency records.

- 3) Assistance. If any action office is having difficulty determining whether a particular document is an Agency record or a personal record, it should contact the appropriate legal office for guidance.

2. PROCEDURAL GUIDANCE FOR RESPONDING TO FOIA REQUESTS

a. Make Sure the Request Adequately Describes the Records. Carefully read the description of the records sought. If the description of the records is not sufficient to identify and locate the records, contact the requester (by telephone if possible) and assist him/her in the identification of the records sought and in formulating the request (see sample letter B, Appendix I). If the description remains insufficient to reasonably identify and locate the records, notify the requester in writing and send a copy to the appropriate FOI Office so that the request may be closed out. Before doing this, make every reasonable effort to identify and locate the requested records.

b. Discuss Requests for Voluminous Records. If the request is extremely broad or involves a substantial number of records (e.g. ten file drawers of records on the XYZ Superfund site), contact the requester (by telephone if possible) and provide him/her with a full description of the records and the estimated costs (which may include search, copying and review depending on the category of the request) of the records to ensure that the requester wants all records (see sample letter B, Appendix I).

c. Locate the Records. Locate the records as promptly as possible. A list of possible outcomes to the search for records follows. The appropriate response to each outcome is either described or referenced.

For records believed to be within EPA's possession:

- 1) The records requested are believed to be within EPA's possession and may be obtained promptly. The next step is to make an initial determination as to whether (or what portion of) the records may be released (see Chapters 5 and 6).
- 2) The records requested are believed to be within EPA's possession but cannot be obtained promptly. In those rare instances when a record cannot be obtained promptly by the action office (e.g., the records are located in the Federal Records Center), the action office should call and write the requester (see sample letter C, Appendix I), notify him/her of the delay and provide a projected date when the record is likely to be sent. If, after a thorough search, the records are determined not to exist, follow the instruction for requested records that do not exist (see Section c.7 below).
- 3) Some or all of the records exist but are in the possession of another EPA office. In this case, promptly contact the appropriate FOI Office for rerouting or coordinating of the Agency's response.
- 4) The records are available in a public reading room. Call the requester, inform him/her of the availability of the documents in a public reading room, and ask whether he/she would prefer to have the documents sent or to review them in the public reading room. If the requester chooses to use the public reading room, confirm this in writing and send a copy of the confirmation to the FOI Office. If the requester prefers to have the records sent, follow normal FOIA procedures.
- 5) For records held by EPA and originating with another Federal agency. When a request for records includes records originating in another Federal agency either: 1) respond to the request after consulting with the originating agency on the releasability of the records, if necessary, or 2) transfer responsibility for responding to the other agency, provided the other agency is subject to FOIA. (Most Federal agencies are subject to FOIA. Contact the appropriate legal office when in doubt as to whether another agency is subject to FOIA.) Whenever the

request is referred to another agency, the requester should be notified in writing with a copy sent to the appropriate FOI Office so that the request may be closed out.

- 6) The records have been published in the Federal Register or elsewhere by the Federal Government. Information may be sent to the requester if readily available within EPA (e.g., a Federal Register Notice). If the information is commonly available outside of EPA (e.g., a manual available from the National Technical Information Service), notify the requester where he/she may obtain it and what it will cost (see sample letter D, Appendix I). Send a copy of the letter to the appropriate FOI Office so that the request may be closed out.

For records not in EPA's possession:

- 7) The records requested do not exist. After thoroughly searching for the requested records and determining that they do not exist, write the requester that the records do not exist and include appeal language (see sample letter E, appendix I). Send a copy to the appropriate FOI Office so that the request may be closed out of the FOIA tracking system. NOTE: The Agency does not consider this response to be a denial, but since such decisions can now be appealed the Agency recommends that these decisions be reviewed at the Division Director level. This review will help to ensure that the records do not exist in that Division or elsewhere in the Agency. Offices need not create records or compile new information to respond to a FOIA request. If the decision is appealed, the action office will be required to conduct a further search and confirm in writing to the Office of General Counsel that no records exist.
- 8) The records exist but are located at the Federal Records Center. EPA records that have been retired to the Federal Records Center for storage are still considered EPA records. These records must be obtained and processed according to normal FOIA procedures. (See section c.2 above.)

- 9) The records exist but are only in the possession of another Federal agency or a delegated State. Notify the requester in writing (see sample letter F, Appendix I) that the requested records are not in EPA's possession and indicate that they can contact the Federal agency or State Office in question. A copy of the letter should be sent to the appropriate FOI Office so that the request may be closed out.
- 10) The records exist but are only in the possession of an EPA contractor. If requested records are held by an EPA contractor but are not located at EPA, as a general rule, they are not Agency records. This would be true, for example, of contractor working papers that have not been turned over to the Agency. Such requests should be closed out of the FOIA tracking system following the procedures discussed in Section c.7 above for records that do not exist. Records in the possession of a contractor may be Agency records when the contractor is functioning as a custodian of the records for the Agency.

**Tab D - Fees and
Fee Waivers**

CHAPTER 4: FEES AND FEE WAIVERS**1. GENERAL PROCEDURES**

The FOIA authorizes EPA to charge requesters the direct cost for document search, duplication and review. In some cases, these costs are not charged. The FOIA also provides for a public interest fee waiver or fee reduction. The requirements for these waivers are listed in Section 2 later in this Chapter.

a. Initial Review

- 1) The action office should first estimate as accurately as possible EPA's search, review and copying costs, if appropriate, (using the fee schedule in Section 1.f below).
- 2) If the fees are less than \$25.00 or if the cost of collecting the fees would otherwise exceed the amount collected, no fees will be charged. The Financial Management Division has determined that it costs \$25.00 to bill and collect payment. If the fees are exactly \$25.00 or more, the entire amount will be charged.
- 3) If the request falls within one of the following categories, no fees will be charged. (Note that some of the categories are not considered as requests subject to FOIA [see Chapter 3]).
 - o Requests by individuals for records about themselves. (Specifically this concerns records from a Privacy Act system of records pertaining to the requester that are retrieved by the requester's name or personal identifier such as a Social Security Number. See 40 CFR, Part 16.) Fees will be waived only for the first copy.
 - o Requests by the Congress.
 - o Requests by another Federal agency including the General Accounting Office.
 - o Requests by an EPA contractor or assistance recipient (e.g., a grantee) when the records are

needed in order to perform work required by the contract, grant or cooperative agreement.

- 4) If the request asks for a public interest fee waiver or reduction in fees, the action office, in conjunction with the FOI Office and the appropriate legal office, should determine whether the fee waiver or fee reduction request should be granted. (See Section 2, page 4-14)

b. **Categories of Requests.** All requests must be assigned to one of the following four categories:

- o Commercial Use
- o Educational and Non-Commercial Scientific Institution
- o Representative of the News Media
- o All Other

Each category of request has a corresponding fee level. How requests should be categorized and the fee level associated with each category are outlined below.

c. **Determining the Category of the Request.** In determining the category of a request, careful consideration should be given to both the identity of the requester and the requester's intended use of the information requested. To help the FOI Office make an accurate determination of a request's category, the following definitions are provided.

Commercial Use: The term refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

Non-Commercial Scientific Institution: The term refers to an institution that is not operated on a commercial basis as that term is defined above and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

Educational Institution: The term refers to 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 and an institution of vocational education, which operates a program or programs of scholarly research.

Representative of the News Media: The term refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public.

d. **Fees to be Charged.** Using the above definitions as a guide in categorizing a request, fee levels will be determined based upon the following schedule:

- 1) Commercial Use Requests. If the request is for records for a commercial use, the requester is charged for the time spent searching for the requested records, reviewing the records to determine whether any should be disclosed and for the cost of each page of duplication. Fees will also be charged for search and review of records even if there is ultimately no disclosure of records. If total fees are less than \$25.00, no charge will be made (see administrative fee waiver, page 4-23).
- 2) Requests From Educational and Non-Commercial Scientific Institutions. If the request is from an educational or non-commercial scientific institution involved in scholarly or scientific research and is not for a commercial use, the requester will only be charged for the duplication cost of the records. No charge will be made for the first 100 pages of duplication or for the time spent searching for and reviewing responsive records. Final charges should be calculated by totalling the cost of duplication and then subtracting the cost of 100 pages of duplication. If this amount is less than \$25.00, no charge will be made (see administrative fee waiver, page 4-23).
- 3) Requests From Representatives of the News Media. If the request is from a representative of the news media and is not for a commercial use, the requester will only be charged for the duplication cost of the records requested. No charge will be made for the first 100 pages of duplication or for the time spent searching for and reviewing responsive records. The final charge should be calculated by totalling the cost of duplication and then subtracting the cost of 100 pages of duplication. If this amount is less

than \$25.00, no charge will be made (see administrative fee waiver, page 4-23).

- 4) All Other Requests. If the request cannot be categorized under the three types of requests defined above, the requester will only be charged for the search and duplication costs of the records requested. No charge will be made for the first two hours of search time and the first 100 pages of duplication or the time spent reviewing the record to determine whether it should be disclosed. The final charges should be calculated by totalling the fees for search time and duplication and then subtracting the cost of two hours of search time and 100 pages of duplication. If this amount is less than \$25.00, no charge will be made (see administrative fee waiver, page 4-23). Fees will be charged for the search of records even if there is ultimately no disclosure of records.

e. Evaluating the Determination. Once the FOI Office has carefully considered both the identity of the requester and the intended use of the information, an accurate determination of a request's category will usually be made.

- o Example 1: A local newspaper requests the release of records for use in a story they are doing on an environmental issue. Such a request should be considered as being made by a representative of the news media and not for commercial use. The newspaper should be charged accordingly (i.e., for the duplication costs of the records excluding the first 100 pages).

At the same time the newspaper has been cited by EPA for a number of violations at one of its facilities. The newspaper has requested records to determine whether they should bring legal action against the Agency. Though the request is from a representative of the news media, the records requested are for a commercial use. The request should be treated as a commercial use request and the newspaper should be charged accordingly (i.e., for the search, review and duplication costs of the records).

- o Example 2: A professor at a graduate institution of higher learning has submitted two separate requests

for records. One request is for records that will be used in a university-sponsored research project. This request is made on behalf of an educational institution involved in scholarly research. The requester should be charged for the duplication costs of the records excluding the first 100 pages.

The second request is for information the professor is going to incorporate into a database which he plans to market to the general public. The information requested is for a commercial use and the professor should be charged accordingly (i.e., for the search, review and duplication costs of the records).

- o Example 3: A university student requests records that she needs to complete her doctoral dissertation. Though the student is enrolled at an educational institution, her request for records is being made solely for her personal use and not on behalf of the university which she attends. Also, the records requested are not for commercial use but for a scholarly purpose. The request should be categorized under all other requests and the requester should be charged accordingly (i.e., for the search and duplication costs of the records excluding the first two hours of search time and the first 100 pages of duplication).

f. Calculating the Fees. After determining the category of the request and the corresponding fee level, a calculation of fees should be made. The fee schedule is as follows:

- 1) Search Time. Search time--both manual and computer--includes all time spent looking for material that is responsive to a request including page-by-page or line-by-line identification of material within documents. Charges for search time will be made as follows:

- o Manual search for records.

Personnel GS-8 and below. \$4.00 will be charged for each 1/2 hour or any portion thereof.

Personnel GS-9 and above. \$10.00 will be charged for each 1/2 hour or any portion thereof.

(Example: If a GS-11 employee spends 40 minutes locating responsive records, the cost for searching is \$20.00.)

Contractor. When a search for records is performed by a contractor, requesters will be assessed actual direct charges up to but not exceeding \$10.00 per 1/2 hour.

o Computer Search for records.

Personnel GS-8 and below. \$4.00 will be charged for each 1/2 hour or any portion thereof.

Personnel GS-9 and above. \$10.00 will be charged for each 1/2 hour or any portion thereof.

PLUS

Computer System Time. Charges will be made for actual computer resource usage as indicated on the computer run printout, when available.

- o Other Search Costs. Other search costs may include, but are not limited to, computer system time, contractor programming time, and the transportation of records (when required as a part of the search). These should be charged at the actual direct cost to EPA.

- 2) Review Time. Review time is the time spent examining records responsive to a request to determine whether any portion of the records should be withheld. It also includes the process of excising and otherwise preparing a document for release. Review time can only be charged to commercial users. (NOTE: Review time does not include the time spent resolving legal or policy issues regarding the application of exemptions).

Personnel GS-8 and below. \$4.00 will be charged for each 1/2 hour or any portion thereof.

Personnel GS-9 and above. \$10.00 will be charged for each 1/2 hour or any portion thereof.

- 3) Duplication Costs

- o Paper Copy of Paper Original. 15 cents per copy.
- o Computer Printout. 15 cents per page.
- o Other Duplication Costs. Other duplication costs may include, but are not limited to, the reproduction of photographs, microfilms, microfiche, or magnetic tapes; computer printouts; and the transportation of records (when required in order to reproduce documents). These will be charged at the actual direct cost to EPA.

NOTE: Two-sided copying is considered 2 copies or 30 cents.

- 4) Certification or Authentication of Records. \$25.00 will be charged per certification or authentication regardless of the volume of records being certified or authenticated.

g. Costs not chargeable. No charge may be made:

- 1) for the delivery of records to the requester.
- 2) for the time spent purging documents of exempt information (except for commercial use requests).
- 3) for the time spent duplicating records (this is included in the 15 cents per copy charge).
- 4) for preparing and reviewing the FOIA response.
- 5) for materials prepared for free distribution to the public. A charge for duplication may be made when printed copies are exhausted and additional photocopies are necessary.
- 6) for responding to a request by an individual for one copy of a record retrievable by the requesting individual's name or personal identifier from a Privacy Act System of records.

h. Assure Payment of Fees. If the action office estimates that the request would require payment of fees equal to or greater than \$25.00, and a fee waiver has not been requested,

(see Section 2, page 4-14), the action office should see if the requester's letter assures that fees will be paid up to the estimated amount.

If the letter does not provide the assurance of payment, the action office should check with the requester (by telephone if possible) to see if he/she agrees to pay up to the estimated amount. The requester must give assurance that he/she will pay fees up to the estimated amount for processing of the request to continue. Normally, the requester is not required to make the actual payment in advance (see section i. below). NOTE: The requester may wish to modify the request and limit the records sought to bring the fees to an amount he or she is willing to pay. Action offices should be prepared to assist requesters in modifying their requests. In having a requester assure payment of fees, observe the following guidelines:

- 1) If the final fees to be charged exceed the amount agreed to by the requester, contact the requester again to obtain a revised assurance to pay.
- 2) All discussions with the requester concerning fees should be documented in writing by the action office (offices may want to document such conversations Conversation Record Form, OF-271).
- 3) The records may be released only after the requester has agreed (verbally or in writing) to pay the fees.
- 4) Time used by the action office to secure pre-payment or assurance of payment is excluded from the mandatory 10-workday response period.
- 5) The action office must keep the appropriate FOI Office apprised of all actions taken with respect to the payment of fees. This includes furnishing a copy of all correspondence to the FOI Office.

i. **Prepayment of Fees.** An action office may require a requester to make a prepayment of fees equal to the estimated amount only if:

- 1) a requester has previously failed to pay a fee in a timely fashion (i.e., within 30 days after the date of billing; see Section 4, page 4-23 on Delinquent Requesters), or

- 2) the action office estimates or determines that the actual amount of fees will exceed \$250.00 and the requester has no history of payment. If the prepayment is not received within 30 days after the date of billing, the request will not be processed and will be closed. (NOTE: If the fees will exceed \$250.00 and the requester has a history of prompt payment of FOIA fees, the action office will notify the requester of the anticipated charges and obtain an assurance of payment. If no assurance is given, the request will not be processed and will be closed).

j. Billing Requesters

- 1) Billing Procedures. If the requester has assured payment of fees, the action office shall determine the fees, complete the Bill for Collection (EPA Form 2505-4) and enclose it with the response letter and requested records. (NOTE: In some Regional Offices, billing is handled entirely by the Financial Management Office rather than the action office. In any case, the procedures for completing the Bill for Collection Form are the same.) The Bill for Collection Form must be typed and completed as follows:
 - o Enter U.S. Environmental Protection Agency in the block captioned "Bureau/Office for Remittance Payable."
 - o Enter the lock box address in the block captioned "Address for Mailing Payment." (See Lock Box Addresses under Section j.4, page 4-13.)
 - o Enter the assigned RIN number in the block captioned "Bill No."
 - o Enter the date of response in the block captioned "Date." (The Bill for Collection should be dated the same date as the reply letter.)
 - o Enter the name and address of the requester in the inset block under the heading "Payer."

- o In the block under the heading "Description," type "FREEDOM OF INFORMATION ACT PAYMENT REQUEST." Give all the details relating to information requested and fees charged for search, review or duplicating records (as appropriate) including such items as: computer system time; contractor computer programming time; reproduction of photographs, microfilms, or magnetic tape; computer printouts; and transportation of records.
- o Enter the total amount of payment requested in the columns under the heading "Amount Due."
- o Enter, at the bottom of the form, the name and telephone number of the responsible official to contact if there are any questions.
- o Include with the bill the Fee Schedule and Payment and Procedures form.
- o Make sure to remind the requester in the response letter to refer to the RIN number when paying the bill.

A Sample Bill for Collection Form is attached at Appendix II.

2) Simultaneously Distribute the Bill for Collection as follows:

- o Mail the original to the FOI requester along with the prompt payment procedures form, reply letter and records.
- o Forward the first copy (Pink-Official Receipt), the second copy (Blue-Accounting Copy), and the third copy (Green-Administrative Billing Copy (1)) to the appropriate Headquarters Financial Management Office or the Regional Financial Management Office (Attention: Accounts Receivable) (see Contact List, Appendix VI).
- o Forward the fourth copy (Green-Administrative Billing Copy (2)) to the appropriate Freedom of Information Office together with two copies of the response letter.

- o Retain the fifth copy (Green-Administrative Billing Copy (3)) together with a copy of the response letter, request letter and other documents for action office files.
- 3) Billing for Prepayment. If the requester has not paid timely or has no history of payment and the action office estimates the fees will exceed \$250.00, an advance payment may be requested before proceeding with the search for records. If the action office estimates or determines that the fees are likely to exceed \$250.00, the assurance of payment should be sought when the requester has a record of prompt payment. If the requester has no history of payment, the action office will require an advance payment of an amount up to the full estimated amount. To do this, the action office completes a Bill for Collection (EPA Form 2505-4), and mails the bill together with an interim response to the requester asking for advance payment within 30 calendar days of the bill date (see sample letter H, Appendix I). (NOTE: No notice of interest, penalties or handling charges should be included on the bill for prepayment).

Advance payment is requested in the form of a check or money order made payable to the U.S. Environmental Protection Agency and mailed to the appropriate Headquarters or Regional Lock Box address (see addresses under Section j.4, page 4-13). Ask the requester to please include the RIN number on the check or money order.

The action office simultaneously forwards copies of the interim response and Bill for Collection for prepayment to the appropriate Financial Management Office and the appropriate Freedom of Information Office. Upon receipt of the advance payment, the Financial Management Office notifies the action office's contact person, whose name appears on the Bill for Collection. Upon notification from the Financial Management Office, the action office searches for, reviews and duplicates the records, calculates the actual fees, and forwards the requested records to the requester.

If after 30 days the action office has not been notified by the Financial Management Office of receipt of advance payment, the action office should call the Financial Management Office and confirm that no payment has been received. The action office shall close the file on the request and forward a written notification to the appropriate Freedom of Information Office and the appropriate Financial Management Office.

If the actual cost is \$25.00 or greater than the advance payment, then the action office shall complete an amended Bill for Collection for additional fees and mail it with the final response and records. If the advance payment is more than the actual cost, a refund shall be made in accordance with the procedures described in Section j.6, page 4-14.

- 4) Method of Payment. All payments shall be in the form of a check or money order payable to the "U.S. Environmental Protection Agency" and shall be sent (accompanied by the top portion of the Bill for Collection, EPA Form 2505-4) to the appropriate lock box address for Headquarters or the Regions (see list of addresses below). In accordance with the U.S. Treasury (TFRM 6-8000) and the Debt Collection Act of 1982, payment is due within thirty calendar days of the date of billing.

LOCK BOX ADDRESSES

EPA - Washington Headquarters
P.O. Box 360277M
Pittsburgh, PA 15251

EPA - Region 1
P.O. Box 360197M
Pittsburgh, PA 15251

EPA - Region 2
P.O. Box 360188M
Pittsburgh, PA 15251

EPA - Region 3
P.O. Box 360515M
Pittsburgh, PA 15251

EPA - Region 4
P.O. Box 100142
Atlanta, GA 30384

EPA - Region 5
P.O. Box 70753
Chicago, IL 60673

EPA - Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

EPA - Region 7
P.O. Box 360748M
Pittsburgh, PA 15251

EPA - Region 8
P.O. Box 360859M
Pittsburgh, PA 15251

EPA - Region 9
P.O. Box 360863M
Pittsburgh, PA 15251

EPA - Region 10
P.O. Box 360903M
Pittsburgh, PA 15251

- 5) Tracking Payments. The action office must forward the Bill for Collection (EPA Form 2505-4) simultaneously to the requester, to the Agency or Regional FOI Office, as appropriate, and to the Headquarters or Regional Financial Management Office, as appropriate. THE BILL FOR COLLECTION MUST BE DATED THE SAME DATE AS THE RESPONSE LETTER. Upon receipt of the copy of the Bill for Collection, the Financial Management Office will establish an accounts receivable and track the bill to ensure that payment is received from the requester within 30 days of the billing date. If at the end of the 30 days the requester has not paid, the Financial Management Office sends a written notification (DEMAND LETTER) to the requester stating that his/her account is delinquent and that interest and handling charges are

being assessed. (The Financial Management Offices will work with Headquarters and Regional FOI Officers to ensure all FOIA-related receivables are properly recorded.)

- 6) Refund of Payment. If a refund is due, the action office shall notify the appropriate Financial Management Office and the appropriate Freedom of Information Office in writing (see sample memo K, Appendix I). Upon receipt of written notification from the action office that a refund is due, the Financial Management Office initiates a refund and prepares EPA Form 2500-3, General Ledger Code Sheet, to record the transactions in the accounting system. As a matter of policy, refunds of amounts under \$1.00 are not issued unless specifically requested.

2. PUBLIC INTEREST FEE WAIVERS OR FEE REDUCTIONS

a. **General Requirement.** FOIA provides that documents shall be furnished without any charge or at a reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

b. **Fee Waiver Policy.** Requesters asking for a fee waiver or reduction must present information in support of such a request. The mere fact that a fee waiver or reduction has been requested does not automatically mean that a fee waiver or reduction should be granted. EPA's policy in this regard is that if all the relevant information in support of a fee waiver or reduction has been supplied by the requester and such information demonstrates that the statutory requirements have been satisfied, the fee waiver or reduction will be granted.

c. **Procedural Guidelines**

- 1) Initial Decision on Waiver. The action office assigned responsibility for responding to an initial request, in conjunction with the FOI Office and legal office if guidance is needed, makes the initial decision on any request for a public interest fee waiver or reduction. This decision requires full understanding of the records being requested.

- 2) Obtain Needed Information. The FOI Office will communicate with the requester if additional information is needed to determine whether the fee waiver or reduction is to be granted (see Section 2.e, page 4-16 and sample letter I, Appendix I). Upon receipt of additional information the FOI Office will send a copy to the action office and coordinate the fee waiver determination.
- 3) Documentation. A decision to deny a fee waiver request or to grant only a portion of the fee waiver request (a fee reduction) must be promptly communicated to the requester by telephone if possible, with subsequent written documentation. Any fee waiver request denial must include the reason for the denial and mention the right to appeal (see sample letter J, Appendix I). The requester should be informed that if an appeal is made, the appeal letter should be addressed to the Agency FOI Officer.
- 4) Multiple Copies. The Agency will consider waiving or reducing fees only for single copies of documents. The Agency is not required by FOIA to make multiple copies. If additional copies are requested and are provided at the Agency's discretion, full duplication fees will be charged.
- 5) Delays. The decision to grant or deny a fee waiver request may be delayed if it is necessary to identify, by searching, the records requested.
- 6) Waiver Requests Must Be Written. The requester must ask for the waiver or reduction of fees in writing. The Agency has no responsibility to ask a requester if a fee waiver is desired.
- 7) Precedents. FEE WAIVER DETERMINATIONS ARE MADE ON A CASE BY CASE BASIS. The granting of a fee waiver for one request does not mean that a fee waiver will automatically be granted on a later, related request.
- 8) Voluminous Records. When a request involves a voluminous amount of material and a fee waiver is requested, the action office should consider asking the requester to review releasable records at an EPA

location convenient to the requester and the Agency, or consider tailoring the request to only those records actually sought.

d. **Assistance in Making Decisions.** Action offices wishing additional guidance on the Agency's public interest fee waiver policy should contact their FOI Coordinator or FOI Officer. If additional consultation is needed, the action office and FOI Coordinator or FOI Officer should contact the Office of General Counsel.

e. **Substantive Criteria for Fee Waivers.** Requests for public interest fee waivers or reductions must be decided on a case-by-case basis. A request for a reduction or waiver of fees can only be granted if it meets the following two requirements:

- 1) disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of government activities and operations and
- 2) it is not primarily in the commercial interest of the requester.

The six enumerated factors elaborated upon below are those which the new statutory standard, by its plain language, requires action offices to take into consideration in determining whether the two basic requirements for a fee waiver or reduction are met. A careful analysis of the factors, in sequence, is necessary to lead to a proper determination of whether a request satisfies the statute's specific "public interest" requirement.

- 1) The Subject of the Request: Whether the Subject of the Requested Records Concerns "the Operations or Activities of the Government."

The action office should consider whether the subject of the requested records concerns the operations or activities of the government. The subject matter of the requested records must specifically concern identifiable operations or activities of the federal government.

While in most cases records possessed by EPA will likely meet this threshold, there are cases in which requested records do not directly concern government operations or activities, and therefore would fail to

meet it. An example can be records in the Agency's possession which often are sought for their intrinsic informational content alone. Requests seeking records for their intrinsic content rather than their value with respect to specific government operations or activities, are not usually expected to contribute to public understanding of those operations or activities. In the case of such requests, whether for records submitted to EPA or generated by it, this threshold consideration is not satisfied.

- 2) The Informative Value of the Information to be Disclosed: Whether the Disclosure is "Likely to Contribute" to an Understanding of Government Operations or Activities.

Next, the action office should determine whether the disclosure is likely to contribute to an understanding of government operations or activities. This requires an analysis of the substantive content of the disclosable portions of the requested records in order to determine whether their disclosure will in fact be informative regarding the particular government activities or operations that are connected to the subject matter of the request. The action office is in the best position to make this determination.

Although the subject matter of a FOIA request may directly concern certain government operations or activities, if the records (or record portions) which can be released in response to that request contain nothing that is meaningfully informative on such operations or activities, then the requested FOIA disclosure would not contribute to an understanding of them. Further, even where information is meaningful in and of itself, it does not necessarily hold great potential for contributing to increased public understanding. Thus, the foundations for a proper fee waiver analysis must be a close appraisal of the information to be disclosed with careful attention to the potential that it holds for contributing to the public understanding of government operations or activities.

When making this appraisal, the action office should also consider whether the requested information is already in the public domain in substantially identical form. If it is, then disclosure of the information would not be likely to contribute to an understanding of government operations or activities, as nothing new would be added to the public record.

- 3) Contribution to Understanding of the Subject by the Public Likely to Result from Disclosure: Whether Disclosure of the Requested Information will Contribute to "Public Understanding."

Next, the action office should consider whether disclosure will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. The proper focus must be on the contribution to public understanding, rather than personal benefit to be derived by the requester. Thus, a requester's indigence, for example, does not entitle him to a fee waiver; there must be a credible showing of a contribution to the public's understanding that would result from the disclosure.

For purposes of this analysis, the identity of the requester should be considered in order to determine whether the requester is in a position to contribute to public understanding through the requested disclosure. A requester's identity and qualifications (e.g., expertise in the subject area and ability and intention to disseminate the information to the general public) should be evaluated. Specialized knowledge is often required to extract, synthesize and effectively convey information to the public and requesters vary in their ability to do so. Where not readily apparent, requesters should be asked to describe with specificity their qualifications, the nature of their research, the purpose for which they intend to use the requested information, and their intended means of dissemination to the public.

Bare assertions by requesters that they are "researchers" or "have plans to author a book" are insufficient evidence that a contribution to understanding by the general public will ultimately

result from a disclosure. Generally, representatives of the news media will be able to satisfy this statutory requirement.

NOTE: This consideration is not satisfied simply because a fee waiver request is made by a library or other record repository, or a requester who intends merely to disseminate information to such an institution. Such requests, like those of other requesters, should be analyzed to identify a particular person who will actually use the requested information in scholarly or other analytic work and then disseminate it to the general public; absent this dissemination, it cannot be determined that disclosure to the requester will contribute to the public's understanding of government operations or activities. Thus, such requesters must provide the same information that an individual would have to provide to obtain a fee waiver.

- 4) Significance of the Contribution to Public Understanding: Whether the Contribution to Public Understanding of Government Operations or Activities Will be "Significant."

Finally, the action office is required by the statute to determine whether an identified contribution to public understanding of government operations or activities will be a "significant" one, i.e., such that the general public's understanding of the subject matter in question likely will be enhanced by the disclosure to a significant extent.

This final step in the "public interest" analysis requires an agency to focus as realistically as possible on the precise nature of the public contribution likely to result from a disclosure. It involves an assessment of the likely impact of the disclosure on the public's understanding of the subject in question, as compared to the level of public understanding of that subject existing prior to the disclosure.

The determination of "significance" will require that the action office's decision properly turn on whether the disclosure is likely to lead to a significant contribution to public understanding.

This does not permit a separate value judgment as to whether the information is "important" enough to be made public, even though it in fact would contribute significantly to public understanding of the operations and activities of the government.

If the action office determines that the likely contribution to public understanding is significant, then the "public interest" requirement for fee waiver determinations is fully satisfied.

Once an action office is satisfied that the first requirement for a fee waiver has been met, the statute then requires a determination of whether disclosure of the requested information is primarily in the commercial interest of the requester.

5) The Existence and Magnitude of a Commercial Interest: Whether the Requester has a Commercial Interest that Would be Furthered by the Requested Disclosure.

An action office must first determine as a threshold matter whether the request involves any commercial interest of the requester and, if so, determine whether the requester's commercial interest outweighs the public interest. A "commercial interest" is one that furthers a commercial, trade or profit interest as those terms are commonly understood.

If the requester's interest in the records is unclear, it is entirely proper to consider and draw reasonable inferences from the requester's identity and the circumstances surrounding the request. Where an action office reasonably believes that such circumstances suggest the existence of a commercial interest in disclosure, the requester should be given an opportunity in the administrative process to provide further information rebutting such reasonable inferences or clarifying the circumstances of the request where necessary.

Where a commercial interest is found to exist, and it would be furthered through the disclosure, the magnitude of that commercial interest must be assessed.

- 6) The Primary Interest in Disclosure: Whether the Magnitude of the Identified Commercial Interest of the Requester is Sufficiently Large, in Comparison with the Public Interest in Disclosure, that Disclosure is "Primarily in the Commercial Interest of the Requester."

Once it has been determined that the requester has a commercial interest, the action office must then determine whether disclosure of the information would be "primarily" in that interest. This requires a balancing of the requester's commercial interest against the public interest in disclosure.

If the public interest can fairly be regarded as outweighing the requester's commercial interest, a fee waiver or reduction should be granted.

For example, although newsgathering organizations usually have a commercial interest in obtaining information, the traditional process of newsgathering and dissemination by established news media organizations, as a rule, should not be considered to be "primarily" in their commercial interest. On the other hand, the disclosure of agency records to data brokers or others who compile and market government information for direct economic return can more readily be considered as primarily in the commercial interests of the requester, depending on the nature of the records and the exact circumstances of the enterprise.

f. Reduction in Fees. If only a portion of the requested records for which a fee waiver has been requested will meet the criteria for granting a waiver, a reduction in fees may be granted. Examples of when a reduction in fees would be appropriate include:

- 1) Part of the records may already be in the public domain;
- 2) Some of the records may relate only to the personal interests of the requester;
- 3) Some records would have little or no value to the public if disclosed; or

- 4) Some records may involve a subject that is not of public interest.

Fees in these cases should be prorated based on the percentage of records that meet the fee waiver criteria.

g. Public Participation Requirements. EPA regulations (40 CFR, Part 25) contain requirements and suggested program elements for public participation under the Clean Water Act, the Resource Conservation and Recovery Act and the Safe Drinking Water Act. Information and assistance requirements include the following:

- 1) A requirement that whenever possible, EPA provide copies of documents of interest to the public free of charge. This requirement only relates to documents that come under the Acts covered by 40 CFR, Part 25. Free copies may not be possible when requests are for voluminous amounts of material and copying resources are limited. When a charge is made, the FOIA fee schedule should be used.
- 2) When free copies of documents are limited, the free copies should be distributed to those requesters whose resources are limited (e.g., private citizens would receive preference over corporations).

h. Fee Waiver or Fee Reduction Appeals. When an action office denies a request for a public interest fee waiver or reduction, the requester must be informed in writing of the decision and of the right to appeal the denial by letter addressed to the Agency FOI Officer. The FOI Officer will promptly refer any appeal to the Office of General Counsel for a decision. The Office of General Counsel will review the file and consult as appropriate with the action office. The review will be de novo, i.e., the request will be reviewed as if it were a new request.

- 1) The Office of General Counsel will notify the requester in writing of its decision. The decision will normally be issued within ten workdays (see also Chapter 10 on Appeals). Copies of the decision will be sent to the action office and the Agency FOI Officer.
- 2) A requester may choose to pay fees while appealing a fee waiver denial and still be eligible for a refund if the appeal is granted.

i. **Court Review of Denials of Requests for Fee Waivers or Reductions.** A requester may seek judicial review of the Agency's denial of a request for a public interest fee waiver or reduction. The court's de novo review is limited to the administrative record. The Agency cannot supplement the record once the matter is in court.

3. ADMINISTRATIVE FEE WAIVERS

a. **Fees Less Than \$25.00 Are Waived.** All fees totalling less than \$25.00 per request are waived. This reflects the Agency's determination that the cost to the Agency of billing and recording the payment of FOIA fees is at least \$25.00. If the total fee is less than \$25.00, the Agency's response should include a statement that the fees are waived as de minimis.

b. **Difference Between Advance Fees and Final Fees Is Less Than \$25.00.** If the difference between the advance fees and the actual fees is less than \$25.00, the difference is waived and not billed. This reflects the Agency's determination, in accordance with 40 CFR 2.120(a)(5)(v), that the costs of collecting the remaining fees would exceed the amount outstanding.

c. **Each Request Is Separate.** As a general rule, each written request for records will be viewed as a separate request for fee calculation purposes. However, in cases in which it appears that a requester has divided the request into several parts in an attempt to avoid paying fees, the parts may be considered together for billing purposes. The parts of the request should relate to records existing in the Agency at the time of the first part of the request.

4. DELINQUENT REQUESTERS

Each month the Financial Management Offices will furnish to the appropriate FOI Office a list of requesters not submitting payment within 60 days. The FOI Offices will maintain and share the delinquent lists. A requester cannot be placed on the delinquent list if an appeal for a fee waiver/reduction is pending.

If a requester whose name appears on the delinquent list makes a new request, the FOI Office shall inform the requester that EPA will not process the request until payment of the overdue fee from the earlier request is submitted (see sample letter G, Appendix I). Any request made by an individual who specifies an affiliation with or representation of a corporation,

association, law firm, or other organization shall be deemed to be a request by the corporation, association, law firm or other organization.

If an organization placed on the delinquent list can show that the person who made the request for which payment is overdue did not make the request on behalf of the organization, the organization will be removed from the delinquent list, although the name of the individual shall remain on the list.

CHAPTER 5: RELEASING RECORDS**1. WHO MAY RELEASE RECORDS**

a. **Authorized Officials.** The Deputy Administrator, Assistant Administrators, Associate Administrators, the Inspector General, the General Counsel, Heads of HQ Staff Offices and Regional Administrators are authorized under section 2.113(b) of EPA's FOIA regulations to issue initial determinations to release records in response to FOIA requests.

b. **Redelegation of Authority.** When records are to be released in full, these officials may redelegate their authority downward to any level of the EPA staff. Chapter 1, Section 7.a, describes the redelegation process.

2. WHAT MAY BE RELEASED

a. **Presumption to Release.** FOIA is intended as a disclosure law, not a withholding law. In handling all FOIA requests, remember that there should be a presumption in favor of releasing information. Information must be released unless it falls into one of the nine exemptions or the exclusions (covered in Chapter 7).

- o All releasable EPA records are subject to public disclosure on request, regardless of whether the requester has shown any justification or need for the documents requested.
- o Some information legally exempt under FOIA is, by EPA policy, normally released to the public. Such discretionary release is discussed in Chapter 9.

b. **Existing Records.** Under FOIA, only existing Agency records are subject to release. Offices need not create records or compile new information to respond to a FOIA request.

NOTE: Offices may create new records if it would be easier or less expensive, or if public understanding of more complex documents would thereby be facilitated. In fact, Part 25 of EPA's regulations on public participation (Title 40 CFR, Part 25) specifically encourages offices to summarize lengthy and/or technical documents covered by that part.

c. **Cut-Off Date for Search.** Ordinarily, the Agency is responsible for releasing only those records that exist as of the date of receipt of a request by the FOI Office. If there has been a long delay (30 days or more) in responding to the request, the cut-off date of the search should be moved to the date on which the search begins. The response should inform the requester if a different cut-off date has been used.

d. **Examples of Releasable Records**

- 1) As a general rule of thumb, release: final orders and opinions in administrative actions; official policy statements, interpretations and guidelines that have been adopted by the Agency; official Agency manuals and similar instructions; and position descriptions.
- 2) The type of document per se is not the sole factor in determining releasability. Each document--e.g., memo, drafts, notes--needs to be analyzed on its own merits for releasability.

e. **Consultation.** If there are any questions concerning a document's releasability after reading Chapters 6 and 7, consult with the appropriate FOI/legal office.

3. **TIME FRAME FOR RELEASING RECORDS**

a. **10-Workday Time Limit**

An initial determination to release a requested record must be made and a letter mailed to the requester by the tenth workday after receipt of a request by the FOI Office. While this does not mean the requested record must be released by that date, (e.g., if copying is not yet completed), the record should be forwarded to the requester promptly thereafter.

NOTE: As a matter of policy, EPA personnel replying to FOIA requests ordinarily should release records simultaneously with determination letters. This will help assure prompt disclosure, ease administrative and recordkeeping burdens, and avoid confusing the requester.

b. **Extensions.** Under Section 2.112(e) the 10-workday time limit may be extended up to an additional 10 workdays if it is "absolutely necessary" because of:

- o the need to search for and collect records from field or other separate offices;
- o the need to search for, collect and examine a voluminous amount of information;
- o the need to consult with another agency or EPA component.

If an extension is necessary, the responsible action office should notify the appropriate FOI Office and then contact the requester in writing (see sample letter L, Appendix I) prior to the end of the initial 10-workday response period, informing him/her of the extension, why it is necessary and when the office expects to issue its determination. A copy of this letter should be sent to the appropriate FOI Office and FOI Program Coordinator.

c. **Legal Recourse.** All EPA personnel responding to FOIA requests should bear in mind that if a request is not answered within 10 workdays (or 20 workdays if extended), the requester may initiate legal action in federal district court.

4. PREPARING RELEASE LETTERS

a. **Basics.** Every EPA FOIA release letter should:

- o be cordial and convey an attitude of cooperation;
- o include the applicable RIN number;
- o include an itemized enclosure list; or
- o include necessary cc/bcc information for recordkeeping purposes;

b. **Sample Release Letter.** A copy of a sample full release letter, which acknowledges a positive determination, enclosing the requested record(s) and index, is included at sample letter M, Appendix I.

c. **Sample Release Letter Without Records.** In instances when the requested record(s) cannot be released simultaneously with the release determination, language to that effect should be included in the release letter. A sample release letter without records is included at sample letter N, Appendix I.

5. RECORDKEEPING

Whenever a release letter is sent to a requester, two copies of it should also be sent to the Agency or Regional FOI Office responsible for tracking the request. In addition, if there is a fee charged, a copy of the invoice and response should be sent simultaneously to the appropriate Financial Management Office (see Chapter 4, Section 1.j). Finally, the FOI Program Coordinator should also receive a copy of the release letter, if appropriate. Requirements for keeping records or files on FOIA requests are contained in Appendix V.

CHAPTER 6: WITHHOLDING RECORDS**1. WHO MAY WITHHOLD RECORDS**

a. **Authorized Officials.** The authority to make initial determinations to withhold records is delegated to the Deputy Administrator, Associate and Assistant Administrators, Heads of HQ Staff Offices, Regional Administrators, the General Counsel and the Inspector General.

b. **Redelegation of Authority.** Decisions to withhold, and consequently deny in part or in full the release of existing, located documents, may be redelegated to persons not lower than the Division Director level or equivalent position.

The only exception is when an initial denial is based solely on a determination by the action office that the records requested may be entitled to confidential treatment under EPA regulations governing confidential business information (§2.204(d)(1)). In this case, authority may be redelegated to any EPA employee.

2. WHAT MAY BE WITHHELD

a. **FOIA Exemptions.** Records must be released unless they fall into one or more of the nine exemption categories established by FOIA. These exemptions provide the basis for withholding under FOIA. The most common exemptions (see Chapter 7) that apply to FOIA requests received by EPA are:

- o Exemption 4 - Trade Secrets, Commercial or Financial Information (Confidential Business Information);
- o Exemption 5 - Privileged Inter- and Intra-Agency Memoranda; and
- o Exemption 7 - Records or Information Compiled for Law Enforcement Purposes.

b. **Partial Denial.** If records contain both exempt and non-exempt information, the non-exempt information must be disclosed if the exempt material is "reasonably segregable" and the necessary deletions can be made without making the record

unintelligible. Section 6 of this chapter (page 6-6) sets out the procedures for partial denial.

c. **Discretionary Release.** If a record in EPA's possession does not fall into one of the nine exemption categories or exclusions, its release is mandatory. If the record is legally exempt by virtue of Exemption 2, 5 or 7 (with the exception of 7(C) or (D)) of the Act, it nonetheless may be released at the Agency's discretion (see Chapter 9).

NOTE: Records contained in a Privacy Act system of records may not be released at the Agency's discretion.

3. PRIOR DISCLOSURE

a. **Effect of Prior Disclosure.** Previous disclosure of documents to the public, depending upon the circumstances of the release, may impair the ability of the Agency to withhold the records in response to a future request, even if the exemption is warranted.

In general, once a record has been released under FOIA, that record cannot later be withheld from a subsequent requester. An exception would be where, for example, confidential business information can be released to the business that submitted the information, but would still be withheld from other requesters. Where an agency mistakenly discloses the contents of a record, it cannot always expect to be able to withhold the record in response to a future FOIA request.

b. **General Rules Regarding Prior Disclosure**

- 1) Circulation of records within an agency or between Federal agencies does not prohibit the agency from subsequently withholding the records.
- 2) Disclosure of predecisional and deliberative records to advisory committees or to the Congress does not prevent future withholding.
- 3) When an agency is compelled to release a document under limited and controlled conditions (e.g., release of documents under protective order in an administrative proceeding), it is not barred from later invoking applicable FOIA exemptions.

- 4) Where a prior disclosure has fulfilled a legitimate government purpose (e.g., disclosure of enforcement information to a delegated State), a waiver has not necessarily occurred and the records may be withheld.
- 5) Where a prior disclosure was unauthorized (e.g., a "leak"), a waiver has not occurred and the records may be withheld.

4. TIME FRAME FOR DENYING REQUESTS

a. **10-Workday Time Limit.** An initial determination to deny requested records must be made and mailed to the requester by the tenth working day after receipt of a request by the FOI Office.

b. **Extensions.** As in the case with releasing records, the 10-workday limit may be extended for up to an additional 10 workdays while considering withholding records if it is "absolutely necessary" because of:

- o the need to search for and collect records from field offices or other separate offices;
- o the need to search for, collect and examine a voluminous amount of information; or
- o the need to consult with another agency or EPA component.

If an extension is necessary, the responsible action office should contact the requester in writing (see sample letter L, Appendix I) prior to the end of the initial 10-day response period, informing him/her of the extension, why it is necessary, and when the office expects to issue its determination. A copy of this letter should be sent to the appropriate FOI Office and FOI Program Coordinator.

c. **Legal Recourse.** All EPA personnel responding to FOIA requests should remember that if a request is not answered within 10 workdays (or 20 workdays if extended), the requester may initiate legal action in federal district court.

5. DENIAL LETTER**a. Basics.** Every EPA FOIA denial letter should:

- 1) be cordial and convey an attitude of cooperation, even though the response is a denial;
- 2) include the applicable RIN number;
- 3) include an itemized list of the withheld records, a reference and summary of the applicable FOIA exemption(s) for each (use the statute for reference purposes), and any additional information that may help the requester understand the Agency's denial. The itemized list should normally include the type of record, the author's name (the "to" and "from" in the case of letters and memoranda), the date, the subject, the number of pages, the specific statutory exemption(s), and the reason(s) for withholding.

NOTE: An itemized index should not be included when the denial does not disclose the existence or non-existence of records, see Section 5.c below.

If Exemption 5 or 7 is the basis for the denial (see Chapter 7), the letter should specify the particular privilege of Exemption 5 relied upon (e.g., the deliberative process privilege) or the particular sub-section of Exemption 7. **NOTE:** Letters containing general assertions of exemption 5 or 7 without identification of the specific privilege or sub-section are insufficient. Agency personnel have a duty to apprise the requester of the bases for the withholding.

In the case of a large number of similar records, the records may be listed by general category (for example, 30 bills of lading submitted by company X relevant to the XYZ Superfund site);

- 4) include the name and position of the EPA employee responsible for denying a request, if that person is different from the signer of the determination letter. **NOTE:** This requirement is particularly

important in instances where a request requires multiple action directed by a lead office;

- 5) state that the requester has the right to appeal the initial denial by sending a written appeal to the Agency FOI Officer within 30 days of receipt of the denial letter;
- 6) include the signature and title of the duly authorized Agency employee issuing the denial (generally at the division director level or higher); and
- 7) include necessary cc/bcc information for record-keeping.

b. Special Circumstances. In some instances, merely revealing to the requester the existence or nonexistence of records would mean disclosing information that an exemption is designed to protect. Under these circumstances action offices should avoid disclosing the existence or nonexistence of the records requested. They should issue a denial stating that the request is denied because "either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of FOIA." (See Chapter 7, "Glomar", page 7-9.) No such determination shall be issued without the concurrence of the Office of General Counsel, General and Information Law Branch.

In certain circumstances action offices may deny the existence of law enforcement records or information that are excluded from the provisions of FOIA (see Chapter 7, "Exclusions" page 7-14). No such determination shall be issued without the concurrence of the Office of General Counsel, General and Information Law Branch and the Department of Justice.

c. Sample Denial Letter. A copy of a sample denial letter is included at sample letter O, Appendix I.

d. Reminder. Since denial letters usually form the basis of EPA's position during subsequent appeals (and often in litigation as well), they should be clear, well-reasoned and comprehensive.

6. PARTIAL DENIAL OF RECORDS

a. **Policy.** Some requested documents contain both exempt and non-exempt information. EPA's FOIA regulations (40 CFR 2.103) stipulate that in such cases the non-exempt portion(s) be forwarded to the requester after the exempt portions have been deleted. (NOTE: Partial denial also applies to requests for several records, some of which are releasable and some exempt.)

For example, records or information compiled for law enforcement purposes that contain both exempt and non-exempt information should be purged of the exempt information, and the remainder released. The action office should delete only those portions of the record that would interfere with or harm the government's enforcement action and release the portions that would not harm the enforcement action.

b. **Guidelines**

- 1) Title 5 of the U.S. Code (5 U.S.C. 552(b)) states that all "reasonably segregable" material should be disclosed.
- 2) Deletions of portions of a record of less than a sentence in length are encouraged if the meaning of the sentence is not obscured.
- 3) Any information otherwise disclosable that is "inextricably intertwined" with exempt information may be withheld.
- 4) To determine which portions of a record must be deleted, see the discussion of the nine FOIA exemptions in Chapter 7.
- 5) Do not purge proprietary information that belongs to the specific requester. For example, confidential business information is generally available to the submitter of the information. Personal information about an individual (such as a Social Security number) is generally available to that individual.

- 6) Doubts about the intelligibility of a document after all necessary deletions have been made should be resolved in favor of release.
- 7) Normal FOIA fees should be charged for those requests where records are denied or partially denied (see Chapter 4, Section 1.f).

c. **Sample Partial Denial Letter.** Guidelines under Section 5.a. of this chapter, should be followed in preparing a partial denial letter. A sample partial denial letter is included at sample letter P, Appendix I.

d. **Reminder.** Like full denial letters, partial denial letters usually form the basis of the Agency's position during subsequent appeals (and often litigation as well). They should, therefore, be clear, well-reasoned and comprehensive.

7. RECORDKEEPING

a. **Copies to FOI Office.** Whenever a full or partial denial letter is sent to a requester, two copies of the letter should be sent to the Agency or Regional FOI Office and one copy should be sent to the FOI Program Coordinator responsible for tracking the request.

b. **Copies on File.** In addition, action offices should keep the request, a copy of the denial letter, copies of the withheld records and any additional correspondence relating to the request on file.

NOTE: The action office should be prepared to make the file available to the Office of General Counsel in case an appeal is filed. Copies of the withheld records must be maintained in a separate file for 60 days so they can be provided promptly to OGC if an appeal is filed.

**Tab G - Exemptions and
Exclusions**

CHAPTER 7: EXEMPTIONS AND EXCLUSIONS**1. OVERVIEW**

FOIA establishes nine exemptions which provide the only basis for withholding information. The exemptions may apply singly or in combination to a given request. The nine exemptions are listed in the box below and discussed at length in the body of the chapter. If you have questions concerning whether specific documents may fall under any of the exemptions, consult the appropriate FOI or legal office.

FOIA also specifies certain types of information that are not subject to the provisions of the Freedom of Information Act. Records that are excluded from FOIA provisions and the manner in which requests for such information should be handled by action offices is discussed later in this chapter.

- Exemption 1 - Matters of National Defense or Foreign Policy
- Exemption 2 - Internal Agency Rules
- Exemption 3 - Information Exempted by Other Statutes
- Exemption 4 - Trade Secrets, Commercial, or Financial Information (Confidential Business Information)
- Exemption 5 - Privileged Inter- or Intra-Agency Memoranda
- Exemption 6 - Personal Privacy
- Exemption 7 - Records or Information Compiled for Law Enforcement Purposes
- Exemption 8 - Records of Financial Institutions
- Exemption 9 - Geological or Geophysical Information and Data Concerning Wells

2. THE NINE EXEMPTIONS

a. **Exemption 1 - Matters of National Defense or Foreign Policy.** This exemption authorizes an agency to withhold information concerning national defense or foreign policy.

- 1) To qualify under this exemption, the information must fall under the criteria established by Executive Order 12356 (implementing the National Security System) to be classified in the interest of national defense or foreign policy and in fact be properly classified pursuant to procedural and substantive criteria contained in the Executive Order.
- 2) Certain information may be classified or reclassified after EPA has received a request for it under FOIA. Special approvals are required. No EPA document may be classified or reclassified once a request for the document under FOIA or Privacy Act has been received, unless the classification is clearly consistent with Executive Order 12356 and is authorized by the Administrator (see Facilities and Support Services Manual, Volume 4850, Security, Part 2, Document Security, Chapter SCR 2-03, Classification).
- 3) With the Agency's increased involvement in the international arena, it is quite likely that we will have classified records in our possession that are responsive to FOIA requests.

b. **Exemption 2 - Internal Agency Rules.** This exemption protects records "related solely to the internal personnel rules and practices of an agency."

- 1) Internal matters of a relatively trivial nature for which there is no substantial and legitimate public interest in disclosure are encompassed under this exemption. Examples include: documents governing staff use of parking facilities; statements of policy as to sick leave; and file numbers, routing stamps and other administrative markings. The rationale for such withholdings is to prevent unwarranted administrative burden.
- 2) As a matter of policy, EPA does not withhold records of a trivial nature, even though such records fall within Exemption 2. Discretionary release of such records is encouraged (see Chapter 9).

- 3) Exemption 2 also has been interpreted to encompass more substantial internal matters, the disclosure of which would allow circumvention of a statute or agency regulation.

c. Exemption 3 - Information Exempted by Other Statutes. Under this exemption, information that is specifically exempted from disclosure by another Federal statute, which has been enacted by Congress, is also exempt from disclosure under FOIA.

- 1) One example is statements of government witnesses relating to federal criminal prosecutions under the Jencks Act.
- 2) The statute in question must (1) leave no discretion as to the requirement that matters be withheld from the public or (2) establish particular criteria for withholding or refer to particular types of matters to be withheld.
- 3) The Privacy Act is not an Exemption 3 statute. Privacy considerations are covered under Exemption 6 or 7(C).

d. Exemption 4 - Trade Secrets, Commercial or Financial Information (Confidential Business Information). This exemption allows the Agency to withhold trade secrets and commercial or financial information obtained from a person and privileged or confidential. EPA regulations elaborating on Exemption 4 are located at 40 CFR Part 2, Subpart B. See Chapter 8 for a detailed discussion of procedures to be followed in responding to requests involving Confidential Business Information (CBI).

e. Exemption 5 - Privileged Inter-Agency or Intra-Agency Memoranda. This exemption allows the Agency to withhold from disclosure inter-agency or intra-agency memoranda or letters which fall under one or more of the following privileges:

- o the deliberative process privilege;
- o the attorney work-product privilege;
- o the attorney-client privilege;
- o the government commercial information privilege;
- o the expert witness report privilege;
- o the investigative report privilege; and
- o the confidential informant privilege (see also Exemption (b)(7)(D)).

- 1) Agency Discretion and Waiver. Even though a document falls under one of the privileges, the Agency encourages the discretionary release of the document, unless release would significantly harm the Agency decisionmaking process. All of these privileges may have been waived if the Agency has disclosed the document to third parties (see Chapter 6, Section 3 on Prior Disclosure).
- 2) Inter- or Intra-Agency Records. Exemption 5 only applies to inter- or intra-agency records.
 - o Inter-Agency Records include only those transmitted between Federal agencies, but generally not those transmitted between Federal and State agencies.
 - o Intra-Agency Records are those transmitted within EPA and include reports prepared by outside consultants at the request of the Agency. Recommendations from State officials to EPA may be considered intra-agency records in limited circumstances when EPA has solicited State comments, has a formal relationship with the State, and the records concern a specific deliberative process. (The Office of General Counsel or Regional Counsel should be consulted in these instances.)
- 3) The Privileges under Exemption 5.
 - o The Deliberative Process Privilege. This privilege incorporates the traditional government privilege against discovery of government documents. The purpose of this privilege is to protect the quality of the Agency's decisionmaking process (i.e., to protect against premature disclosure of proposed policies before they are adopted), to encourage candid and frank discussions among Agency officials, and to avoid premature disclosure which could mislead the public. NOTE: Former Administrator Ruckelshaus' memorandum of October 3, 1984, addresses the assertion of the deliberative process privilege in litigation and does not cover the assertion of this privilege in FOIA matters.

- o Predecisional, Deliberative Documents. Only predecisional, deliberative documents may be withheld. Predecisional, deliberative documents are written prior to the Agency's final decision and usually contain recommendations or express opinions on that decision. These documents typically discuss the pros and cons of the Agency's adoption of one viewpoint or another. In determining whether a document is predecisional, consider the document's language and its place in the Agency's chain of decisionmaking. Documents written by a subordinate and transmitted to a superior are more likely to be predecisional than those written by a person with final decision-making authority. (NOTE: As a general rule, action offices must segregate from the record those predecisional and deliberative sections and release the factual portions to the requester.)
- o Drafts of Documents are Often Predecisional. They must be part of the decisionmaking chain and either (1) contain language which discusses or debates the decision being made, or makes recommendations, such as a memorandum from a subordinate to a superior which discusses the effects and pros and cons of the decision; or (2) represent a tentative expression of the Agency's position, as in a draft administrative order or memorandum which is being reviewed prior to the adoption of a final Agency position.
- o Factual Portions of Deliberative Process Documents Must Ordinarily be Released. The deliberative process privilege does not allow the withholding of purely factual portions of documents. Purely factual portions of these documents must be released if they can be segregated from the remainder of the document (see Chapter 6, Section 6). If the facts themselves reflect the Agency's deliberations or involve some subjective opinion which may be reviewed or evaluated and changed, such factual portions may also be withheld.
- o Final and Post-Decisional Documents. Final decision documents and post-decisional documents may not be withheld under the deliberative process privilege. These include post-decisional analyses or explanations of a final decision as well as

descriptions of Agency efforts to enforce current Agency policies. Documents lose their predecisional status if they are adopted, either formally or informally, as the Agency's final position on a matter, or if they are specifically incorporated by reference in a final Agency decision. Similarly, the deliberative process privilege does not allow the withholding of "Agency working law," such as guidelines, orders, decisions or interpretations that are used to make decisions affecting the public.

- o Settlement Documents. Some courts have held that documents transmitted between the government and third parties during settlement negotiations are not inter- or intra-agency documents, but have indicated much sympathy for withholding such documents from public disclosure for policy reasons. The Department of Justice has indicated that settlement documents may be withheld by agencies at the administrative level, particularly where strong policy interests militating against disclosure are present.
- o The Attorney Work-Product Privilege. This privilege allows the withholding of documents prepared by, or at the direction of, an attorney in anticipation of possible litigation (which can include administrative proceedings). Litigation need not have commenced but it must be reasonably contemplated. This means that a specific claim must exist that is likely to lead to litigation. The privilege is still applicable after a legal case has ended or even if it was never begun, as long as the documents were prepared in reasonable contemplation of litigation.

Segregable factual materials need not be deleted from attorney work-product documents since the facts are generally intertwined with an attorney's evaluation of the case. The privilege, however, does not extend to purely factual documents, such as witness statements or objective data, unless the documents reflect the results of an attorney's evaluation, or reveal his/her strategy or thought process.

- o The Attorney-Client Privilege. This privilege applies to confidential communications between attorney and client. An attorney-client relationship is necessary to invoke this privilege. Such a relationship exists for communications between an Agency attorney and an Agency employee. The application of this privilege requires that the communications between the parties be of a confidential nature. Unlike the attorney work-product privilege, the availability of the attorney-client privilege is not limited to the context of litigation. The privilege still applies when this information is disseminated within the Agency to persons involved with the matter in question. However, unrestricted distribution within the Agency would preclude the Agency from claiming the privilege.
- o The Government Commercial Information Privilege. A privilege is available to the government for information it generates in the process leading up to the award of a contract. This privilege incorporates the language of Federal Rule of Civil Procedure 26(c)(7), which provides that "for good cause shown . . . a trade secret or . . . confidential research, development or commercial information" may be protected in discovery in civil litigation. This privilege expires once the contract is awarded or upon withdrawal of the contractual offer. An example of this privilege is cost estimates prepared by the government and used to evaluate the construction proposals of private contractors.
- o The Expert Witness Report Privilege. Another privilege that is commonly invoked allows the withholding of records generated by an expert witness.
- o The Investigative Report Privilege. This privilege has been applied to protect witness statements in Inspector General investigations.
- o The Confidential Informant Statement Privilege. Statements obtained from confidential informants such as statements given to the Inspector General by witnesses who have been granted confidentiality, may be withheld.

f. **Exemption 6 - Personal Privacy.** Exemption 6 permits the withholding of all information about individuals in "personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

1. Threshold test: The record must be a personnel, medical or similar file. This is a relatively easy test to meet. Personnel and medical files are easily identified. The term "similar file" has been very broadly interpreted to include any information about a particular individual which is identifiable to that individual.
 - o The actual label assigned to the file is of no significance. Nor does the information have to be of a highly sensitive or intimate nature.
 - o If a record can be sanitized so that the identity of the individual cannot be determined from the record itself, or from the record in conjunction with publicly available information, the record is not a similar file and does not meet the threshold test for Exemption 6. Accordingly, a sanitized copy of the record should be disclosed.
2. Balancing test: Information which meets the threshold test is withholdable under Exemption 6 if the invasion of privacy resulting from disclosure would be clearly unwarranted. To determine this, the individual's privacy interest must be balanced against the public interest in disclosure.

Privacy interest: Encompasses the individual's reasonable expectation of privacy and control over the dissemination of personal information about himself. Individuals have an expectation of privacy with respect to information which, by its nature, is personal, embarrassing or otherwise injurious to the individual. Privacy interests also include the right to be free from the secondary effects of disclosure such as harassment or unwanted intrusions even if the information itself is not inherently harmful.

- o Individuals may have a privacy interest in information which is publicly available, e.g., marital status or home address, but there is no privacy interest in information which is very well known and clearly in the public domain.

- o Businesses and other entities do not have privacy rights.

Public interest: There is a public interest in a particular Agency record if disclosure of that record sheds light on the operations or activities of the government. The interest is that of the general public in knowing what its Government is doing. The FOIA requester's identity, personal motives or interests (including commercial interests) in seeking the information are not relevant to the issue of public interest and must not be considered in determining if a public interest exists.

Balancing process: First, determine if the individual has any privacy interest in the information. If there is none, the information must be released even if there is no public interest. Second, if there is a privacy interest, determine whether any public interest in the information exists. If both privacy and public interests exist, the competing interests must be weighed against each other and the stronger interest prevails. If the privacy interest outweighs the public interest, the information is exempt under Exemption 6 and may not be released in the Agency's discretion.

3. Glomar: Occasionally a FOIA request is worded in such a way that it would not be possible to deny the record under Exemption 6 without revealing the very information which is protected under the Exemption. For example, drug counseling records maintained by EPA's Employee Counseling and Assistance Program are normally withholdable under Exemption 6. However, if EPA denied a FOIA request for such records in reliance on Exemption 6, the Agency would be revealing the existence of such records, the very information which is protected. To guard against such inadvertent disclosures, the Agency may provide a "Glomar" response; that is, it would neither confirm nor deny the existence of records in response to all requests for counseling records. The appropriate EPA legal office must be contacted before responding to the FOIA request in any case in which a "Glomar" response might be suitable.
4. Law Enforcement Records: Exemption 6 would normally be applicable to protect the personal privacy of

individuals named in law enforcement files if there is no countervailing public interest. Exemption 7(C), which protects personal privacy in the law enforcement context, would also be applicable. Since the test for applying Exemption 7(C) is less stringent than that of Exemption 6, consideration should always be given to relying on both exemptions. See discussion of Exemption 7(C) below.

5. Personnel-Related Records on Federal Employees: EPA frequently receives FOIA requests for personnel-related information on current and former Agency employees. Federal employees have privacy rights with respect to the personal details of their employment and there is frequently little or no public interest in this information. However, other personnel information on Federal employees is considered available to the public upon request because it has been determined by the courts, the Office of Personnel Management and/or common practice that there is little if any privacy interest in this information. Many records, such as employee applications. (SF 171's) and official personnel folders, contain both exempt and non-exempt information. The following lists describe the types of personnel-related information which is frequently subject to FOIA requests and whether such information is customarily considered exempt or not under Exemption 6.

<u>EXEMPT</u>	<u>NOT EXEMPT</u>
Social Security No.	Name/position/organization *
Home addresses & Telephone No.	Office addresses/ Tel. No. *
Salaries in the Private Sector	Fed./State Gov. salaries (past and present)/amounts of awards and within grade increases
Evaluations/appraisals	Position descriptions/job standards
Employment/Education data not related to qualifications for Federal employment	Employment/Education data <u>related</u> to qualifications for Federal employment
Identities of unsuccessful applicants for employment or promotion	Identities of <u>successful</u> applicants for employment or promotion
Recommendations for promotions, awards	Approved promotions, awards, including employee grade and step
College grades	Past Federal/State/Military service and dates of service *
Birthdate/Marital status/similar personal or family data	
Life/health/charity/thrift savings options and withholding data	
Citizenship	* With the exception of certain sensitive positions
Reasons for terminating past employment	
Leave records	

g. Exemption 7 - Records or Information Compiled For Law Enforcement Purposes. In 1986, exemption 7 was amended to apply to all records or information compiled for law enforcement purposes whose release could reasonably be expected to cause the specified harm. Prior to 1986 the exemption applied only to investigatory records whose release would cause the harm each sub-section sought to prevent. Exemption 7 provides that records or information compiled for law enforcement purposes need not be disclosed in six specific instances (discussed below).

- 1) Exemption 7(A): Interference with Enforcement Proceedings. Records or information compiled for law enforcement purposes may be withheld where disclosure "could reasonably be expected to interfere with enforcement proceedings." Harm to the government's case in court by premature release of evidence or information, or damage to the Agency's ability to conduct an investigation, constitutes interference under this exemption. Damage to a related or similar enforcement proceeding also constitutes interference. Exemption 7(A) can be invoked only as long as the enforcement proceeding is in progress, pending or anticipated.

The government must be able to specifically articulate the kind of harm that would affect its case. Some types of harm that fall under this exemption include premature disclosure of the government's evidence and strategy or the focus of its investigation, and the possibility that potential witnesses and sources of information would be inhibited.

The applicability of this exemption need not be justified document by document since some generic categorization of documents is permitted. For instance, acceptable generic categories include "witness statements prior to a hearing," "affidavits and interviews of charging parties," and "correspondence with attorneys and charging parties."

- 2) Exemption 7(B): Deprive a Person of the Right to a Fair Trial. Records or information compiled for law enforcement purposes may also be withheld if their disclosure "would deprive a person of the right to a fair trial or an impartial adjudication." This exemption applies mostly in the criminal trials of individuals.

- 3) Exemption 7(C): Unwarranted Invasion of Personal Privacy. Records or information compiled for law enforcement purposes may be withheld if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The public interest in the disclosure of a document must be balanced against the invasion of privacy that would result from disclosure. Exemption 7(C) is not limited to matters contained in an individual personnel, medical or similar file, but pertains to any personal information compiled for law enforcement purposes.

Courts have recognized the danger of damage to an individual's reputation simply because his or her name is mentioned in a record compiled for law enforcement purposes even though he or she is not charged. Such information may be released only where exceptional interests weigh in favor of disclosure.

Exemption 7(C) is also used to protect the identities of FBI agents and other law enforcement officials who are personally involved in compiling records or information for law enforcement purposes, and to withhold the names of informers who may not technically qualify as confidential sources under Exemption 7(D).

- 4) Exemption 7(D): Disclose Identity of Confidential Source. The first prong of Exemption 7(D) applies to civil law enforcement investigations and permits records and information compiled for law enforcement purposes to be withheld if disclosure "would reveal the identity of the source." The second prong of Exemption 7(D) applies to a criminal law enforcement matter and allows the withholding not only of the identity of the confidential source, but also any information provided by the source. This allows withholding of information provided by a confidential source even if the information was obtainable by other means.

There is no balancing test used in applying this exemption. To receive protection under this Section, the Agency must have given sources an express promise of confidentiality, or there must be circumstances from which assurances of confidentiality reasonably may be inferred.

- 5) Exemption 7(E): Reveal Techniques, Procedures or Guidelines. This exemption permits the withholding of records or information compiled for law enforcement purposes that "would disclose techniques and procedures for law enforcement investigations or prosecution, or would disclose guidelines for law enforcement investigation or prosecution if such disclosure could reasonably be expected to risk circumvention of law." Generally, the technique or procedure should not be known to the public. Those portions of an internal agency enforcement manual or guidelines that would enable the circumvention of the law should be withheld.
 - 6) Exemption 7(F): Endanger Life or Safety of Any Individual. Under this exemption any records or information compiled for law enforcement purposes may be withheld if disclosure "could reasonably be expected to endanger the life or physical safety of any individual." No balancing test is required.
- h. **Exemption 8 - Records of Financial Institutions.** This exemption applies to reports prepared for agencies responsible for the regulation or supervision of financial institutions (such as the Federal Reserve Board). It generally does not apply to records in EPA's possession.
- i. **Exemption 9 - Geological and Geophysical Information and Data Concerning Wells.** This exemption pertains to "geological and geophysical information and data, including maps, concerning wells."
3. **EXCLUSIONS**
- a. **Substantive Guidelines.**
- 1) Whenever a request is made which involves access to records described in sub-section (b)(7)(A) and
 - o the investigation or procedure involves a possible violation of criminal law; and
 - o there is reason to believe that the subject of the investigation is unaware of its pendency and

- o the disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the Agency may, only during such time as these circumstances continue, treat the records as not subject to the FOIA requirements.

- 2) Action offices shall also deny the existence of records whenever informant records maintained by the Agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier and the informant's status as an informant has not been officially confirmed.

b. **Procedural Guidelines.** In situations where it would appear to be appropriate to rely on the exclusion provisions, action offices must consult with the Office of General Counsel, Contracts and General Law Division prior to responding to the request.

It is important to distinguish between the exclusions set forth above and the situation where an agency expressly refuses to confirm or deny the existence of records (i.e., "Glomar") responsive to the FOIA request.

CHAPTER 8: BUSINESS CONFIDENTIALITY**1. AUTHORITY**

EPA's basic rules concerning Confidential Business Information (CBI) are set out in sections 2.201 through 2.215 of EPA's regulations in 40 CFR Part 2, Subpart B. Special provisions on handling of business information submitted under specific EPA statutes are found in sections 2.301 through 2.311 of the regulations. These special rules incorporate, modify, or replace the basic rules for information gathered under these statutes. When basic rules and the special rules conflict, the provisions of the special rules should be followed.

2. INTRODUCTION

In the course of its work, EPA receives information that may be entitled to protection from disclosure for reasons of business confidentiality. In defining what constitutes "confidential business information," EPA adopts the concept of business confidentiality encompassed by Exemption 4 of FOIA, (5 U.S.C. 552(b)(4)), which allows an agency to withhold from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The term CBI also includes business information that may not be disclosed under the Trade Secrets Act, 18 U.S.C. 1905, or under any of the statutes administered by EPA.

Under Exemption 4, commercial or financial information is determined to be confidential if its disclosure would be likely to: (1) impair the government's ability to obtain necessary information in the future or (2) cause substantial competitive harm to the person/business from whom the information was obtained. The second test, that of substantial competitive harm, is the one most commonly applied to information in EPA's possession because many of our statutes give us the authority to mandate businesses to give us information.

EPA operates under detailed regulations that spell out precise steps to be taken to determine the confidentiality of information claimed as CBI. While this manual provides guidance on the handling of CBI, it is not a substitute for EPA's regulations, which should be consulted to assure compliance with all required procedures.

3. ACTION BY EPA OFFICE TO DETERMINE CONFIDENTIALITY

a. **Initial Determination.** An EPA office that possesses information obtained from a business may need to make an initial determination of whether the information is entitled to confidential treatment. This need will arise if a FOIA request for the information is received, or anticipated, or if for any other reason the office desires to ascertain the confidential status of the information. Absent a FOIA request, there is normally no requirement that an office initiate the process of making an initial determination of confidentiality.

Under EPA's regulations, business information may not be disclosed unless EPA has ascertained that there is no claim of confidentiality applicable to the information (or unless a final determination of nonconfidentiality has already been made and the appropriate period allowed for comment by the business has ended).

If an examination of business information reveals that, even though no applicable confidentiality claim exists, the affected business might be expected to assert a claim if it knew EPA proposed to disclose the information, the EPA office must contact a responsible official of the business to determine whether the business asserts a claim. Because the submitter bears the burden of substantiating confidentiality, offices should emphasize this burden to discourage unwarranted assertions (see 40 CFR §2.204(c)(2)(i)).

If a FOIA request is pending at the time, the action office must make this inquiry by telephone or equally prompt means, and must inform the responsible official from the business that any claim the business wishes to assert must be brought to the action office's attention by the third working day after such inquiry. The office should keep a record of the result of this inquiry (see 40 CFR §2.204(c)(2)(ii)).

The action office need not inquire whether a confidentiality claim exists if (1) the business failed to assert a claim at the time the information was provided to EPA, as long as the business was notified at that time that failure to assert a claim would mean that EPA could make the information available to the public without notifying the business; (2) the business failed to assert a claim after receiving the same notice at some other time; or (3) the business has otherwise waived or withdrawn a claim covering the information.

Except where the information is clearly not entitled to confidential treatment (see section 3.b, below), the action office should furnish each business that has asserted a claim an opportunity to comment on (i.e., substantiate) its claim, if such opportunity has not been furnished previously (see sample letter Q, Appendix I).

If a FOIA request is pending, the action office should also send the requester an initial determination that the records requested may be entitled to withholding under Exemption 4, and notify the requester that a final confidentiality determination will be issued by EPA's legal office (see sample letter R, Appendix I). The FOIA request is therefore initially denied (see Chapter 6, Section 5).

b. Final Determination (By Action Office). If the EPA action office determines that business information claimed to be confidential "clearly is not entitled to confidential treatment," it may issue a final confidentiality determination and notify the business of its decision by means of the notice procedures outlined in section 4.b, below. (Note that the notice period must expire before the information may be released.)

Such determinations of clear lack of entitlement to confidential treatment may only be made by the action office in such clear-cut cases as, for example, where the office knows that the claimed information is publicly available elsewhere. In such cases, no opportunity to comment need be furnished the business. A copy of any such notice shall be forwarded promptly to the appropriate EPA legal office.

c. Notice of Opportunity to Comment. When the action office determines that business information in its possession may be entitled to confidential treatment (see section 3.a, above), the office shall provide each affected business with notice that EPA is making a final confidentiality determination and provide them with an opportunity to comment (if such notice and opportunity have not previously been provided). This manual outlines what is required in connection with such notice, but the action office should consult 40 CFR §2.204(e) for specific instructions.

The action office must send the notice by certified mail (return receipt requested), by personal delivery, or by other means allowing verification of the fact and date of receipt. At or about the time the written notice is sent, the action office should also call a responsible official of the business to let

that person know that the business should expect to receive the notice shortly and to request that the office be contacted if the notice does not arrive within a few days.

The written notice should ask the business to comment on (i.e., substantiate) specific points regarding its confidentiality claim. Those points are spelled out in 40 CFR §2.204(e)(4).

If a FOIA request for the information prompted the need to determine confidentiality, the period for comments should be fifteen working days from the time the business received the written notice. In other cases, the action office should establish a reasonable period for comment of not less than fifteen working days from the time of receipt of the notice.

The comment period may be extended at the request of the business (before the comment due date) with approval by the appropriate EPA legal office. However, if a FOIA request for the information is pending, the EPA legal office will not approve an extension, except in extraordinary circumstances, without the consent of all FOIA requesters.

The written notice should state that the business's comments will be treated as entitled to confidential treatment if so marked unless already possessed by the Agency in nonconfidential form (see 40 CFR §2.205(c)). It should also state that EPA will consider a business's failure to furnish timely comments as a waiver of the business's confidentiality claim and that, in such event, EPA may release the information in question with no further notice to the business.

If a business's comments have not been received by the specified EPA action office by the due date (including any extension), the office should promptly contact the business to inquire whether it was granted an extension of time or whether its comments were lost in transmission. If the comments were lost, duplicate comments should be forwarded immediately by the business (see 40 CFR §2.205(b)(4)).

When comments are received by the action office, it should forward all relevant materials to the appropriate EPA legal office so that a final determination of confidentiality may be made.

4. FINAL CONFIDENTIALITY DETERMINATION BY EPA LEGAL OFFICE

Final confidentiality determinations are made by the Office of General Counsel or the Office of Regional Counsel, as appropriate, in accordance with the criteria set out in 40 CFR §2.208. Unlike an initial determination by an EPA action office that business information may be entitled to confidential treatment under Exemption 4 of FOIA, a final confidentiality determination is a basis for denying information under that exemption.

The EPA legal office makes its final determination in accordance with 40 CFR §2.208, under which commercial or financial information has been held to be confidential if its disclosure would be likely to either (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial competitive harm to the person from whom the information was obtained. EPA's inquiry usually focuses on the second prong of the test, that of substantial competitive harm, since the first prong applies only to information voluntarily submitted to the Agency (i.e., information which EPA cannot require).

a. Final Determination by EPA Legal Office of Entitlement to Confidential Treatment. If the EPA legal office makes a determination that business information is entitled to confidential treatment, it informs the business of its determination, and EPA must maintain the information as confidential. If a request for the information under FOIA is pending at the time, the EPA legal office issues the requester a final determination denying the request (see 40 CFR §2.204(d)(1)).

b. Final Determination by EPA Legal Office of Nonentitlement to Confidential Treatment. If the EPA legal office determines that business information is not entitled to confidential treatment, it issues a notice to each affected business of the denial of the claim. The notice must state the basis for the determination, that it is a final Agency action, and that it is subject to judicial review (see 40 CFR §2.205(f)(2)). The notice must also state that EPA will not disclose the information until the tenth working day after the business's receipt of the notice of denial of its claim. This waiting period is modified to thirty calendar days in the case of information obtained under the Toxic Substances Control Act or the Federal Insecticide, Fungicide, and Rodenticide Act (see special rule provisions at 40 CFR §2.306(e) and 2.307(e)).

5. PREVIOUS CONFIDENTIALITY OR CLASS DETERMINATION

In some cases, information claimed as confidential business information may be the subject of a previous final confidentiality determination or "class determination". A class determination is a final confidentiality determination issued by the Office of General Counsel covering certain identifiable items of information and which may be applied thereafter to information falling within the class.

An EPA action office can check with the appropriate EPA legal office to find out whether particular claimed information is the subject of a previous final determination or class determination.

a. **Previous Final Determination.** If a previous final determination exists on particular information, then that determination controls and no further inquiry of the business should be made (see 40 CFR §2.204(b)). If the determination held that the information was not entitled to confidential treatment, and the appropriate notice was provided the business, the information may be disclosed without further notice. A previous final confidentiality determination may be modified by the EPA legal office under 40 CFR §2.205(h).

b. **Class Determination.** If the information is covered by a class determination which finds that category of information confidential or not confidential, the business need not be furnished the usual opportunity to comment on its claim. Instead the EPA office should send a copy of the class determination to the business, provide the appropriate notice, and allow the applicable notice period to run before any information determined not to be confidential is disclosed (see 40 CFR §2.207).

6. DISCLOSURE WITH CONSENT OF AFFECTED BUSINESS

Before initiating a confidentiality determination, the EPA office should consider whether it is possible to obtain the affected business's waiver, modification, or withdrawal of its claim of confidentiality in such a way that will allow disclosure of the needed or requested information without the necessity of a final determination. For example, the action office may be able to obtain the affected business's consent to disclose the useful portion of the information while EPA continues to protect from disclosure information that is claimed as confidential but the disclosure of which is not presently needed or requested.

7. DISCLOSURE OF CBI OTHER THAN UNDER FOIA

Business information that is not available to the public because it has been claimed or determined to be CBI may nonetheless be disclosed to certain persons in special circumstances, as set out in 40 CFR §2.209 and the modifications in the special rules. For example, the rules state the circumstances under which CBI may be disclosed to other Federal agencies, to authorized representatives, and to the Congress. These provisions of the regulations should be consulted to determine when such disclosures are permitted and the procedures that must be followed. Note especially that certain conditions must be met before CBI may be disclosed to Agency contractors or subcontractors (and that in some cases such disclosure is not permitted). The special rule provisions for each statute should be consulted.

CHAPTER 9: DISCRETIONARY RELEASE

1. WHEN TO USE DISCRETIONARY RELEASE

a. **Policy.** As a matter of policy, EPA encourages release of records that are exempt under 5 U.S.C. 552(b)(2), (5) or (7) (with the exception of (b)(7)(C) or (D)) of FOIA (see Chapter 7, sections 2b, e, and g) unless an important Agency purpose is served by withholding the documents. Before granting a discretionary release, you should decide whether release would cause significant harm to the Agency.

NOTE: EPA may not exercise its discretion to release information which is exempt from disclosure under the FOIA if the information is contained in a Privacy Act system of records. In general, the Privacy Act prohibits the disclosure of records in a system of records to any person other than the individual to whom the records pertain.

b. **Procedures.** In making any discretionary release of documents, the standard release procedures outlined in Chapter 5 should be followed carefully.

2. WHEN NOT TO USE DISCRETIONARY RELEASE

a. **Policy.** In responding to a FOIA request, EPA will under no circumstances release records exempted under 5 U.S.C. 552(b)(1), (3), (4), (6), (8) or (9), unless

- 1) it is on the order of a Federal court, or
- 2) exceptional circumstances exist, appropriate precautions are taken and the approval of the Office of General Counsel or Regional Counsel is obtained.
(Such exceptional circumstances have rarely, if ever, occurred at EPA.)

b. **Court Order To Withhold.** The Agency has no discretion to release a record if a court has prohibited the Agency from releasing the record to the public.

3. DISCRETIONARY RELEASE ON APPEAL

Discretionary release on appeals is discussed in Chapter 10, section 4.c.

CHAPTER 10: APPEALS**1. RIGHT TO APPEAL**

Any person whose request for records under FOIA has been denied in whole or in part by an initial determination may appeal that denial. In addition, a person has the right to file an appeal whenever the Agency response has indicated no responsive records have been located. (see sample letter O, Appendix I). Written appeals are addressed to the EPA Freedom of Information Officer, A-101, 401 M Street, S.W., Washington, D.C., 20460.

2. TIME FRAME FOR RECEIVING APPEALS

a. **Timely Appeals.** To be timely, an appeal must be mailed to EPA within 30 calendar days of the receipt of an initial denial or a no record response.

b. **Untimely Appeals.** Appeals mailed to EPA more than 30 calendar days after the receipt of an initial denial or a no record response may be treated either as a timely appeal or as an entirely new FOIA request at the discretion of the Agency FOI Office.

3. TIME FRAME FOR RESPONDING TO APPEALS

a. **20-Day Time Limit.** The Office of General Counsel has 20 workdays from the date the Agency FOI Office receives an appeal in which to issue a written determination stating which of the requested records under appeal shall be disclosed and which shall not be disclosed.

b. **Extensions.** This time limit may be extended up to an additional 10 workdays, unless the total of all such extensions including any used during the initial determination period would exceed 10 workdays.

c. **Backlog.** Due to the Agency's backlog of FOIA appeals, the Office of General Counsel will apprise the appellant (in writing) of the backlog and EPA's policy of processing appeals on a first-come, first-served basis. The backlog letter does not predict an appeal decision date, but indicates that the Agency will issue its determination as quickly as possible.

4. APPEAL PROCEDURE

a. **Office of General Counsel.** Upon receipt of an appeal, the Agency FOI Office sends the appeal to the Office of General Counsel.

The Office of General Counsel contacts the action office, and asks it to send the initial request, Agency response, index of withheld documents and copies of withheld documents and any additional correspondence needed to make a legal determination on the appeal. In addition, the Office of General Counsel ascertains the names of the individuals in the action office and legal office most familiar with the records under appeal, and consults with these individuals concerning their rationale for withholding the documents.

After reviewing this information, the Office of General Counsel makes its appeal determination. In appropriate cases, however, the Office of General Counsel may consult with the appellant in an attempt to find a mutually acceptable resolution short of a formal written legal determination of the appeal.

b. **Determinations.** The Office of General Counsel makes one of the following legal determinations in connection with every appeal for an existing, located record:

- 1) the record must be disclosed;
- 2) the record must not be disclosed because a statute or provision of the regulations so requires; or
- 3) the record is exempt from mandatory disclosure, but may legally be disclosed at the Agency's discretion.

c. **Discretionary Release.** Whenever the Office of General Counsel determines that a record is exempt by virtue of 5 U.S.C. 552(b)(2), (5) or (7) (with the exception of (b)(7)(C) or (D)), but may legally be released to the public at EPA's discretion, the matter is referred to the Associate Administrator for Communications, Education and Public Affairs except in the case of appeals of initial denials originating in the Office of the Inspector General and in the case of records contained in a Privacy Act system of records.

- o If the Associate Administrator for Communications, Education and Public Affairs determines that the public interest would not be served by disclosure, the Office of General Counsel issues a determination denying the appeal.
- o If the Associate Administrator for Communications, Education and Public Affairs determines that the public interest would be served by disclosure, the record is disclosed.

Prior to issuing a discretionary release in the public interest, the Associate Administrator for Communications, Education and Public Affairs consults with the appropriate action office. In the event that there is disagreement between the Office of Communications, Education and Public Affairs and the action office, the Administrator, upon request, determines whether the public interest would be served by disclosure. The Office of General Counsel then issues a final determination in accordance with the Administrator's decision.

If an appeal is based on a response indicating no records exist, the Office of General Counsel will require the action office(s) to make an additional search and respond in writing to the Office of General Counsel concerning the results of the search. If no records are located in the additional search, the Office of General Counsel will notify the requester of the results, apprise them of their right to seek judicial review, and close the file on the appeal. If documents are located, the Office of General Counsel will issue an appeal determination.

5. ISSUING APPEAL DETERMINATIONS

a. **Release on Appeal.** If the Office of General Counsel's determination holds that a record is to be disclosed, the record will be enclosed with OGC's determination letter (and Bill for Collection, if fees are assessed) to the appellant. A copy of the determination is forwarded to the action office and FOI Coordinator or Regional FOI Officer and two copies are sent to the Agency FOI Officer. (Copies of the Bill for Collection should be sent to the Agency FOI Office and the HQ Financial Management Office.)

b. **Appeal Denials.** If the Office of General Counsel's determination is to deny an appeal in whole or in part, OGC sends the appellant a copy of its determination, in which the rationale for withholding the record (or portions of the record) is

explained. It also forwards a copy of the determination to the appropriate action office and FOI Program Coordinator or Regional FOI Officer and sends two copies to the Agency FOI Officer.

6. JUDICIAL REVIEW

a. Judicial Review. Whenever OGC issues a determination denying an appeal, or indicating no responsive records exist, it states that the appellant has the right to seek judicial review of the final Agency decision by complaint filed in the United States District Court for the district in which the complainant resides or has his/her principal place of business, for the district in which the records are located or for the District of Columbia.

b. Action Office's Role. In the event an appellant files suit against the Agency under FOIA, the Department of Justice represents the Agency with assistance from EPA attorneys. The action office responsible for responding to the initial request is actively involved in the preparation of submissions to the court such as affidavits and indices.

CHAPTER 11: ANNUAL REPORT AND RECORDKEEPING**1. ANNUAL REPORT TO CONGRESS**

a. **Agency FOI Office.** Each calendar year, the Agency's FOI Officer prepares a report to the Congress describing FOIA requests received and handled by EPA. The Agency's FOI Officer prepares this report on or before March 1 for the preceding calendar year. The report is addressed to the Speaker of the House of Representatives and the President of the Senate for referral to the appropriate committees of the Congress. The Agency FOI Officer compiles the report from information submitted by Headquarters and Regional FOI Offices.

b. **Regional FOI Offices.** Each calendar year, every Regional FOI Officer prepares a Regional FOI report on requests received and handled in their Regional Office. The Regional FOI Officer prepares this report on or before February 1 for the preceding calendar year. This deadline is important to ensure inclusion of Regional information in the report to Congress prepared by the Agency's FOI Officer. The Region is asked to submit the information in the same format outlined in section 1.c below.

c. **Content of the Annual Report.** The Agency's annual report to Congress covers:

1) requests

- o the number of FOIA requests received;

2) denials

- o the number of determinations EPA made to deny records in whole or in part and the reason for each denial;
- o the name(s) and title(s)/position(s) of each person(s) responsible for the initial denial of records requested and the number of times the official denied release of records;

3) appeals

- o the number of appeals filed and the result of each appeal, including the number of determinations to either reverse the denial and release the records in whole or in part, or to support the denial;
- o the name(s) and title(s)/position(s) of each person(s) responsible for the denial of records, in whole or in part, on appeal and the number of times each official made a final determination on appeal to deny records;

4) confidential business information determinations

- o the number of final business confidentiality determinations made by EPA, the results of each determination, including the number of determinations to either reverse the denial and release the records in whole or in part or to support the denial of records in whole or in part;
- o the name(s) and title(s)/position(s) of each person(s) responsible for final business confidentiality determinations that resulted in a denial of information and the number of instances of participation for each;

5) disciplinary actions

- o the results of any disciplinary proceedings or actions taken against employees or FOI Officers who were primarily responsible for improperly withholding records or an explanation of why disciplinary actions were not taken;

6) Agency rules or regulations

- o a copy of Agency rules or regulations regarding the Freedom of Information Act;

7) fees/fee schedule

- o a copy of the fee schedule and the total amount of fees collected for making records available;

8) administrative costs

- o the administrative costs to EPA of complying with the provisions of the Act in actual dollar terms;

9) compliance with time limitations

- o the total number of instances in which it was necessary to seek a 10-day extension of time;

10) court actions

- o total number of instances where court appeals were taken on the basis of exhaustion of administrative procedures;
- o instances where court allowed additional time upon a showing of exceptional circumstances together with a copy of each court opinion or order containing such an extension of time;

11) internal memoranda

- o a copy of any unpublished internal memoranda or instructions that outline procedures for Agency personnel to follow in administering or applying FOIA. Also included should be a statement indicating whether the memoranda or instructions are publicly available and, if they are not available, the legal basis for not disclosing such documents.

2. EVALUATIONS

Use of Annual Report. The Agency's FOI Officer will analyze information gathered for the annual report to Congress from a management standpoint to assure that EPA's actions are in keeping with the intent of FOIA. He/she may, from time to time, conduct evaluations of specific EPA responses to FOIA requests. Information on administrative workload and costs is used to document the need for future positions in EPA and to document the effects of the Act on Executive Agencies' workload.

3. RECORDS RETENTION SCHEDULES

Freedom of Information files are maintained by calendar year and should be retained in accordance with EPA's Records Retention Schedules. The Schedules are included in Appendix V and are also available from the Information Management and Services Division.

NOTE: Once a record is responsive to a FOIA request, the FOIA records retention schedules dictate how long that record must be retained by the action office.

APPENDICES

APPENDIX I
SAMPLE LETTERS/MEMORANDA

	PAGE
A. Response to Request for Future Records	I-1
B. Clarifying a Vague or Overly Broad Request	I-2
C. Notification that Records Can Not be Obtained Promptly	I-3
D. Notification that Records are Available for Sale Elsewhere	I-4
E. Notification that Records Do Not Exist	I-5
F. Notification that Records are Possessed by another Federal Agency or Delegated State	I-6
G. Request for Payment Owed on Earlier Request	I-7
H. Request for Prepayment	I-8
I. Request for Fee Waiver Justification	I-9
J. Denial of Public Interest Fee Waiver Request	I-11
K. Request for Refund Memo.....	I-12
L. Extension of 10-Day Time Limit	I-13
M. Release Letter with Records	I-14
N. Release Letter without Records	I-15
O. Denial Letter	I-16
P. Partial Denial Letter	I-17
Q. Request for Substantiation from an Affected Business	I-18
R. Initial Denial Base on Claim of Business Confidentiality	I-21

SAMPLE LETTER A

RESPONSE TO REQUEST FOR FUTURE RECORDS

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information Act request of (date of request), regarding (nature of request).

The Freedom of Information Act does not require EPA to place a requester's name on a distribution list for automatic receipt of certain kinds of records as they become available. The Act only establishes requirements for disclosure of existing records.

However, you may submit future requests under the Freedom of Information Act, if you desire to ascertain whether such records have been created and are available. Any such letter(s) should reference the period of time for which records are being requested.

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER B

CLARIFYING A VAGUE OR OVERLY BROAD REQUEST

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This letter concerns your Freedom of Information Act request of (date of request), regarding (nature of request).

In reviewing your request, we find your description of the records is not sufficient to allow us to identify and locate the records you seek. We have tried unsuccessfully to reach you by telephone to clarify your request. We cannot process your request without further information. Please contact (name of employee) of my office at (telephone) at your earliest convenience.

If we have not heard from you by (date*), we will assume that you are no longer interested in pursuing your request, and your file will be closed.

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

*Normally, 30 days should be adequate.

SAMPLE LETTER C

NOTIFYING REQUESTER THAT RECORDS CANNOT BE OBTAINED PROMPTLY

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This letter concerns your Freedom of Information Act request of (date of request), regarding (nature of request).

I wish to advise you that we have not been able to obtain the record(s) you requested due to (reason for delay). We are making every effort to obtain the record(s) and hope to complete our response to you by (projected date of release).

I regret the inconvenience this may have caused. Please contact (name of employee) of this office at (telephone) if you have any questions.

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER D

**NOTIFYING REQUESTER THAT RECORDS ARE AVAILABLE FOR SALE
ELSEWHERE**

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information Act request of (date of request), regarding (nature of request).

The information you requested may be purchased from (e.g., the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. Their telephone number is 703-487-4600. (Indicate the cost of the document(s), if known.))

Any further questions regarding this information should be directed to (NTIS).

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

NOTE: Many services can provide documents only if an identification or order number is known. Provide the requester with the document order number and price if available.

SAMPLE LETTER E

NOTIFICATION THAT RECORDS DO NOT EXIST

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information Act request of (date of request).

I wish to advise you that the Agency has no records responsive to your request. If you consider this response to be a denial, you may appeal it by addressing your written appeal to the Freedom of Information Officer (A-101), United States Environmental Protection Agency, 401 M. Street, S.W., Washington, D.C. 20460.

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER F

**NOTIFICATION THAT RECORDS ARE POSSESSED ONLY BY ANOTHER
FEDERAL AGENCY OR DELEGATED STATE**

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information request
of (date of request), regarding (nature of request).

This is to advise you that the records you requested are not
in EPA's possession but may be available from (name and address
of other Agency or State Program Office). You may wish to
contact (name of other Agency or State Program) directly.

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER G
REQUEST FOR PAYMENT OWED ON EARLIER REQUEST

(stamp date)

Re: Freedom of Information Act Request RIN (RIN number of
request on which payment is still due)

Dear Mr./Mrs./Ms. (name of requester):

We have received your letter of (date) requesting information from the Environmental Protection Agency (EPA) under the Freedom of Information Act. A review of our records indicates that you made another request that was assigned Request Identification Number RIN (number of request on which payment is still due). You were billed (amount) by EPA for costs related to processing that request. Attached is a copy of the Bill for Collection sent to you at that time requesting payment. There is no indication in our records that you have paid the amount due.

Pursuant to 40 CFR 2.120(e), we will not process your current request until you pay the amount due on your earlier request or furnish proof (in the form of a receipt or cancelled check) that the bill was paid.

Please make your check or money order payable to the U.S. Environmental Protection Agency, refer to the RIN number indicated above, and attach the top portion of the enclosed Bill for Collection.

Sincerely,

Signature and Title

Enclosure

bcc: Financial Management Division

SAMPLE LETTER H

REQUEST FOR PREPAYMENT

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This letter concerns your Freedom of Information Act request of (date of request).

Pursuant to Title 40 CFR, Part 2, section 2.120(c), "Prepayment or Assurance of Payment," it will be necessary for you to prepay the costs associated with your request. Upon receipt of your payment, we will complete the processing of your request and forward the requested records to you.

Enclosed is a Bill for Collection requesting prepayment. This represents our best estimate of cost at this time. Please return the top portion of the form with your check or money order payable to the U.S. Environmental Protection Agency and forward your payment to the address listed on the form. Your check should refer to the Freedom of Information Act Request Number (listed above).

Sincerely,

Signature and Title

Enclosure

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER I

FEE WAIVER JUSTIFICATION LETTER

(stamp date)

Re: Freedom of Information Act Request _____

Dear Mr./Mrs./Ms. (name of requester):

Your Freedom of Information Act request did not contain sufficient information to enable the Agency to make a determination on your fee waiver request.

The Freedom of Information Reform Act of 1986 provides that "Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." In order to evaluate whether the statutory standard authorizing a fee waiver or reduction has been met, we will need additional information upon which to base our determination. Your response should include:

- (i) A clear statement of your interest in the requested documents, the use proposed for the documents and whether you will derive income or other benefit from such use;
- (ii) a statement of how the public will benefit from such use and from the release of the requested documents;
- (iii) if specialized use of the documents or information is contemplated, a statement of your qualifications that are relevant to the specialized use;
- (iv) a statement indicating how you plan to disseminate the documents or information to the public;
- (v) and additional information you deem relevant to your request for a fee waiver.

-2-

If we have not heard from you by (15 working days), we will issue a determination based upon the information provided in your request letter.

Sincerely,

Signature and Title

SAMPLE LETTER J

LANGUAGE FOR FEE WAIVER/REDUCTION DENIAL

The following provides some guidance concerning what wording should be used in release, partial release and discretionary release letters that also acknowledge a fee waiver/reduction denial.

The statutory test for evaluating fee waiver requests is whether release 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." I have considered six factors in determining whether your request satisfies this statutory standard: (1) whether the subject of the requested records concerns the operations or activities of the government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to the understanding of the general public; (4) whether the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; (5) whether you have a commercial interest that would be furthered by the requested disclosure; and (6) whether any such commercial interest outweighs the public interest in disclosure.

On the basis of all of the information available to me I have concluded that your fee waiver request (or a portion of your fee waiver request) must be denied because (state the basis for denying the fee waiver for all or part of the requested records). If you desire to appeal this fee waiver (or reduction) denial, you should submit a written appeal to the Agency's Freedom of Information Officer, A-101, U. S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460. Any appeal should refer to the Request Identification Number listed above, the date of this determination, and my name, title and address (or the name, title and address of the person directing issuance of the denial).

**SAMPLE MEMO K
REQUEST FOR FOI REFUND**

(stamp date)

SUBJECT: Request for FOI Refund
FROM: (Responding Office)
THRU: Freedom of Information Officer
(Headquarters or Region)
TO: Financial Management Office
(Headquarters or Region)

Please process a refund check in the amount of \$_____ to the following individual:

Mr. John Doe
Jane Doe, Inc.
123 Anywhere Lane
Anytown, U.S. 56789

RIN #: _____

TYPE REASON FOR REFUND HERE
(see example below)

Advance payment of \$_____ was received on (date).
Actual charges of \$_____ were incurred in filling the Freedom of Information request.

If you need further information, please contact (name) on (telephone #).

cc: FOI Coordinator

(TO BE COMPLETED BY FOI OFFICE)

REFUND APPROVED IN THE AMOUNT OF: \$_____

FREEDOM OF INFORMATION OFFICER
(Headquarters or Region)

DATE OF APPROVAL

NOTE: After approval, the FOI Office will send this memo to the Headquarters or Regional Financial Management Office.

SAMPLE LETTER L
EXTENSION OF TEN-DAY TIME LIMIT

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information Act request of (date of request). An extension of the time required to comply with your request is necessary.

The reason for the extension is (are):

- ☐ The need to search for and collect the requested records from offices that are physically distant from this office. (40 CFR 2.112(e)(1))
- ☐ The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records involved in your request. (40 CFR 2.112(e)(2))
- ☐ The need for consultation, which shall be conducted with all practicable speed, with another agency or EPA office having a substantial subject-matter interest in your request. (40 CFR 2.112(e)(3))

An initial determination is expected by (date of expected determination).

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER M
RELEASE LETTER WITH RECORDS

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs. Ms. (name of requester):

This is in response to your Freedom of Information Act request of (request date), regarding (nature of request).

I am enclosing a copy/copies of the records which is/are responsive to your request. The cost of providing this information is _____. An itemized invoice covering the charges for processing your request is enclosed. Please forward your check or money order, made payable to the U.S. Environmental Protection Agency, within 30 days of the date of this response. Your check should refer to the RIN number above and should be accompanied by the top portion of the enclosed Bill for Collection. Your prompt payment of the amount indicated will be appreciated.

Sincerely,

Signature and Title

Enclosures: (index of documents and Bill for Collection.)

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER N
RELEASE LETTER WITHOUT RECORDS

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information Act request of (request date), regarding (nature of request).

My office has determined that the record(s) you requested can be released under the Freedom of Information Act. We are currently copying the information you requested and will forward it to you (along with an itemized invoice covering the charges for processing your request by (estimated date of completion)).

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER O

DENIAL LETTER

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information Act request of (request date), concerning (nature of request).

We are unable to provide you with the requested records because they are exempt from mandatory disclosure by virtue of 5 U.S.C. 552(b) (cite the exemption or exemptions). An itemized list of the records which are being withheld along with the basis for withholding is provided on the enclosure to this letter.

You may appeal this denial by addressing, within 30 days of your receipt of this letter, your written appeal to the Freedom of Information Officer (A-101), United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Your appeal should include the RIN number listed above, the date of this determination, and my name, title and address (or the name, title and address of the person directing issuance of the denial).

Please contact () at (), should you have any questions concerning this matter.

Sincerely,

Signature and Title
(Division Director Level or Above)

Enclosure: (index of withheld documents)

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

NOTE: If you are relying on exemption 5, cite the specific privilege (e.g., deliberative process privilege). If you are relying on exemption 7, cite the particular subsection of 7 (i.e., (A), (B), etc.).

SAMPLE LETTER P
PARTIAL DENIAL LETTER

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your Freedom of Information Act request regarding (nature of request).

Enclosed you will find copies of some of the documents responsive to your request.

We are unable to provide you with the documents, or portions of documents, which have been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. 552(b) (cite exemption or exemptions). An itemized list by categories of the withheld material along with the basis for withholding is provided on the enclosure to this letter.

You may appeal this partial denial by submitting a written appeal to the Freedom of Information Officer (A-101), United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, within 30 days of receipt of this partial denial. Your appeal should refer to the RIN number listed above, the date of this determination, and my name, title and address (or the name, title and address of the person directing issuance of the partial denial).

Please contact (_____) at (_____), should you have any questions concerning this matter.

Sincerely,

Signature and Title
(Division Director Level or Above)

Enclosures: (index of documents released and withheld)

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

SAMPLE LETTER Q

REQUEST FOR SUBSTANTIATION FROM AN AFFECTED BUSINESS

(date stamp)

Certified Mail
Return Receipt Requested

(Addressee)

Re: (Reference the RIN number and or the Information which is the subject of the final confidentiality determination.)

Dear (name of the representative of the Affected Business):

The Environmental Protection Agency (EPA) has received a request under the Freedom of Information Act (FOIA) for certain records pertaining to (description of the information which is the subject of the final confidentiality determination). You asserted a business confidentiality claim covering (all or part) of this information. In accordance with EPA's Freedom of Information Act regulations (40 C.F.R. Part 2), the request has been initially denied to afford you an opportunity to substantiate your claim before a final determination is made.

This letter is to notify you that the EPA (appropriate legal office) will be making a final confidentiality determination concerning this information. If you feel that some or all of the above information is entitled to confidential treatment, please specify which portions of the information you consider confidential. Please be specific by page, paragraph and sentence when identifying the information subject to your claim. Any information not specifically identified as subject to a confidentiality claim will be disclosed to the requestor without further notice to you. For each item or class of information that you identify as being subject to your claim, please answer the following questions:

1. For what period of time do you request that the information be maintained as confidential? If the occurrence of a specific event will eliminate the need for confidentiality, please specify that event.

2. Information submitted to EPA becomes stale over time. Why should the information you claim as confidential be protected for the time period specified in your answer to question #1?
3. What measures have you taken to protect the information claimed as confidential? Have you disclosed the information to anyone other than a governmental body or someone who is bound by an agreement not to disclose the information further? If so, why should the information still be considered confidential?
4. Has any governmental body made a determination as to the confidentiality of the information? If so, please attach a copy of the determination.
5. Is the information contained in any publicly available material such as promotional publications, annual reports, articles, etc.? Is there any means by which a member of the public could obtain access to the information?
6. For each category of information claimed as confidential, discuss with specificity why release of the information is likely to cause substantial harm to your competitive position. Explain the nature of those harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and such harmful effects. How could your competitors make use of this information to your detriment?
7. Do you assert that the information is "voluntarily submitted" as defined at 40 CFR sec. 2.201(i)? If so, explain why, and how disclosure would tend to lessen EPA's ability to obtain similar information in the future.
8. Any other issue you deem relevant.

Please note that you bear the burden of substantiating your confidentiality claim pursuant to 40 C.F.R. 2.208(e). Conclusory allegations will be given little or no weight in the determination. If you wish to claim any of the information in your response as confidential, you must mark the response "CONFIDENTIAL" or with a similar designation, and must bracket all text so claimed. Information so designated will be disclosed

by EPA only to the extent allowed by, and by means of the procedures set forth in, 40 CFR Part 2. If you fail to claim the information as confidential upon submission it may be made available to the public without further notice to you.

Your comments must be postmarked or hand delivered to this office by the 15th working day after your receipt of this letter. You may seek an extension of time to submit your comments, but the request must be made to the (appropriate legal office) before the end of the 15-day period. Except in extraordinary circumstances, no extension will be made without the permission of the requester. Failure to submit your comments within that time will be regarded as a waiver of your confidentiality claim, and EPA will be free to release the information.

Should you have any questions in this matter, please call me at (telephone).

Sincerely,

Signature and Title

NOTE: Please be sure to check with your FOI Officer or FOI Coordinator to determine whether the affected business has designated a specific person or office to receive this letter. If they have, you must address the request for substantiation to the designated person or office (see 40 CFR 2.213).

SAMPLE LETTER R

INITIAL DENIAL BASED ON CLAIM OF BUSINESS CONFIDENTIALITY

(stamp date)

Re: Freedom of Information Act Request RIN _____

Dear Mr./Mrs./Ms. (name of requester):

This is in response to your request of (request date) in which you requested (describe the requested records). I have determined that the records in question have been claimed confidential and may contain trade secrets or commercial or financial information which is exempt from disclosure under 5 U.S.C. 552(b)(4). Pursuant to 40 C.F.R. 2.204(d)(1), your request is being initially denied because further inquiry by EPA is required before a final determination can be made. We will consult with the third party(ies) in connection with their business confidentiality claim(s) covering these records and (the appropriate EPA legal office) will issue a final confidentiality determination.

You may appeal this initial denial of your request by writing to the Freedom of Information Officer, A-101, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. Any appeal must be made within 30 days after your receipt of this initial denial. A final confidentiality determination will be made by the (appropriate EPA legal office) whether or not you file an appeal, and you will be notified of the final determination.

You should refer to RIN _____ in any further correspondence concerning this matter. Please contact (_____) at (_____) if you have any questions.

Sincerely,

Signature and Title

bcc: Agency or Regional FOI Office (2)
FOI Coordinator (if appropriate)

APPENDIX II

SAMPLE FORMS

FOI Request Log	II - 1
Bill for Collection Form	II - 2
Acknowledgement (HQ Form 1550-2)	II - 4
(NOTE: Forms 1550-13-22 For Regions 1-10, respectively)	

05/04/92

United States Environmental Protection Agency
Freedom of Information Request Log

Initial Requests								Appeals		
Requestor & Company	Action Office	Date Received	RIN No.	Due Date (10 working days after receipt date)	Disposition		Fees	Disposition		
					Approval Date	Denial Date (Cite exemption & name & title of signing official)		Date Received	Date Approved	Denial Date (Cite exemption & name & title of signing official)

1550
05/4/92

BILL FOR COLLECTION		BILL NO. RIN-1989-89
BUREAU/OFFICE FOR REMITTANCE PAYABLE U.S. Environmental Protection Agency		DATE
ADDRESS FOR MAILING PAYMENT P.O. Box 360277 M Pittsburgh, Pa. 15251		AMOUNT OF PAYMENT \$

PAYER

Mr. John Doe
McKenna, Wilkinson & Kittner
1575 Eye Street, N.W.
Washington, D.C. 20005

DETACH AND RETURN
THIS PART OF BILL
WITH REMITTANCE.

DATE	DESCRIPTION	QUANTITY	UNIT PRICE		AMOUNT	
			COST	PER		
	FREEDOM OF INFORMATION ACT PAYMENT REQUEST					
	5 hr. search time @ \$10.00 per 1/2 hour				100	00
	250 pages duplicated @ 15 ¢ per page				37	50
	2 hours search time excluded from charges				- 40	00
	100 pages of duplication excluded from charges				- 15	00
	If there are any questions, call Jane Doe on (202) 260-1234					
			AMOUNT DUE		\$	82 50

IMPORTANT: A receipt will be issued for all cash remittances and for all other remittances when required by applicable procedures. Failure to receive a receipt for cash payment should be promptly reported to the bureau or office shown above.

EPA Form 2505-4 (9-73) REPLACES FORM DI-1040 WHICH IS OBSOLETE.

ORIGINAL BILLING

U.S. ENVIRONMENTAL PROTECTION AGENCY
FREEDOM OF INFORMATION
FEE SCHEDULE AND PAYMENT PROCEDURES
EFFECTIVE JANUARY 2, 1992

NOTICE TO REQUESTER

Payment should be made in the form of a check or money order, payable to the U.S. Environmental Protection Agency. To ensure proper credit of your payment, please write the Freedom of Information Act Request Identification Number (RIN #) on your check or money order and return with the top portion of the Bill for Collection. Mail payment to:

U.S. Environmental Protection Agency
Washington Headquarters
P.O. Box 360277M
Pittsburgh, PA 15251

In accordance with U.S. Treasury (I TFM 6-8000) and the Debt Collection Act of 1982, payment is due within 30 calendar days of the bill date. If not received within the 30 days, interest at the rate of 6% which begins to accrue from the date of the bill through the date of payment, will be assessed. A late payment handling charge of \$15.00 will be imposed after 30 days with an additional charge of \$15.00 for each subsequent 30-day period. A 6% per annum penalty will be applied on any principal amount not paid within 90 days of the due date.

In accordance with the Freedom of Information Reform Act of 1986, your request has been categorized as:

- () COMMERCIAL USE REQUEST: request charged for search, review, and duplication costs
- () EDUCATIONAL AND NON-COMMERCIAL SCIENTIFIC INSTITUTIONS: requester charged for duplication costs excluding first 100 pages
- () REPRESENTATIVE OF THE NEWS MEDIA: requester charged for duplication costs excluding the first 100 pages
- () ALL OTHER REQUEST: requester charged for search and duplication time excluding the first two hours of search time and the first 100 pages of duplication


ATTACHMENT TO BILL FOR COLLECTION FOR FREEDOM OF INFORMATION PAYMENT
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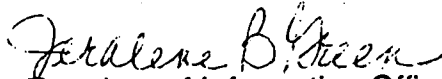


United States
Environmental Protection
Agency (A-101)
Washington, DC 20460

Official Business
Penalty for Private Use
\$300

EPA Form 1550-2 (9-90) Replaces EPA Form 1550-3, which is obsolete.

 United States Environmental Protection Agency Washington, DC 20460 Freedom of Information Act Request Acknowledgement		Date
Date of Your Request	Date Your Request Was Received	
<p>The Agency has ten (10) working days to respond to your request. You can expect a reply shortly after expiration of the ten-working-day period. Further correspondence on this subject should cite the following Request Identification Number:</p>		
HQ - RIN -		


Agency Freedom of Information Officer (A-101)
U. S. Environmental Protection Agency

APPENDIX III

FOIA STATUTE (5 U.S.C. §552)

THE FREEDOM OF INFORMATION ACT

5 U.S.C. §552

As Amended By
The Freedom of Information Reform Act of 1986*

§552. Public information; agency rules, opinions, orders, records, and proceedings

- (a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the

* The provisions specifying the effective dates of these amendments are set out at the end of the text of the Act.

Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a-uniform the schedule of fees applicable to all-constituent-units-of-such agency; the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. Such-fees-shall-be-limited to-reasonable-standard-charges-for-document-search-and-duplication-and-provide-for-recovery-of-only-the-direct-costs-of-such search-and-duplication---Documents-shall-be-furnished-without charge-or-at-a-reduced-charge-where-the-agency-determines-that waiver-or-reduction-of-the-fee-is-in-the-public-interest-because furnishing-the-information-can-be-considered-as-primarily benefiting-the-general-public-

(ii) Such agency regulations shall provide that--

(I) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use;

(II) fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media; and

(III) for any request not described in (I) or (II), fees shall be limited to reasonable standard charges for document search and duplication.

(iii) Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(iv) Fee schedules shall provide for the recovery of only the direct costs of search, duplication, or review. Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purposes of withholding any portions exempt from disclosure under this section. Review costs may not include any costs incurred in resolving issues of law or policy that may be raised in

the course of processing a request under this section. No fee may be charged by any agency under this section--

(I) if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee; or

(II) for any request described in clause (ii) (II) or (III) of this subparagraph for the first two hours of search time or for the first one hundred pages of duplication.

(v) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250.

(vi) Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

(vii) In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo, provided that the court's review of the matter shall be limited to the record before the agency.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) [Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.] Repealed. Pub. L. 98-620, Title IV, §402(2), Nov. 8, 1984, 98 Stat. 3335, 3357.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit his findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office 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 agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) 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 section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(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 or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information would (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information 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 a confidential source, (E) would disclose investigative techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of law-enforcement personnel; any individual;

(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.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) (1) Whenever a request is made which involves access to records described in subsection (b) (7) (A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings,

the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b) (1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

~~(c)~~ (d) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

~~(d)~~ (e) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

~~(e)~~(f) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

* * * * *

Section 1804. Effective Dates [Will not be codified].

(a) The amendments made by section 1802 [the modification of Exemption 7 and the addition of the new subsection (c)] shall be effective on the date of enactment of this Act [October 27, 1986], and shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date.

(b)(1) The amendments made by section 1803 [the new fee and fee waiver provisions] shall be effective 180 days after the date of the enactment of this Act, except that regulations to implement such amendments shall be promulgated by such 180th day.

(2) The amendments made by section 1803 shall apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date, except that review charges applicable to records requested for commercial use shall not be applied by an agency to requests made before the effective date specified in paragraph (1) of this subsection or before the agency has finally issued its regulations.

APPENDIX IV

EPA REGULATIONS

U.S. ENVIRONMENTAL PROTECTION AGENCY
FREEDOM OF INFORMATION ACT REGULATIONS
40 CFR PART 2
REVISED AS OF JULY 1, 1989

Environmental Protection Agency**Part 2****PART 2—PUBLIC INFORMATION****Subpart A—Requests for Information**

- Sec.
- 2.100 Definitions.
 - 2.101 Policy on disclosure of EPA records.
 - 2.102 [Reserved]
 - 2.103 Partial disclosure of records.
 - 2.104 Requests to which this subpart applies.
 - 2.105 Existing records.
 - 2.106 Where requests for agency records shall be filed.
 - 2.107 Misdirected written requests; oral requests.
 - 2.108 Form of request.
 - 2.109 Requests which do not reasonably describe records sought.
 - 2.110 Responsibilities of Freedom of Information Officers.
 - 2.111 Action by office responsible for responding to request.
 - 2.112 Time allowed for issuance of initial determination.
 - 2.113 Initial denials of requests.

Sec.

- 2.114 Appeals from initial denials; manner of making.
- 2.115 Appeal determinations; by whom made.
- 2.116 Contents of determination denying appeal.
- 2.117 Time allowed for issuance of appeal determination.
- 2.118 Exemption categories.
- 2.119 Discretionary release of exempt documents.
- 2.120 Fees; payment; waiver.
- 2.121 Exclusions.

Subpart B—Confidentiality of Business Information

- 2.201 Definitions.
- 2.202 Applicability of subpart; priority where provisions conflict; records containing more than one kind of information.
- 2.203 Notice to be included in EPA requests, demands, and forms; method of asserting business confidentiality claim; effect of failure to assert claim at time of submission.
- 2.204 Initial action by EPA office.
- 2.205 Final confidentiality determination by EPA legal office.
- 2.206 Advance confidentiality determinations.
- 2.207 Class determinations.
- 2.208 Substantive criteria for use in confidentiality determinations.
- 2.209 Disclosure in special circumstances.
- 2.210 Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.
- 2.211 Safeguarding of business information; penalty for wrongful disclosure.
- 2.212 Establishment of control offices for categories of business information.
- 2.213 Designation by business of addressee for notices and inquiries.
- 2.214 Defense of Freedom of Information Act suits; participation by affected business.
- 2.215 Confidentiality agreements.
- 2.216—2.300 [Reserved]
- 2.301 Special rules governing certain information obtained under the Clean Air Act.
- 2.302 Special rules governing certain information obtained under the Clean Water Act.
- 2.303 Special rules governing certain information obtained under the Noise Control Act of 1972.
- 2.304 Special rules governing certain information obtained under the Safe Drinking Water Act.
- 2.305 Special rules governing certain information obtained under the Solid Waste Disposal Act, as amended.

§ 2.100

- 2.306 Special rules governing certain information obtained under the Toxic Substances Control Act.
- 2.307 Special rules governing certain information obtained under the Federal Insecticide, Fungicide and Rodenticide Act.
- 2.308 Special rules governing certain information obtained under the Federal Food, Drug and Cosmetic Act.
- 2.309 Special rules governing certain information obtained under the Marine Protection, Research and Sanctuaries Act of 1972.
- 2.310 Special rules governing certain information obtained under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.
- 2.311 Special rules governing certain information obtained under the Motor Vehicle Information and Cost Savings Act.

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States Is Not a Party

- 2.401 Scope and purpose.
- 2.402 Policy on presentation of testimony and production of documents.
- 2.403 Procedures when voluntary testimony is requested.
- 2.404 Procedures when an employee is subpoenaed.
- 2.405 Subpoenas duces tecum.
- 2.406 Requests for authenticated copies of EPA documents.

AUTHORITY: 5 U.S.C. 301, 552 (as amended), 553; secs. 114, 206, 208, 301, and 307, Clean Air Act, as amended (42 U.S.C. 7414, 7525, 7542, 7601, 7607); secs. 308, 501 and 509(a), Clean Water Act, as amended (33 U.S.C. 1318, 1361, 1369(a)); sec. 13, Noise Control Act of 1972 (42 U.S.C. 4912); secs. 1445 and 1450, Safe Drinking Water Act (42 U.S.C. 300j-4, 300j-9); secs. 2002, 3007, and 9005, Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6927, 6995); secs. 8(c), 11, and 14, Toxic Substances Control Act (15 U.S.C. 2607(c), 2610, 2613); secs. 10, 12, and 25, Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136h, 136j, 136w); sec. 408(f), Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 346(f)); secs. 104(f) and 108, Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. 1414(f), 1418); sec. 104, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604); sec. 505, Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 2005).

SOURCE: 41 FR 36902, Sept. 1, 1976, unless otherwise noted.

40 CFR Ch. I (7-1-88 Edition)**Subpart A—Requests for Information****§ 2.100 Definitions.**

For the purposes of this part:

(a) "EPA" means the United States Environmental Protection Agency.

(b) "EPA Record" or, simply "record" means any document, writing, photograph, sound or magnetic recording, drawing, or other similar thing by which information has been preserved, from which the information can be retrieved and copied, and over which EPA has possession or control. It may include copies of the records of other Federal agencies (see § 2.111(d)). The term includes informal writings (such as drafts and the like), and also includes information preserved in a form which must be translated or deciphered by machine in order to be intelligible to humans. The term includes documents and the like which were created or acquired by EPA, its predecessors, its officers, and its employees by use of Government funds or in the course of transacting official business. However, the term does not include materials which are the personal records of an EPA officer or employee. Nor does the term include materials published by non-Federal organizations which are readily available to the public, such as books, journals, and periodicals available through reference libraries, even if such materials are in EPA's possession.

(c) "Request" means a request to inspect or obtain a copy of one or more records.

(d) "Requestor" means any person who has submitted a request to EPA.

(e) The term "commercial use" request refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade or profit interests of the requestor or the person on whose behalf the request is made. In determining whether a requestor properly belongs in this category, EPA must determine the use to which a requestor will put the documents requested. Moreover, where EPA has reasonable cause to doubt the use to which a requestor will put the records sought, or where that use is not clear from the request itself, EPA may seek addition-

Environmental Protection Agency**§ 2.101**

al clarification before assigning the request to a specific category.

(f) The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (e) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(g) The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution or professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(h) The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of "freelance" journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but EPA may also look to the past publication record of a requestor in making this determination.

(i) The term "search" includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identifica-

tion of material within documents. Searching for material must be done in the most efficient and least expensive manner so as to minimize costs for both the EPA and the requestor. For example, EPA will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. "Search" will be distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure (see paragraph (j) of this section). Searches may be done manually or by computer using existing programming.

(j) The term "review" refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (e) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving legal or policy issues regarding the application of exemptions. (Documents must be reviewed in responding to all requests; however, review time may only be charged to Commercial Use Requesters.)

(k) The term "duplication" refers to the process of making a copy of a document necessary to respond to a FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51658, Dec. 18, 1985; 53 FR 216, Jan. 5, 1988]

§ 2.101 Policy on disclosure of EPA records.

(a) EPA will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons in business information entitled to confidential treatment, and the need for EPA to promote frank internal

§ 2.103

policy deliberations and to pursue its official activities without undue disruption.

(b) All EPA records shall be available to the public unless they are exempt from the disclosure requirements of 5 U.S.C. 552.

(c) All nonexempt EPA records shall be available to the public upon request regardless of whether any justification or need for such records has been shown by the requestor.

(d) When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service, EPA will inform the requester of the steps necessary to obtain records from the sources.

[41 FR 36902, Sept. 1, 1976, as amended at 53 FR 216, Jan. 5, 1988]

§ 2.102 [Reserved]**§ 2.103 Partial disclosure of records.**

If a requested record contains both exempt and nonexempt material, the nonexempt material shall be disclosed, after the exempt material has been deleted in accordance with § 2.119.

§ 2.104 Requests to which this subpart applies.

(a) This subpart applies to any written request (other than a request made by another Federal agency) received by any EPA office, whether or not the request cites the Freedom of Information Act, 5 U.S.C. 552. See §§ 2.107(a) and 2.112(b) regarding the treatment of requests which are directed by the requestor to offices other than those listed in § 2.106.

(b) Any written request to EPA for existing records prepared by EPA for routine public distribution, e.g., pamphlets, copies of speeches, press releases, and educational materials, shall be honored. No individual determination under § 2.111 is necessary in such cases, since preparation of the records for routine public distribution itself constitutes a determination that the records are available to the public.

40 CFR Ch. I (7-1-88 Edition)**§ 2.105 Existing records.**

(a) The Freedom of Information Act, 5 U.S.C. 552, does not require the creation of new records in response to a request, nor does it require EPA to place a requestor's name on a distribution list for automatic receipt of certain kinds of records as they come into existence. The Act establishes requirements for disclosure of existing records.

(b) All existing EPA records are subject to routine destruction according to standard record retention schedules.

§ 2.106 Where requests for agency records shall be filed.

(a) A request for records may be filed with the EPA Freedom of Information Officer, A-101, 401 M Street, SW., Washington, DC 20460.

(b) Should the requestor have reason to believe that the records sought may be located in an EPA regional office, he may transmit his request to the appropriate regional Freedom of Information Office indicated below:

(1) Region I (Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, Vermont):

U.S. Environmental Protection Agency,
Freedom of Information Officer, Room
2303, John F. Kennedy Federal Building,
Boston, Mass. 02203.

(2) Region II (New Jersey, New York, Puerto Rico, Virgin Islands):

U.S. Environmental Protection Agency,
Freedom of Information Officer, Room
1005, 26 Federal Plaza, New York, NY
10007.

(3) Region III (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia):

U.S. Environmental Protection Agency,
Freedom of Information Officer, 841
Chestnut Street, Philadelphia, PA 19107.

(4) Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee):

U.S. Environmental Protection Agency,
Freedom of Information Officer, 345
Courtland Street, N.E., Atlanta, GA 30365.

Environmental Protection Agency**§ 2.110**

(5) Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin):

U.S. Environmental Protection Agency,
Freedom of Information Officer, 230
Dearborn Street, Chicago, IL 60604.

(6) Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas):

U.S. Environmental Protection Agency,
Freedom of Information Officer (6M-MC),
1201 Elm Street, Dallas, TX 75270.

(7) Region VII (Iowa, Kansas, Missouri, Nebraska):

U.S. Environmental Protection Agency,
Freedom of Information Officer, 726 Min-
nesota Avenue, Kansas City, KS 66101.

(8) Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming):

U.S. Environmental Protection Agency,
Freedom of Information Officer, One
Denver Place, 999 18th Street, Suite 1300,
Denver, CO 80202-2413.

(9) Region IX (Arizona, California, Hawaii, Nevada, American Samoa, Guam, Trust Territory of Pacific Islands):

U.S. Environmental Protection Agency,
Freedom of Information Officer, 215 Fre-
mont Street, San Francisco, CA 94105.

(10) Region X (Alaska, Idaho, Oregon, Washington):

U.S. Environmental Protection Agency,
Freedom of Information Officer, 1200
Sixth Avenue, Seattle, WA 98101.

[41 FR 36902, Sept. 1, 1976, as amended at
50 FR 51659, Dec. 18, 1985]

§ 2.107 Misdirected written requests; oral requests.

(a) EPA cannot assure that a timely or satisfactory response under this subpart will be given to written requests that are addressed to EPA offices, officers, or employees other than the Freedom of Information Officers listed in § 2.106. Any EPA officer or employee who receives a written request for inspection or disclosure of EPA records shall promptly forward a copy of the request to the appropriate Freedom of Information Officer, by the fastest practicable means, and shall, if appropriate, commence action under § 2.111. For purposes of § 2.112,

the time allowed with respect to initial determinations shall be computed from the day on which the appropriate Freedom of Information Officer receives the request.

(b) While EPA officers and employees will attempt in good faith to comply with requests for inspection or disclosure of EPA records made orally, by telephone or otherwise, such oral requests are not required to be processed in accordance with this subpart.

[41 FR 36902, Sept. 1, 1976, as amended at
50 FR 51659, Dec. 18, 1985]

§ 2.108 Form of request.

A request shall be made in writing, shall reasonably describe the records sought in a way that will permit their identification and location, and should be addressed to one of the addresses set forth in § 2.106, but otherwise need not be in any particular form.

§ 2.109 Requests which do not reasonably describe records sought.

(a) If the description of the records sought in the request is not sufficient to allow EPA to identify and locate the requested records, the EPA office taking action under § 2.111 will notify the requestor (by telephone when practicable) that the request cannot be further processed until additional information is furnished.

(b) EPA will make every reasonable effort to assist in the identification and description of records sought and to assist the requestor in formulating his request. If a request is described in general terms (e.g., all records having to do with a certain area), the EPA office taking action under § 2.111 may communicate with the requestor (by telephone when practicable) with a view toward reducing the administrative burden of processing a broad request and minimizing the fees payable by the requestor. Such attempts will not be used as a means to discourage requests, but rather as a means to help identify with more specificity the records actually sought.

§ 2.110 Responsibilities of Freedom of Information Officers.

(a) Upon receipt of a written request, the Freedom of Information Of-

§ 2.111**40 CFR Ch. I (7-1-88 Edition)**

ficer (whether at EPA Headquarters or at an EPA region) shall mark the request with the date of receipt, and shall attach to the request a control slip indicating the date of receipt, the date by which response is due, a unique Request Identification Number, and other pertinent administrative information. The request and control slip shall then be forwarded immediately to the EPA office believed to be responsible for maintaining the records requested. (If the records requested are believed to be located at two or more EPA offices, each such office shall be furnished a copy of the request and control slip, with instructions concerning which office shall serve as the lead office for coordinating the response.) The Freedom of Information Officer shall retain a file copy of the request and control slip, and shall monitor the handling of the request to ensure a timely response.

(b) The Freedom of Information Officer shall maintain a file concerning each request received, which shall contain a copy of the request, initial and appeal determinations, and other pertinent correspondence and records.

(c) The Freedom of Information officer shall collect and maintain the information necessary to compile the reports required by 5 U.S.C. 552(d).

§ 2.111 Action by office responsible for responding to request.

(a) Whenever an EPA office becomes aware that it is responsible for responding to a request, the office shall:

(1) Take action under § 2.109, if required, to obtain a better description of the records requested;

(2) Locate the records as promptly as possible, or determine that the records are not known to exist, or that they are located at another EPA office, or that they are located at another Federal agency and not possessed by EPA;

(3) When appropriate, take action under § 2.120(c) to obtain payment or assurance of payment;

(4) If any located records contain business information, as defined in § 2.201(c), comply with Subpart B of this part;

(5) Determine which of the requested records legally must be withheld, and why (see § 2.119(b));

(6) Of the requested records which are exempt from mandatory disclosure but which legally may be disclosed (see § 2.119(a)), determine which records will be withheld, and why;

(7) Issue all initial determination within the allowed period (see § 2.112), specifying (individually or by category) which records will be disclosed and which will be withheld, and signed by a person authorized to issue the determination under § 2.113(b). Denials of requests shall comply with § 2.113; and

(8) Furnish the appropriate Freedom of Information Officer a copy of the determination. If the determination denied a request for one or more existing, located records, the responding office shall also furnish the Freedom of Information officer the name, address, and telephone number of the EPA employee(s) having custody of the records, and shall maintain the records in a manner permitting their prompt forwarding to the General Counsel upon request if an appeal from the initial denial is filed. See also § 2.204(f).

(b) If it appears that some or all of the requested records are not in the possession of the EPA office which has been assigned responsibility for responding to the request but may be in the possession of some other EPA office, the Freedom of Information officer who is monitoring the request shall be so informed immediately.

(c) In determining which records are responsive to a request, the EPA office responding shall ordinarily include those records within the Agency's possession as of the date of the Agency's receipt of the request.

(d) When a request for EPA records encompasses records of another Federal agency, the EPA office shall either: (1) Respond to the request after consulting with the originating agency when appropriate or; (2) promptly transfer responsibility for responding to the request to the originating agency provided that the other agency is subject to the FOIA. Whenever the EPA office refers a request to another agency, it shall notify the requestor of the referral.

Environmental Protection Agency**§ 2.113**

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.112 Time allowed for issuance of initial determination.

(a) Except as otherwise provided in this section, not later than the tenth working day after the date of receipt by a Freedom of Information Office of a request for records, the EPA office responsible for responding to the request shall issue a written determination to the requestor stating which of the requested records will, and which will not, be released and the reason for any denial of a request. If the records are not known to exist or are not in EPA's possession, the EPA office shall so inform the requestor. To the extent requested records which are in EPA's possession are published by the Federal government, the response may inform the requestor that the records are available for inspection and where copies can be obtained.

(b) The period of 10 working days shall be measured from the date the request is first received and logged in by the Headquarters or regional Freedom of Information Office.

(c) There shall be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date that a requestor is notified by EPA under § 2.109 that his request does not reasonably identify the records sought, and the date that the requestor furnishes a reasonable identification.

(d) There shall be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date that a requestor is notified by EPA under § 2.120 that prepayment or assurance of payment of fees is required, and the date that the requestor pays (or makes suitable arrangements to pay) such charges.

(e) The EPA office taking action under § 2.111, after notifying the appropriate Freedom of Information Office, may extend the basic 10-day period established under subsection (a) of this section by a period not to exceed 10 additional working days, by furnishing written notice to the requestor within the basic 10-day period stating the reasons for such extension

and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension:

(1) There is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

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

(3) There is a 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 EPA.

(f) Failure of EPA to issue a determination within the 10-day period or any authorized extension shall constitute final agency action which authorizes the requestor to commence an action in an appropriate Federal district court to obtain the records.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.113 Initial denials of requests.

(a) An initial denial of a request may be issued only for the following reasons:

(1) A statutory provision, provision of this part, or court order requires that the information not be disclosed;

(2) The record is exempt from mandatory disclosure under 5 U.S.C. 552(b) and EPA has decided that the public interest would not be served by disclosure; or

(3) Section 2.204(d)(1) requires initial denial because a third person must be consulted in connection with a business confidentiality claim.

(b) The Deputy Administrator, Assistant Administrators, Regional Administrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices are delegated the authority to issue initial determinations. This authority may be redelegated; *Provided*, That the authority to issue initial

§ 2.114

denials of requests for existing, located records (other than denials based solely on § 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent.

(c) [Reserved]

(d)(1) Each initial determination to deny a request shall be written, signed, and dated, and, except as provided in paragraph (d)(2), shall contain a reference to the Request Identification Number, shall identify the records that are being withheld (individually, or, if the denial covers a large number of similar records, by described category), and shall state the basis for denial for each record or category of records being withheld.

(2) No initial determination shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information or classified national security information. Instead of identifying the existence or nonexistence of the records, the initial determination shall state that the request is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b). No such determination shall be made without the concurrence of the General Counsel or his designee. The General Counsel has designated the Contracts and Information Law Branch to act on these requests for concurrence. See § 2.121 for guidance on initial determinations denying, in limited circumstances, the existence of certain law enforcement records or information.

(e) If the decision to deny a request is made by an authorized EPA employee other than the person signing the determination letter, that other person's identity and position shall be stated in the determination letter.

(f) Each initial determination which denies, in whole or in part, a request for one or more existing, located EPA records (including determinations described in § 2.113(d)(2) of this section) shall state that the requester may appeal the initial denial by sending a written appeal to the address shown in § 2.106(a) within 30 days after receipt

40 CFR Ch. I (7-1-88 Edition)

of the determination. An initial determination which only denies the existence of records, however, will not include a notice of appeal rights.

(g) A determination shall be deemed issued on the date the determination letter is placed in EPA mailing channels for first class mailing to the requestor, delivered to the U.S. Postal Service for mailing, or personally delivered to the requestor, whichever date first occurs.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985; 53 FR 216, Jan. 5, 1988]

§ 2.114 Appeals from initial denials; manner of making.

(a) Any person whose request for one or more existing, located EPA records has been denied in whole or in part by an initial determination may appeal that denial by addressing a written appeal to the address shown in § 2.106(a).

(b) An appeal should be mailed no later than 30 calendar days after the date the requestor received the initial determination on the request. An untimely appeal may be treated either as a timely appeal or as a new request, at the option of the Freedom of Information Officer.

(c) The appeal letter shall contain a reference to the Request Identification Number (RIN), the date of the initial determination, and the name and address of the person who issued the initial denial. The appeal letter shall also indicate which of the records to which access was denied are the subjects of the appeal.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.115 Appeal determinations; by whom made.

(a) The General Counsel shall make one of the following legal determinations in connection with every appeal from the initial denial of a request for an existing, located record:

- (1) The record must be disclosed;
- (2) The record must not be disclosed, because a statute or a provision of this part so requires; or
- (3) The record is exempt from mandatory disclosure but legally may be

Environmental Protection Agency**§ 2.117**

disclosed as a matter of Agency discretion.

(b) Whenever the General Counsel has determined under paragraph (a)(3) of this section that a record is exempt from mandatory disclosure but legally may be disclosed, and the record has not been disclosed by EPA under 5 U.S.C. 552, the matter shall be referred to the Assistant Administrator for External Affairs. If the Assistant Administrator determines that the public interest would not be served by disclosure, a determination denying the appeal shall be issued by the General Counsel. If the Assistant Administrator determines that the public interest would be served by disclosure, the record shall be disclosed unless the Administrator (upon a review of the matter requested by the appropriate Assistant Administrator, Associate Administrator, Regional Administrator, the General Counsel, or the head of a headquarters staff office) determines that the public interest would not be served by disclosure, in which case the General Counsel shall issue a determination denying the appeal. This review by the Assistant Administrator for External Affairs shall not apply to appeals from initial determinations by the Office of Inspector General to deny requests.

(c) The General Counsel may delegate his authority under paragraph (a) of this section to a Regional Counsel, or to any other attorney employed on a full-time basis by EPA, in connection with any category of appeals or any individual appeal.

(d) The Assistant Administrator for External Affairs may delegate the authority under paragraph (b) of this section to the Deputy Assistant Administrator for External Affairs.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.116 Contents of determination denying appeal.

(a) Except as provided in paragraph (b) of this section, each determination denying an appeal from an initial denial shall be in writing, shall state which of the exemptions in 5 U.S.C. 552(b) apply to each requested existing record, and shall state the reason(s) for denial of the appeal. A

denial determination shall also state the name and position of each EPA officer or employee who directed that the appeal be denied. Such a determination shall further state that the person whose request was denied may obtain de novo judicial review of the denial by complaint filed with the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the Agency records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4).

(b) No determination denying an appeal shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information or classified national security information. Instead of identifying the existence or nonexistence of the records, the determination shall state that the appeal is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b).

[53 FR 217, Jan. 5, 1988]

§ 2.117 Time allowed for issuance of appeal determination.

(a) Except as otherwise provided in this section, not later than the twentieth working day after the date of receipt by the Freedom of Information Officer at EPA Headquarters of an appeal from an initial denial of a request for records, the General Counsel shall issue a written determination stating which of the requested records (as to which an appeal was made) shall be disclosed and which shall not be disclosed.

(b) The period of 20 working days shall be measured from the date an appeal is first received by the Freedom of Information Officer at EPA Headquarters, except as otherwise provided in § 2.205(a).

(c) The Office of General Counsel, after notifying the Freedom of Information Officer at EPA Headquarters, may extend the basic 20-day period established under subsection (a) of this

§ 2.118

40 CFR Ch. I (7-1-89 Edition)

section by a period not to exceed 10 additional working days, by furnishing written notice to the requestor within the basic 20-day period stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension:

(1) There is a need to search for and collect the records from field facilities or other establishments that are separate from the office processing the appeal;

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

(3) There is a 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 EPA.

(d) No extension of the 20-day period shall be issued under subsection (c) of this section which would cause the total of all such extensions and of any extensions issued under § 2.112(e) to exceed 10 working days.

§ 2.118 Exemption categories.

(a) 5 U.S.C. 552(b) establishes nine exclusive categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No request under 5 U.S.C. 552 for an existing, located record in EPA's possession shall be denied by any EPA office or employee unless the record contains (or its disclosure would reveal) matters that are—

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and 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;

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

(5) Interagency 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)(i) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(A) Could reasonably be expected to interfere with enforcement proceedings;

(B) Would deprive a person of a right to a fair trial or an impartial adjudication;

(C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information 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, information furnished by a confidential source;

(E) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(F) Could reasonably be expected to endanger the life or physical safety of any individual.

(ii) [Reserved]

Environmental Protection Agency**§ 2.120**

(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.

(b) The fact that the applicability of an exemption permits the withholding of a requested record (or portion thereof) does not necessarily mean that the record must or should be withheld. See § 2.119.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 53 FR 217, Jan. 5, 1988]

§ 2.119 Discretionary release of exempt documents.

(a) An EPA office may, in its discretion, release requested records despite the applicability of one or more of the exemptions listed in § 2.118 (a)(2), (a)(5), or (a)(7). Disclosure of such records is encouraged if no important purpose would be served by withholding the records.

(b) As a matter of policy, EPA will not release a requested record if EPA has determined that one or more of the exemptions listed in § 2.118(a) (1), (3), (4), (6), (8), or (9), applies to the record, except when ordered to do so by a Federal court or in exceptional circumstances under appropriate restrictions with the approval of the Office of General Counsel or a Regional Counsel.

§ 2.120 Fees; payment; waiver.

(a) *Fee schedule.* Requesters shall be charged the full allowable direct costs incurred by the Agency in responding to a FOIA request. However, if EPA uses a contractor to search for, reproduce or disseminate records responsive to a request, the cost to the requester shall not exceed the cost of the Agency itself performing the service.

(1) There are four categories of requests. Fees for each of the categories will be charged as follows:

(i) Commercial use requests. If the request seeks disclosure of records for a commercial use, the requester shall be charged for the time spent searching for the requested record, reviewing

the record to determine whether it should be disclosed and for the cost of each page of duplication. Commercial use requesters should note that EPA also may charge fees to them for time spent searching for and/or reviewing records, even if EPA fails to locate the records or if the records located are determined to be exempt from disclosure.

(ii) Requests from an educational or non-commercial scientific institution whose purpose is scholarly or scientific research, involving a request which is not for a commercial use and seeks disclosure of records. In the case of such a request, the requester shall be charged only for the duplication cost of the records, except that the first 100 pages of duplication shall be furnished without charge.

(iii) Requests from a representative of the news media, involving a request which is not for a commercial use and seeks disclosure of records. In the case of such a request, the requester shall be charged only for the duplication cost of the records, except that the first 100 pages of duplication shall be furnished without charge.

(iv) All other requests. If the request seeks disclosure of records other than as described in paragraphs (a)(1) (i), (ii), and (iii) of this section, the requester shall be charged the full cost of search and duplication. However, the first two hours of search time (or its cost equivalent) and the first 100 pages of duplication (or their cost equivalent) shall be furnished without charge. Requesters in the "all other requests" category should note that EPA also may charge fees to them for time spent searching for records, even if EPA fails to locate the records or if the records located are determined to be exempt from disclosure.

(2) The determination of a requester's fee category will be based on the following:

(i) Commercial use requesters: The use to which the requester will put the documents requested;

(ii) Educational and non-commercial scientific institution requesters: Identity of the requester and the use to which the requester will put the documents requested;

§ 2.120

40 CFR Ch. I (7-1-88 Edition)

(iii) Representatives of the news media requesters: The identity of the requester and the use to which the requestor will put the documents requested.

(3) Fees will be charged to requesters, as appropriate, for search, duplication and review of requested records in accordance with the following schedule:

(i) Manual search for records.

(A) EPA Employees: For each ½ hour or portion thereof:

(1) GS-8 and below: \$4.00.

(2) GS-9 and above: \$10.00.

(B) Contractor employees: The requestor will be charged for actual charges up to but not exceeding the rate which would have been charged had EPA employees conducted the search.

(ii) Computer search for records charges will consist of:

(A) EPA employee operators: For each ½ hour or portion thereof:

(1) GS-8 and below: \$4.00.

(2) GS-9 and above: \$10.00, plus.

(B) Contractor operators: Requestors will be charged for the actual charges up to but not exceeding the rate which would have been charged had EPA employees conducted the search (see paragraph (a)(3)(i)(A) of this section), plus.

(C) Actual computer resource usage charges for this search.

(iii) Review of records. For each ½ hour or portion thereof (EPA employees):

(A) GS-8 and below: \$4.00.

(B) GS-9 and above: \$10.00.

(iv) Duplication or reproduction of records.

(A) Duplication or reproduction of documents by EPA employees (paper copy of paper original): \$.15 per page.

(B) Computer printouts (other than those calculated in a direct-cost billing—see paragraph (a)(3)(ii) of this section "Computer search for records") \$.15 per page.

(C) Other methods of duplication or reproduction, including, but not limited to, duplication of photographs, microfilm and magnetic tape, will be charged at the actual direct cost to EPA.

(4) Other charges.

(i) Other charges incurred in responding to a request including but not limited to, special handling or transportation of records, will be charged at the actual direct cost to EPA.

(ii) Certification or authentication of records: \$25.00 per certification or authentication.

(5) No charge shall be made—

(i) For the cost of preparing or reviewing letters of response to a request or appeal;

(ii) For time spent resolving legal or policy issues concerning the application of exemptions;

(iii) For search time and the first 100 pages of duplication for requests described in § 2.120(a)(1) (ii) and (iii) of this section;

(iv) For the first two hours of search time (or its cost equivalent) and for the first 100 pages of duplication for requests described in § 2.120(a)(1)(iv) of this section;

(v) If the total fee in connection with a request is less than \$25.00, or if the costs of collecting the fee would otherwise exceed the amount of the fee. However, when EPA reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, EPA will aggregate such requests to determine the total fee, and will charge accordingly;

(vi) For responding to a request by an individual for one copy of a record retrievable by the requesting individual's name or personal identifier from a Privacy Act system of records;

(vii) For furnishing records requested by either House of Congress, or by a duly authorized committee or subcommittee of Congress, unless the records are requested for the benefit of an individual Member of Congress or for a constituent;

(viii) For furnishing records requested by and for the official use of other Federal agencies; or

(ix) For furnishing records needed by an EPA contractor, subcontractor, or grantee to perform the work required by the EPA contract or grant.

(b) *Method of payment.* All fee payments shall be in the form of a check or money order payable to the "U.S.

Environmental Protection Agency**§ 2.120**

Environmental Protection Agency" and shall be sent (accompanied by a reference to the pertinent Request Identification Number(s)) to the appropriate Headquarters or Regional Office lock box address:

- (1) EPA—Washington Headquarters, P.O. Box 360277M, Pittsburgh, PA 15251;
- (2) EPA—Region 1, P.O. Box 360197M, Pittsburgh, PA 15251;
- (3) EPA—Region 2, P.O. Box 360188M, Pittsburgh, PA 15251;
- (4) EPA—Region 3, P.O. Box 360515M, Pittsburgh, PA 15251;
- (5) EPA—Region 4, P.O. Box 100142, Atlanta, GA. 30384;
- (6) EPA—Region 5, P.O. Box 70753, Chicago, IL 60673;
- (7) EPA—Region 6, P.O. Box 360582M, Pittsburgh, PA 15251;
- (8) EPA—Region 7, P.O. Box 360748M, Pittsburgh, PA 15251;
- (9) EPA—Region 8, P.O. Box 360859M, Pittsburgh, PA 15251;
- (10) EPA—Region 9, P.O. Box 360863M, Pittsburgh, PA 15251;
- (11) EPA—Region 10, P.O. Box 360903M, Pittsburgh, PA 15251;

Under the Debt Collection Act of 1982 (Pub. L. 97-365), payment (except for prepayment) shall be due within thirty (30) calendar days after the date of billing. If payment is not received at the end of thirty calendar days, interest and a late payment handling charge will be assessed. In addition, under this Act, a penalty charge will be applied on any principal amount not paid within ninety (90) calendar days after the due date for payment. By the authority of the Debt Collection Act of 1982, delinquent amounts due may be collected through: administrative offset or referred to private collection agencies. Information related to delinquent accounts may also be reported to the appropriate credit agencies.

(c) *Assurance of payment.* (1) If an EPA office estimates that the fees for processing a request (or aggregated requests as described in § 2.120(a)(5)(vi) of this section) will exceed \$25.00, that office need not search for, duplicate or disclose records in response to the request(s) until the requester assures payment of the total amount of fees estimated to become due under this

section. In such cases, the EPA office will promptly inform the requester (by telephone if practicable) of the need to make assurance of payment.

(2) An EPA office may not require a requester to make an advance payment, i.e. payment before work is commenced or continued on a request, unless:

(i) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days after the date of the billing), or

(ii) The EPA office estimates or determines that the allowable charges that a requester may be required to pay are likely to exceed \$250.00. Then the EPA office will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment. If such advance payment is not received within 30 days after EPA's billing, the request will not be processed and the request will be closed. See also § 2.112(d).

(d) *Reduction or waiver of fee.* (1) The fee chargeable under this section shall be reduced or waived by EPA if the Agency determines that disclosure of the information:

(i) Is in the public interest because it is 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 requestor.

(2) Both of these requirements must be satisfied before fees properly assessable can be waived or reduced.

(3) The Agency will employ the following four factors in determining whether the first requirement has been met:

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

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute to an understanding of government operations or activities";

§ 2.121**40 CFR Ch. I (7-1-88 Edition)**

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding"; and

(iv) The significance of the contribution to public understanding: Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

(4) The Agency will employ the following factors in determining whether the second requirement has been met:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

(5) In all cases, the burden shall be on the requester to present information in support of a request for a waiver of fees. A request for reduction or waiver of fees should include:

(i) A clear statement of the requester's interest in the requested documents;

(ii) The use proposed for the documents and whether the requester will derive income or other benefit from such use;

(iii) A statement of how the public will benefit from such use and from the release of the requested documents; and

(iv) If specialized use of the documents or information is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(6) A request for reduction or waiver of fees shall be addressed to the appropriate Freedom of Information Officer. The requester shall be informed in writing of the Agency's decision whether to grant or deny the fee waiver or fee reduction request. This decision may be appealed by letter addressed to the EPA Freedom of Information Officer. The General Counsel shall decide such appeals. The Gener-

al Counsel may redelegate this authority only to the Deputy General Counsel or the Associate General Counsel for Grants, Contracts and General Law.

(e) The Financial Management Office shall maintain a record of all fees charged requesters for searching for, reviewing and reproducing requested records under this section. If after the end of 60 calendar days from the date on which request for payment was made the requester has not submitted payment to the appropriate EPA billing address (as listed in § 2.120(b)), the Financial Management Division shall place the requester's name on a delinquent list which is sent to the EPA Freedom of Information Officer. If a requester whose name appears on the delinquent list makes a request under this part, the EPA Freedom of Information Officer shall inform the requester that EPA will not process the request until the requester submits payment of the overdue fee from the earlier request. Any request made by an individual who specifies an affiliation with or representation of a corporation, association, law firm, or other organization shall be deemed to be a request by the corporation, association, law firm, or other organization. If an organization placed on the delinquent list can show that the person who made the request for which payment was overdue did not make the request on behalf of the organization the organization will be removed from the delinquent list but the name of the individual shall remain on the list. A requester shall not be placed on the delinquent list if a request for a reduction or for a waiver is pending under paragraph (d) of this section.

[53 FR 217, Jan. 5, 1988]

§ 2.121 Exclusions.

(a) Whenever a request is made which involves access to records described in § 2.118(a)(7)(i)(A), and

(1) The investigation or proceeding involves a possible violation of criminal law; and

(2) There is reason to believe that the subject of the investigation or proceeding is not aware of its pendency.

Environmental Protection Agency**§ 2.201**

and disclosure of the existence of such records could reasonably be expected to interfere with enforcement proceedings, EPA shall, during only such time as the circumstances continue, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

(b) Whenever informant records maintained by the Agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier and the informant's status as an informant has not been officially confirmed, EPA shall treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

(c) No determination relying on this section shall be issued without the concurrence of the General Counsel or his designee. The General Counsel has designated the Contracts and Information Law Branch to act on these requests for concurrence.

(d) An initial determination which only relies on this section will not include notice of appeal rights.

(153 FR 219, Jan. 5, 1988)

**Subpart B—Confidentiality of
Business Information**

§ 2.201 Definitions.

For the purposes of this subpart:

(a) "Person" means an individual, partnership, corporation, association, or other public or private organization or legal entity, including Federal, State or local governmental bodies and agencies and their employees.

(b) "Business" means any person engaged in a business, trade, employment, calling or profession, whether or not all or any part of the net earnings derived from such engagement by such person inure (or may lawfully inure) to the benefit of any private shareholder or individual.

(c) "Business information" (sometimes referred to simply as "information") means any information which pertains to the interests of any business, which was developed or acquired by that business, and (except where the context otherwise requires) which is possessed by EPA in recorded form.

(d) "Affected business" means, with reference to an item of business information, a business which has asserted (and not waived or withdrawn) a business confidentiality claim covering the information, or a business which could be expected to make such a claim if it were aware that disclosure of the information to the public was proposed.

(e) "Reasons of business confidentiality" include the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information. The definition is meant to encompass any concept which authorizes a Federal agency to withhold business information under 5 U.S.C. 552(b)(4), as well as any concept which requires EPA to withhold information from the public for the benefit of a business under 18 U.S.C. 1905 or any of the various statutes cited in § 2.301 through § 2.309.

(f) [Reserved]

(g) Information which is "available to the public" is information in EPA's possession which EPA will furnish to any member of the public upon request and which EPA may make public, release or otherwise make available to any person whether or not its disclosure has been requested.

(h) "Business confidentiality claim" (or, simply, "claim") means a claim or allegation that business information is entitled to confidential treatment for reasons of business confidentiality, or a request for a determination that such information is entitled to such treatment.

(i) "Voluntarily submitted information" means business information in EPA's possession—

(1) The submission of which EPA had no statutory or contractual authority to require; and

(2) The submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability, including such regulatory programs as permit, licensing, registra-

§ 2.202**40 CFR Ch. I (7-1-89 Edition)**

tion, or certification programs, but excluding programs concerned solely or primarily with the award or administration by EPA of contracts or grants.

(j) "Recorded" means written or otherwise registered in some form for preserving information, including such forms as drawings, photographs, videotape, sound recordings, punched cards, and computer tape or disk.

(k) [Reserved]

(l) "Administrator," "Regional Administrator," "General Counsel," "Regional Counsel," and "Freedom of Information Officer" mean the EPA officers or employees occupying the positions so titled.

(m) "EPA office" means any organizational element of EPA, at any level or location. (The terms "EPA office" and "EPA legal office" are used in this subpart for the sake of brevity and ease of reference. When this subpart requires that an action be taken by an "EPA office" or by an "EPA legal office," it is the responsibility of the officer or employee in charge of that office to take the action or ensure that it is taken.)

(n) "EPA legal office" means the EPA General Counsel and any EPA office over which the General Counsel exercises supervisory authority, including the various Offices of Regional Counsel. (See paragraph (m) of this section.)

(o) A "working day" is any day on which Federal government offices are open for normal business. Saturdays, Sundays, and official Federal holidays are not working days; all other days are.

§ 2.202 Applicability of subpart; priority where provisions conflict; records containing more than one kind of information.

(a) Sections 2.201 through 2.215 establish basic rules governing business confidentiality claims, the handling by EPA of business information which is or may be entitled to confidential treatment, and determinations by EPA of whether information is entitled to confidential treatment for reasons of business confidentiality.

(b) Various statutes (other than 5 U.S.C. 552) under which EPA operates contain special provisions concerning

the entitlement to confidential treatment of information gathered under such statutes. Sections 2.301 through 2.311 prescribe rules for treatment of certain categories of business information obtained under the various statutory provisions. Paragraph (b) of each of those sections should be consulted to determine whether any of those sections applies to the particular information in question.

(c) The basic rules of §§ 2.201 through 2.215 govern except to the extent that they are modified or supplanted by the special rules of §§ 2.301 through 2.311. In the event of a conflict between the provisions of the basic rules and those of a special rule which is applicable to the particular information in question, the provision of the special rule shall govern.

(d) If two or more of the sections containing special rules apply to the particular information in question, and the applicable sections prescribe conflicting special rules for the treatment of the information, the rule which provides greater or wider availability to the public of the information shall govern.

(e) For most purposes, a document or other record may usefully be treated as a single unit of "information," even though in fact the document or record is comprised of a collection of individual items of information. However, in applying the provisions of this subpart, it will often be necessary to separate the individual items of information into two or more categories, and to afford different treatment to the information in each such category. The need for differentiation of this type may arise, e.g., because a business confidentiality claim covers only a portion of a record, or because only a portion of the record is eligible for confidential treatment. EPA offices taking action under this subpart must be alert to this problem.

(f) In taking actions under this subpart, EPA offices should consider whether it is possible to obtain the affected business's consent to disclosure of useful portions of records while protecting the information which is or may be entitled to confidentiality (e.g., by withholding such portions of a record as would identify a business, or

Environmental Protection Agency**§ 2.204**

by disclosing data in the form of industry-wide aggregates, multi-year averages or totals, or some similar form).

(g) This subpart does not apply to questions concerning entitlement to confidential treatment or information which concerns an individual solely in his personal, as opposed to business, capacity.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§ 2.203 Notice to be included in EPA requests, demands, and forms; method of asserting business confidentiality claim; effect of failure to assert claim at time of submission.

(a) *Notice to be included in certain requests and demands for information, and in certain forms.* Whenever an EPA office makes a written request or demand that a business furnish information which, in the office's opinion, is likely to be regarded by the business as entitled to confidential treatment under this subpart, or whenever an EPA office prescribes a form for use by businesses in furnishing such information, the request, demand, or form shall include or enclose a notice which—

(1) States that the business may, if it desires, assert a business confidentiality claim covering part or all of the information, in the manner described by paragraph (b) of this section, and that information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in this subpart;

(2) States that if no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to the business; and

(3) Furnishes a citation of the location of this subpart in the Code of Federal Regulations and the FEDERAL REGISTER.

(b) *Method and time of asserting business confidentiality claim.* A business which is submitting information to EPA may assert a business confidentiality claim covering the information by placing on (or attaching to) the information, at the time it is submitted to EPA, a cover sheet, stamped

or typed legend, or other suitable form of notice employing language such as "trade secret," "proprietary," or "company confidential." Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the business, and may be submitted separately to facilitate identification and handling by EPA. If the business desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state.

(c) *Effect of failure to assert claim at time of submission of information.* If information was submitted by a business to EPA on or after October 1, 1976, in response to an EPA request or demand (or on an EPA-prescribed form) which contained the substance of the notice required by paragraph (a) of this section, and if no business confidentiality claim accompanied the information when it was received by EPA, the inquiry to the business normally required by § 2.204(c)(2) need not be made. If a claim covering the information is received after the information itself is received, EPA will make such efforts as are administratively practicable to associate the late claim with copies of the previously-submitted information in EPA files (see § 2.204(c)(1)). However, EPA cannot assure that such efforts will be effective, in light of the possibility of prior disclosure or widespread prior dissemination of the information.

§ 2.204 Initial action by EPA office.

(a) *Situations requiring action.* This section prescribes procedures to be used by EPA offices in making initial determinations of whether business information is entitled to confidential treatment for reasons of business confidentiality. Action shall be taken under this section whenever an EPA office:

(1) Learns that it is responsible for responding to a request under 5 U.S.C. 552 for the release of business information; in such a case, the office shall issue an initial determination within the period specified in § 2.112;

(2) Desires to determine whether business information in its possession is entitled to confidential treatment,

§ 2.204**40 CFR Ch. I (7-1-89 Edition)**

even though no request for release of the information has been received; or

(3) Determines that it is likely that EPA eventually will be requested to disclose the information at some future date and thus will have to determine whether the information is entitled to confidential treatment. In such a case this section's procedures should be initiated at the earliest practicable time, in order to increase the time available for preparation and submission of comments and for issuance of determinations, and to make easier the task of meeting response deadlines if a request for release of the information is later received under 5 U.S.C. 552.

(b) *Previous confidentiality determination.* The EPA office shall first ascertain whether there has been a previous determination, issued by a Federal court or by an EPA legal office acting under this subpart, holding that the information in question is entitled to confidential treatment for reasons of business confidentiality.

(1) If such a determination holds that the information is entitled to confidential treatment, the EPA Office shall furnish any person whose request for the information is pending under 5 U.S.C. 552 an initial determination (see § 2.111 and § 2.113) that the information has previously been determined to be entitled to confidential treatment, and that the request is therefore denied. The office shall furnish such person the appropriate case citation or EPA determination. If the EPA office believes that a previous determination which was issued by an EPA legal office may be improper or no longer valid, the office shall so inform the EPA legal office, which shall consider taking action under § 2.205(h).

(2) With respect to all information not known to be covered by such a previous determination, the EPA office shall take action under paragraph (c) of this section.

(c) *Determining existence of business confidentiality claims.* (1) Whenever action under this paragraph is required by paragraph (b)(2) of this section, the EPA office shall examine the information and the office's records to determine which businesses, if any,

are affected businesses (see § 2.201(d)), and to determine which businesses if any, have asserted business confidentiality claims which remain applicable to the information. If any business is found to have asserted an applicable claim, the office shall take action under paragraph (d) of this section with respect to each such claim.

(2)(i) If the examination conducted under paragraph (c)(1) of this section discloses the existence of any business which, although it has not asserted a claim, might be expected to assert a claim if it knew EPA proposed to disclose the information, the EPA office shall contact a responsible official of each such business to learn whether the business asserts a claim covering the information. However, no such inquiry need be made to any business—

(A) Which failed to assert a claim covering the information when responding to an EPA request or demand, or supplying information on an EPA form, which contained the substance of the statements prescribed by § 2.203(a);

(B) Which otherwise failed to assert a claim covering the information after being informed by EPA that such failure could result in disclosure of the information to the public; or

(C) Which has otherwise waived or withdrawn a claim covering the information.

(ii) If a request for release of the information under 5 U.S.C. 552 is pending at the time inquiry is made under this paragraph (c)(2), the inquiry shall be made by telephone or equally prompt means, and the responsible official contacted shall be informed that any claim the business wishes to assert must be brought to the EPA office's attention no later than the close of business on the third working day after such inquiry.

(iii) A record shall be kept of the results of any inquiry under this paragraph (c)(2). If any business makes a claim covering the information, the EPA office shall take further action under paragraph (d) of this section.

(3) If, after the examination under paragraph (c)(1) of this section, and after any inquiry made under paragraph (c)(2) of this section, the EPA office knows of no claim covering the

Environmental Protection Agency**§ 2.204**

information and the time for response to any inquiry has passed, the information shall be treated for purposes of this subpart as not entitled to confidential treatment.

(d) *Preliminary determination.* Whenever action under this paragraph is required by paragraph (c)(1) or (2) of this section on any business's claim, the EPA Office shall make a determination with respect to each such claim. Each determination shall be made after consideration of the provisions of § 2.203, the applicable substantive criteria in § 2.208 or elsewhere in this subpart, and any previously-issued determinations under this subpart which are applicable.

(1) If, in connection with any business's claim, the office determines that the information may be entitled to confidential treatment, the office shall—

(i) Furnish the notice of opportunity to submit comments prescribed by paragraph (e) of this section to each business which is known to have asserted an applicable claim and which has not previously been furnished such notice with regard to the information in question;

(ii) Furnish, to any person whose request for release of the information is pending under 5 U.S.C. 552, a determination (in accordance with § 2.113) that the information may be entitled to confidential treatment under this subpart and 5 U.S.C. 552(b)(4), that further inquiry by EPA pursuant to this subpart is required before a final determination on the request can be issued, that the person's request is therefore initially denied, and that after further inquiry a final determination will be issued by an EPA legal office; and

(iii) Refer the matter to the appropriate EPA legal office, furnishing the information required by paragraph (f) of this section after the time has elapsed for receipt of comments from the affected business.

(2) If, in connection with all applicable claims, the office determines that the information clearly is not entitled to confidential treatment, the office shall take the actions required by § 2.205(f). However, if a business has previously been furnished notice

under § 2.205(f) with respect to the same information, no further notice need be furnished to that business. A copy of each notice furnished to a business under this paragraph (d)(2) and § 2.205(f) shall be forwarded promptly to the appropriate EPA legal office.

(e) *Notice to affected businesses; opportunity to comment.* (1) Whenever required by paragraph (d)(1) of this section, the EPA office shall promptly furnish each business a written notice stating that EPA is determining under this subpart whether the information is entitled to confidential treatment, and affording the business an opportunity to comment. The notice shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact and date of receipt. The notice shall state the address of the office to which the business's comments shall be addressed (the EPA office furnishing the notice, unless the General Counsel has directed otherwise), the time allowed for comments, and the method for requesting a time extension under § 2.205(b)(2). The notice shall further state that EPA will construe a business's failure to furnish timely comments as a waiver of the business's claim.

(2) If action under this section is occasioned by a request for the information under 5 U.S.C. 552, the period for comments shall be 15 working days after the date of the business's receipt of the written notice. In other cases, the EPA office shall establish a reasonable period for comments (not less than 15 working days after the business's receipt of the written notice). The time period for comments shall be considered met if the business's comments are postmarked or hand delivered to the office designated in the notice by the date specified. In all cases, the notice shall call the business's attention to the provisions of § 2.205(b).

(3) At or about the time the written notice is furnished, the EPA office shall orally inform a responsible representative of the business (by telephone or otherwise) that the business should expect to receive the written notice, and shall request the business

§ 2.204

40 CFR Ch. I (7-1-89 Edition)

to contact the EPA office if the written notice has not been received within a few days, so that EPA may furnish a duplicate notice.

(4) The written notice required by paragraph (e)(1) of this section shall invite the business's comments on the following points (subject to paragraph (e)(5) of this section):

(i) The portions of the information which are alleged to be entitled to confidential treatment;

(ii) The period of time for which confidential treatment is desired by the business (e.g., until a certain date, until the occurrence of a specified event, or permanently);

(iii) The purpose for which the information was furnished to EPA and the approximate date of submission, if known;

(iv) Whether a business confidentiality claim accompanied the information when it was received by EPA;

(v) Measures taken by the business to guard against undesired disclosure of the information to others;

(vi) The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;

(vii) Pertinent confidentiality determinations, if any, by EPA or other Federal agencies, and a copy of any such determination, or reference to it, if available;

(viii) Whether the business asserts that disclosure of the information would be likely to result in substantial harmful effects on the business' competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and

(ix) Whether the business asserts that the information is voluntarily submitted information as defined in § 2.201(i), and if so, whether and why disclosure of the information would tend to lessen the availability to EPA of similar information in the future.

(5) To the extent that the EPA office already possesses the relevant facts, the notice need not solicit responses to the matters addressed in paragraphs (e)(4) (i) through (ix) of this section, although the notice shall

request confirmation of EPA's understanding of such facts where appropriate.

(6) The notice shall refer to § 2.205(c) and shall include the statement prescribed by § 2.203(a).

(f) *Materials to be furnished to EPA legal office.* When a matter is referred to an EPA legal office under paragraph (d)(1) of this section, the EPA office taking action under this section shall forward promptly to the EPA legal office the following items:

(1) A copy of the information in question, or (where the quantity or form of the information makes forwarding a copy of the information impractical) representative samples, a description of the information, or both;

(2) A description of the circumstances and date of EPA's acquisition of the information;

(3) The name, address, and telephone number of the EPA employee(s) most familiar with the information;

(4) The name, address and telephone number of each business which asserts an applicable business confidentiality claim;

(5) A copy of each applicable claim (or the record of the assertion of the claim), and a description of when and how each claim was asserted;

(6) Comments concerning each business's compliance or noncompliance with applicable requirements of § 2.203;

(7) A copy of any request for release of the information pending under 5 U.S.C. 552;

(8) A copy of the business's comments on whether the information is entitled to confidential treatment;

(9) The office's comments concerning the appropriate substantive criteria under this subpart, and information the office possesses concerning the information's entitlement to confidential treatment; and

(10) Copies of other correspondence or memoranda which pertain to the matter.

[41 FR 38902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

Environmental Protection Agency**§ 2.205****§ 2.205 Final confidentiality determination by EPA legal office.**

(a) *Role of EPA legal office.* (1) The appropriate EPA legal office (see paragraph (1) of this section) is responsible for making the final administrative determination of whether or not business information covered by a business confidentiality claim is entitled to confidential treatment under this subpart.

(2) When a request for release of the information under 5 U.S.C. 552 is pending, the EPA legal office's determination shall serve as the final determination on appeal from an initial denial of the request.

(i) If the initial denial was issued under § 2.204(b)(1), a final determination by the EPA legal office is necessary only if the requestor has actually filed an appeal.

(ii) If the initial denial was issued under § 2.204(d)(1), however, the EPA legal office shall issue a final determination in every case, unless the request has been withdrawn. (Initial denials under § 2.204(d)(1) are of a procedural nature, to allow further inquiry into the merits of the matter, and a requestor is entitled to a decision on the merits.) If an appeal from such a denial has not been received by the EPA Freedom of Information Officer on the tenth working day after issuance of the denial, the matter shall be handled as if an appeal had been received on that day, for purposes of establishing a schedule for issuance of an appeal decision under § 2.117 of this part.

(b) *Comment period; extensions; untimeliness as waiver of claim.* (1) Each business which has been furnished the notice and opportunity to comment prescribed by § 2.204(d)(1) and § 2.204(e) shall furnish its comments to the office specified in the notice in time to be postmarked or hand delivered to that office not later than the date specified in the notice (or the date established in lieu thereof under this section).

(2) The period for submission of comments may be extended if, before the comments are due, a request for an extension of the comment period is made by the business and approved by the EPA legal office. Except in extraordinary circumstances, the EPA

legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(3) The period for submission of comments by a business may be shortened in the manner described in paragraph (g) of this section.

(4) If a business's comments have not been received by the specified EPA office by the date they are due (including any approved extension), that office shall promptly inquire whether the business has complied with paragraph (b)(1) of this section. If the business has complied with paragraph (b)(1) but the comments have been lost in transmission, duplicate comments shall be requested.

(c) *Confidential treatment of comments from business.* If information submitted to EPA by a business as part of its comments under this section pertains to the business's claim, is not otherwise possessed by EPA, and is marked when received in accordance with § 2.203(b), it will be regarded by EPA as entitled to confidential treatment and will not be disclosed by EPA without the business's consent, unless its disclosure is duly ordered by a Federal court, notwithstanding other provisions of this subpart to the contrary.

(d) *Types of final determinations; matters to be considered.* (1) If the EPA legal office finds that a business has failed to furnish comments under paragraph (b) of this section by the specified due date, it shall determine that the business has waived its claim. If, after application of the preceding sentence, no claim applies to the information, the office shall determine that the information is not entitled to confidential treatment under this subpart and, subject to § 2.210, is available to the public.

(2) In all other cases, the EPA legal office shall consider each business's claim and comments, the various provisions of this subpart, any previously-issued determinations under this subpart which are pertinent, the materials furnished it under § 2.204(f), and such other materials as it finds appropriate. With respect to each claim, the office shall determine whether or not the information is entitled to confi-

§ 2.205

40 CFR Ch. I (7-1-88 Edition)

dential treatment for the benefit of the business that asserted the claim, and the period of any such entitlement (e.g., until a certain date, until the occurrence of a specified event, or permanently), and shall take further action under paragraph (e) or (f) of this section, as appropriate.

(3) Whenever the claims of two or more businesses apply to the same information, the EPA legal office shall take action appropriate under the particular circumstances to protect the interests of all persons concerned (including any person whose request for the information is pending under 5 U.S.C. 552).

(e) *Determination that information is entitled to confidential treatment.* If the EPA legal office determines that the information is entitled to confidential treatment for the full period requested by the business which made the claim, EPA shall maintain the information in confidence for such period, subject to paragraph (h) of this section, § 2.209, and the other provisions of this subpart which authorize disclosure in specified circumstances, and the office shall so inform the business. If any person's request for the release of the information is then pending under 5 U.S.C. 552, the EPA legal office shall issue a final determination denying that request.

(f) *Determination that information is not entitled to confidential treatment; notice; waiting period; release of information.* (1) Notice of denial (or partial denial) of a business confidentiality claim, in the form prescribed by paragraph (f)(2) of this section, shall be furnished—

(i) By the EPA office taking action under § 2.204, to each business on behalf of which a claim has been made, whenever § 2.204(d)(2) requires such notice; and

(ii) By the EPA legal office taking action under this section, to each business which has asserted a claim applicable to the information and which has furnished timely comments under paragraph (b) of this section, whenever the EPA legal office determines that the information is not entitled to confidential treatment under this subpart for the benefit of the business, or determines that the period of any en-

titlement to confidential treatment is shorter than that requested by the business.

(2) The notice prescribed by paragraph (f)(1) of this section shall be written, and shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact of receipt and the date of receipt. The notice shall state the basis for the determination, that it constitutes final agency action concerning the business confidentiality claim, and that such final agency action may be subject to judicial review under Chapter 7 of Title 5, United States Code. With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the tenth working day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof by the EPA legal office under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination, and to obtain preliminary injunctive relief against disclosure. The notice shall further state that if such an action is timely commenced, EPA may nonetheless make the information available to the public (in the absence of an order by the court to the contrary), once the court has denied a motion for a preliminary injunction in the action or has otherwise upheld the EPA determination, or whenever it appears to the EPA legal office, after reasonable notice to the business, that the business is not taking appropriate measures to obtain a speedy resolution of the action. If the information has been found to be temporarily entitled to confidential treatment, the notice shall further state that the information will not be disclosed prior to the end of the period of such temporary entitlement to confidential treatment.

(3) The period established in a notice under paragraph (f)(2) of this section for commencement of an action to obtain judicial review may be extended if, before the expiration of such period, a request for an extension

Environmental Protection Agency**§ 2.205**

is made by the business and approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(4) After the expiration of any period of temporary entitlement to confidential treatment, a determination under this paragraph (f) shall be implemented by the EPA legal office by making the information available to the public (in the absence of a court order prohibiting disclosure) whenever—

(i) The period provided for commencement by a business of an action to obtain judicial review of the determination has expired without notice to the EPA legal office of commencement of such an action;

(ii) The court, in a timely-commenced action, has denied the business' motion for a preliminary injunction, or has otherwise upheld the EPA determination; or

(iii) The EPA legal office, after reasonable notice has been provided to the business, finds that the business is not taking appropriate measures to obtain a speedy resolution of the timely-commenced action.

(5) Any person whose request for release of the information under 5 U.S.C. 552 is pending at the time notice is given under paragraph (f)(2) of this section shall be furnished a determination under 5 U.S.C. 552 stating the circumstances under which the information will be released.

(g) *Emergency situations.* If the General Counsel finds that disclosure of information covered by a claim would be helpful in alleviating a situation posing an imminent and substantial danger to public health or safety, he may prescribe and make known to interested persons such shorter comment period (paragraph (b) of this section), post-determination waiting period (paragraph (f) of this section), or both, as he finds necessary under the circumstances.

(h) *Modification of prior determinations.* A determination that information is entitled to confidential treatment for the benefit of a business,

made under this subpart by an EPA legal office, shall continue in effect in accordance with its terms until an EPA legal office taking action under this section, or under § 2.206 or § 2.207, issues a final determination stating that the earlier determination no longer describes correctly the information's entitlement to confidential treatment because of change in the applicable law, newly-discovered or changed facts, or because the earlier determination was clearly erroneous. If an EPA legal office tentatively concludes that such an earlier determination is of questionable validity, it shall so inform the business, and shall afford the business an opportunity to furnish comments on pertinent issues in the manner described by § 2.204(e) and paragraph (b) of this section. If, after consideration of any timely comments submitted by the business, the EPA legal office makes a revised final determination that the information is not entitled to confidential treatment, or that the period of entitlement to such treatment will end sooner than it would have ended under the earlier determination, the office will follow the procedure described in paragraph (f) of this section. Determinations under this section may be made only by, or with the concurrence of, the General Counsel.

(i) *Delegation and redelegation of authority.* Unless the General Counsel otherwise directs, or this subpart otherwise specifically provides, determinations and actions required by this subpart to be made or taken by an EPA legal office shall be made or taken by the appropriate Regional counsel whenever the EPA office taking action under § 2.204 or § 2.206(b) is under the supervision of a Regional Administrator, and by the General Counsel in all other cases. The General Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the General Counsel's supervision. A Regional Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the Regional counsel's supervision.

§ 2.206

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51661, Dec. 18, 1985]

§ 2.206 Advance confidentiality determinations.

(a) An advance determination under this section may be issued by an EPA legal office if—

(1) EPA has requested or demanded that a business furnish business information to EPA;

(2) The business asserts that the information, if submitted, would constitute voluntarily submitted information under § 2.201(i);

(3) The business will voluntarily submit the information for use by EPA only if EPA first determines that the information is entitled to confidential treatment under this subpart; and

(4) The EPA office which desires submission of the information has requested that the EPA legal office issue a determination under this section.

(b) The EPA office requesting an advance determination under this section shall—

(1) Arrange to have the business furnish directly to the EPA legal office a copy of the information (or, where feasible, a description of the nature of the information sufficient to allow a determination to be made), as well as the business's comments concerning the matters addressed in § 2.204(e)(4), excluding, however, matters addressed in § 2.204 (e)(4)(iii) and (e)(4)(iv); and

(2) Furnish to the EPA legal office the materials referred to in § 2.204(f) (3), (7), (8), and (9).

(c) In making a determination under this section, the EPA legal office shall first determine whether or not the information would constitute voluntarily submitted information under § 2.201(i). If the information would constitute voluntarily submitted information, the legal office shall further determine whether the information is entitled to confidential treatment.

(d) If the EPA legal office determines that the information would not constitute voluntarily submitted information, or determines that it would constitute voluntarily submitted information but would not be entitled to confidential treatment, it shall so inform the business and the EPA

40 CFR Ch. I (7-1-88 Edition)

office which requested the determination, stating the basis of the determination, and shall return to the business all copies of the information which it may have received from the business (except that if a request under 5 U.S.C. 552 for release of the information is received while the EPA legal office is in possession of the information, the legal office shall retain a copy of the information, but shall not disclose it unless ordered by a Federal court to do so). The legal office shall not disclose the information to any other EPA office or employee and shall not use the information for any purpose except the determination under this section, unless otherwise directed by a Federal court.

(e) If the EPA legal office determines that the information would constitute voluntarily submitted information and that it is entitled to confidential treatment, it shall so inform the EPA office which requested the determination and the business which submitted it, and shall forward the information to the EPA office which requested the determination.

§ 2.207 Class determinations.

(a) The General Counsel may make and issue a class determination under this section if he finds that—

(1) EPA possesses, or is obtaining, related items of business information;

(2) One or more characteristics common to all such items of information will necessarily result in identical treatment for each such item under one or more of the provisions in this subpart, and that it is therefore proper to treat all such items as a class for one or more purposes under this subpart; and

(3) A class determination would serve a useful purpose.

(b) A class determination shall clearly identify the class of information to which it pertains.

(c) A class determination may state that all of the information in the class—

(1) Is, or is not, voluntarily submitted information under § 2.201(i);

(2) Is, or is not, governed by a particular section of this subpart, or by a

Environmental Protection Agency**§ 2.209**

particular set of substantive criteria under this subpart;

(3) Fails to satisfy one or more of the applicable substantive criteria, and is therefore ineligible for confidential treatment;

(4) Satisfies one or more of the applicable substantive criteria; or

(5) Satisfies one or more of the applicable substantive criteria during a certain period, but will be ineligible for confidential treatment thereafter.

(d) The purpose of a class determination is simply to make known the Agency's position regarding the manner in which information within the class will be treated under one or more of the provisions of this subpart. Accordingly, the notice of opportunity to submit comments referred to in § 2.204(d)(1)(ii) and § 2.205(b), and the list of materials required to be furnished to the EPA legal office under § 2.204(d)(1)(iii), may be modified to reflect the fact that the class determination has made unnecessary the submission of materials pertinent to one or more issues. Moreover, in appropriate cases, action based on the class determination may be taken under § 2.204(b)(1), § 2.204(d), § 2.205(d), or § 2.206. However, the existence of a class determination shall not, of itself, affect any right a business may have to receive any notice under § 2.204(d)(2) or § 2.205(f).

§ 2.208 Substantive criteria for use in confidentiality determinations.

Determinations issued under §§ 2.204 through 2.207 shall hold that business information is entitled to confidential treatment for the benefit of a particular business if—

(a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

(b) The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(c) The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means

(other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

(d) No statute specifically requires disclosure of the information; and

(e) Either—

(1) The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

(2) The information is voluntarily submitted information (see § 2.201(i)), and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future.

§ 2.209 Disclosure in special circumstances.

(a) *General.* Information which, under this subpart, is not available to the public may nonetheless be disclosed to the persons, and in the circumstances, described by paragraphs (b) through (g) of this section. (This section shall not be construed to restrict the disclosure of information which has been determined to be available to the public. However, business information for which a claim of confidentiality has been asserted shall be treated as being entitled to confidential treatment until there has been a determination in accordance with the procedures of this subpart that the information is not entitled to confidential treatment.)

(b) *Disclosure to Congress or the Comptroller General.* (1) Upon receipt of a written request by the Speaker of the House, President of the Senate, chairman of a committee or subcommittee, or the Comptroller General, as appropriate, EPA will disclose business information to either House of Congress, to a committee or subcommittee of Congress, or to the Comptroller General, unless a statute forbids such disclosure.

(2) If the request is for business information claimed as confidential or determined to be confidential, the EPA office processing the request shall provide notice to each affected business of the type of information disclosed and to whom it is disclosed. Notice shall be given at least ten days

§ 2.209

40 CFR Ch. I (7-1-88 Edition)

prior to disclosure, except where it is not possible to provide notice ten days in advance of any date established by the requesting body for responding to the request. Where ten days advance notice cannot be given, as much advance notice as possible shall be provided. Where notice cannot be given before the date established by the requesting body for responding to the request, notice shall be given as promptly after disclosure as possible. Such notice may be given by notice published in the *FEDERAL REGISTER* or by letter sent by certified mail, return receipt requested, or telegram. However, if the requesting body asks in writing that no notice under this subsection be given, EPA will give no notice.

(3) At the time EPA discloses the business information, EPA will inform the requesting body of any unresolved business confidentiality claim known to cover the information and of any determination under this subpart that the information is entitled to confidential treatment.

(c) *Disclosure to other Federal agencies.* EPA may disclose business information to another Federal agency if—

(1) EPA receives a written request for disclosures of the information from a duly authorized officer or employee of the other agency or on the initiative of EPA when such disclosure is necessary to enable the other agency to carry out a function on behalf of EPA;

(2) The request, if any, sets forth the official purpose for which the information is needed;

(3) When the information has been claimed as confidential or has been determined to be confidential, the responsible EPA office provides notice to each affected business of the type of information to be disclosed and to whom it is to be disclosed. At the discretion of the office, such notice may be given by notice published in the *FEDERAL REGISTER* at least 10 days prior to disclosure, or by letter sent by certified mail return receipt requested or telegram either of which must be received by the affected business at least 10 days prior to disclosure. However, no notice shall be required when EPA furnishes business information to another Federal agency to perform a

function on behalf of EPA, including but not limited to—

(i) Disclosure to the Department of Justice for purposes of investigation or prosecution of civil or criminal violations of Federal law related to EPA activities;

(ii) Disclosure to the Department of Justice for purposes of representing EPA in any matter; or

(iii) Disclosure to any Federal agency for purposes of performing an EPA statutory function under an interagency agreement.

(4) EPA notifies the other agency of any unresolved business confidentiality claim covering the information and of any determination under this subpart that the information is entitled to confidential treatment, and that further disclosure of the information may be a violation of 18 U.S.C. 1905; and

(5) The other agency agrees in writing not to disclose further any information designated as confidential unless—

(i) The other agency has statutory authority both to compel production of the information and to make the proposed disclosure, and the other agency has, prior to disclosure of the information to anyone other than its officers and employees, furnished to each affected business at least the same notice to which the affected business would be entitled under this subpart;

(ii) The other agency has obtained the consent of each affected business to the proposed disclosure; or

(iii) The other agency has obtained a written statement from the EPA General Counsel or an EPA Regional Counsel that disclosure of the information would be proper under this subpart.

(d) *Court-ordered disclosure.* EPA may disclose any business information in any manner and to the extent ordered by a Federal court. Where possible, and when not in violation of a specific directive from the court, the EPA office disclosing information claimed as confidential or determined to be confidential shall provide as much advance notice as possible to each affected business of the type of information to be disclosed and to whom it is to be disclosed, unless the affected business

Environmental Protection Agency**§ 2.211**

has actual notice of the court order. At the discretion of the office, subject to any restrictions by the court, such notice may be given by notice in the **FEDERAL REGISTER**, letter sent by certified mail return receipt requested, or telegram.

(e) *Disclosure within EPA.* An EPA office, officer, or employee may disclose any business information to another EPA office, officer, or employee with an official need for the information.

(f) *Disclosure with consent of business.* EPA may disclose any business information to any person if EPA has obtained the prior consent of each affected business to such disclosure.

(g) *Record of disclosures to be maintained.* Each EPA office which discloses information to Congress, a committee or subcommittee of Congress, the Comptroller General, or another Federal agency under the authority of paragraph (b) or (c) of this section, shall maintain a record of the fact of such disclosure for a period of not less than 36 months after such disclosure. Such a record, which may be in the form of a log, shall show the name of the affected businesses, the date of disclosure, the person or body to whom disclosure was made, and a description of the information disclosed.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§ 2.210 Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.

(a) *Information which is not entitled to confidential treatment under this subpart shall be made available to the public (using the procedures set forth in §§ 2.204 and 2.205) if its release is requested under 5 U.S.C. 552, unless EPA determines (under Subpart A of this part) that, for reasons other than reasons of business confidentiality, the information is exempt from mandatory disclosure and cannot or should not be made available to the public. Any such determination under subpart A shall be coordinated with actions taken under this subpart for the purpose of avoiding delay in responding to requests under 5 U.S.C. 552.*

(b) Notwithstanding any other provision of this subpart, if any statute not cited in this subpart appears to require EPA to give confidential treatment to any business information for reasons of business confidentiality, the matter shall be referred promptly to an EPA legal office for resolution. Pending resolution, such information shall be treated as if it were entitled to confidential treatment.

§ 2.211 Safeguarding of business information; penalty for wrongful disclosure.

(a) No EPA officer or employee may disclose, or use for his or her private gain or advantage, any business information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position or employment, except as authorized by this subpart.

(b) Each EPA officer or employee who has custody or possession of business information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.

(c) Violation of paragraph (a) or (b) of this section shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action. Willful violation of paragraph (a) of this section may result in criminal prosecution under 18 U.S.C. 1905 or other applicable statute.

(d) Each contractor or subcontractor with EPA, and each employee of such contractor or subcontractor, who is furnished business information by EPA under §§ 2.301(h), § 2.302(h), 2.304(h), 2.305(h), 2.306(j), 2.307(h), 2.308(i), or 2.310(i) shall use or disclose that information only as permitted by the contract or subcontract under which the information was furnished. Contractors or subcontractors shall take steps to properly safeguard business information including following any security procedures for handling and safeguarding business information which are contained in any manuals, procedures, regulations, or guidelines provided by EPA. Any violation of this paragraph shall constitute grounds for suspension or debarment of the contractor or subcontractor in question. A

§ 2.212

willful violation of this paragraph may result in criminal prosecution.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51662, Dec. 18, 1985]

§ 2.212 Establishment of control offices for categories of business information.

(a) The Administrator, by order, may establish one or more mutually exclusive categories of business information, and may designate for each such category an EPA office (hereinafter referred to as a "control office") which shall have responsibility for taking actions (other than actions required to be taken by an EPA legal office) with respect to all information within such category.

(b) If a control office has been assigned responsibility for a category of business information, no other EPA office, officer, or employee may make available to the public (or otherwise disclose to persons other than EPA officers and employees) any information in that category without first obtaining the concurrence of the control office. Requests under 5 U.S.C. 552 for release of such information shall be referred to the control office.

(c) A control office shall take the actions and make the determinations required by § 2.204 with respect to all information in any category for which the control office has been assigned responsibility.

(d) A control office shall maintain a record of the following, with respect to items of business information in categories for which it has been assigned responsibility:

- (1) Business confidentiality claims;
- (2) Comments submitted in support of claims;
- (3) Waivers and withdrawals of claims;
- (4) Actions and determinations by EPA under this subpart;
- (5) Actions by Federal courts; and
- (6) Related information concerning business confidentiality.

§ 2.213 Designation by business of addressee for notices and inquiries.

(a) A business which wishes to designate a person or office as the proper addressee of communications from EPA to the business under this subpart may do so by furnishing in writ-

40 CFR Ch. I (7-1-88 Edition)

ing to the Freedom of Information Officer (A-101), Environmental Protection Agency, 401 M St. SW., Washington, DC 20460, the following information: The name and address of the business making the designation; the name, address, and telephone number of the designated person or office; and a request that EPA inquiries and communications (oral and written) under this subpart, including inquiries and notices which require reply within deadlines if the business is to avoid waiver of its rights under this subpart, be furnished to the designee pursuant to this section. Only one person or office may serve at any one time as a business's designee under this subpart.

(b) If a business has named a designee under this section, the following EPA inquiries and notices to the business shall be addressed to the designee:

- (1) Inquiries concerning a business's desire to assert a business confidentiality claim, under § 2.204(c)(2)(i)(A);
- (2) Notices affording opportunity to substantiate confidentiality claims, under § 2.204(d)(1) and § 2.204(e);
- (3) Inquiries concerning comments, under § 2.205(b)(4);
- (4) Notices of denial of confidential treatment and proposed disclosure of information, under § 2.205(f);
- (5) Notices concerning shortened comment and/or waiting periods under § 2.205(g);
- (6) Notices concerning modifications or overrulings of prior determinations, under § 2.205(h);
- (7) Notices to affected businesses under §§ 2.301(g) and 2.301(h) and analogous provisions in §§ 2.302, 2.303, 2.304, 2.305, 2.306, 2.307, and 2.308; and
- (8) Notices to affected businesses under § 2.209.

(c) The Freedom of Information Officer shall, as quickly as possible, notify all EPA offices that may possess information submitted by the business to EPA, the Regional Freedom of Information Offices, the Office of General Counsel, and the offices of Regional Counsel of any designation received under this section. Businesses making designations under this section should bear in mind that several working days may be required for dissemination of this information within EPA.

Environmental Protection Agency**§ 2.215**

and that some EPA offices may not receive notice of such designations.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40001, Sept. 8, 1978]

§ 2.214 Defense of Freedom of Information Act suits; participation by affected business.

(a) In making final confidentiality determinations under this subpart, the EPA legal office relies to a large extent upon the information furnished by the affected business to substantiate its claim of confidentiality. The EPA legal office may be unable to verify the accuracy of much of the information submitted by the affected business.

(b) If the EPA legal office makes a final confidentiality determination under this subpart that certain business information is entitled to confidential treatment, and EPA is sued by a requester under the Freedom of Information Act for disclosure of that information, EPA will:

(1) Notify each affected business of the suit within 10 days after service of the complaint upon EPA;

(2) Where necessary to preparation of EPA's defense, call upon each affected business to furnish assistance; and

(3) Not oppose a motion by any affected business to intervene as a party to the suit under rule 24(b) of the Federal Rules of Civil Procedure.

(c) EPA will defend its final confidentiality determination, but EPA expects the affected business to cooperate to the fullest extent possible in this defense.

[43 FR 40001, Sept. 8, 1978]

§ 2.215 Confidentiality agreements.

(a) No EPA officer, employee, contractor, or subcontractor shall enter into any agreement with any affected business to keep business information confidential unless such agreement is consistent with this subpart. No EPA officer, employee, contractor, or subcontractor shall promise any affected business that business information will be kept confidential unless the promise is consistent with this subpart.

(b) If an EPA office has requested information from a State, local, or

Federal agency and the agency refuses to furnish the information to EPA because the information is or may constitute confidential business information, the EPA office may enter into an agreement with the agency to keep the information confidential, notwithstanding the provisions of this subpart. However, no such agreement shall be made unless the General Counsel determines that the agreement is necessary and proper.

(c) To determine that an agreement proposed under paragraph (b) of this section is necessary, the General Counsel must find:

(1) The EPA office requesting the information needs the information to perform its functions;

(2) The agency will not furnish the information to EPA without an agreement by EPA to keep the information confidential; and

(3) Either:

(i) EPA has no statutory power to compel submission of the information directly from the affected business, or

(ii) While EPA has statutory power to compel submission of the information directly from the affected business, compelling submission of the information directly from the business would—

(A) Require time in excess of that available to the EPA office to perform its necessary work with the information,

(B) Duplicate information already collected by the other agency and overly burden the affected business, or

(C) Overly burden the resources of EPA.

(d) To determine that an agreement proposed under paragraph (b) of this section is proper, the General Counsel must find that the agreement states—

(1) The purpose for which the information is required by EPA;

(2) The conditions under which the agency will furnish the information to EPA;

(3) The information subject to the agreement;

(4) That the agreement does not cover information acquired by EPA from another source;

(5) The manner in which EPA will treat the information; and

§ 2.301**40 CFR Ch. I (7-1-88 Edition)**

(6) That EPA will treat the information in accordance with the agreement subject to an order of a Federal court to disclose the information.

(e) EPA will treat any information acquired pursuant to an agreement under paragraph (b) of this section in accordance with the procedures of this subpart except where the agreement specifies otherwise.

[43 FR 40001, Sept. 8, 1978]

§§ 2.216—2.300 [Reserved]

§ 2.301 Special rules governing certain information obtained under the Clean Air Act.

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

(1) "Act" means the Clean Air Act, as amended, 42 U.S.C. 7401 et seq.

(2)(i) "Emission data" means, with reference to any source of emission of any substance into the air—

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be "emission data" only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to

demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(3) "Standard or limitation" means any emission standard or limitation established or publicly proposed pursuant to the Act or pursuant to any regulation under the Act.

(4) "Proceeding" means any rule-making, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(5) "Manufacturer" has the meaning given it in section 216(1) of the Act, 42 U.S.C. 7550(1).

(b) *Applicability.* (1) This section applies to business information which was—

(i) Provided or obtained under section 114 of the Act, 42 U.S.C. 7414, by the owner or operator of any stationary source, for the purpose (A) of developing or assisting in the development of any implementation plan under section 110 or 111(d) of the Act, 42 U.S.C. 7410, 7411(d), any standard of performance under section 111 of the Act, 42 U.S.C. 7411, or any emission standard under section 112 of the Act, 42 U.S.C. 7412, (B) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (C) of carrying out any provision of the Act (except a provision of Part II of the Act with respect to a manufacturer of new motor vehicles or new motor vehicle engines);

(ii) Provided or obtained under section 208 of the Act, 42 U.S.C. 7542, for the purpose of enabling the Administrator to determine whether a manufacturer has acted or is acting in compliance with the Act and regulations

Environmental Protection Agency**§ 2.301**

under the Act, or provided or obtained under section 206(c) of the Act, 42 U.S.C. 7525(c); or

(iii) Provided in response to a subpoena for the production of papers, books, or documents issued under the authority of section 307(a) of the Act, 42 U.S.C. 7607(a).

(2) Information will be considered to have been provided or obtained under section 114 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 114, or if its submission could have been required under section 114, regardless of whether section 114 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 113(a) of the Act, 42 U.S.C. 7413(a), whether an action was brought under section 113(b) of the Act, 42 U.S.C. 7413(b), or whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 208 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 208, or if its submission could have been required under section 208, regardless of whether section 208 was cited as the authority for any request for the information, whether an action was brought under section 204 of the Act, 42 U.S.C. 7523, or whether the information was provided directly to EPA or through some third person.

(4) Information will be considered to have been provided or obtained under section 206(c) of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 206(c), or if its submission could have been required under section 206(c) regardless of whether section 206(c) was cited as authority for any request for the information, whether an action was brought under section 204 of the Act, 42 U.S.C. 7523, or whether the information was provided directly to EPA or through some third person.

(5) Information will be considered to have been provided or obtained under section 307(a) of the Act if it was provided in response to a subpoena issued under section 307(a), or if its produc-

tion could have been required by subpoena under section 307(a), regardless of whether section 307(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(6) This section specifically does not apply to information obtained under section 115(j) or 211(b) of the Act, 42 U.S.C. 7415(j), 7545(b).

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, § 2.209 and §§ 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is emission data or a standard or limitation is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Emission data, standards or limitations, and any other information provided under section 114 or 208 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Emission data and standards or limitations provided in response to a subpoena issued under section 307(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than emission data and standards or limitations) provided in response to a subpoena issued under section 307(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

§ 2.301

40 CFR Ch. I (7-1-88 Edition)

(g) *Disclosure of information relevant to a proceeding.* (1) Under sections 114, 208 and 307 of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2) In connection with any proceeding other than a proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies which may be entitled to confidential treatment may be made available to the public under this paragraph (g)(2). No information shall be made available to the public under this paragraph (g)(2) until any affected business has been informed that EPA is considering making the information available to the public under this paragraph (g)(2) in connection with an identified proceeding, and has afforded the business a reasonable period for comment (such notice and opportunity to comment may be afforded in connection with the notice prescribed by § 2.204(d)(1) and § 2.204(e)). Information may be made available to the public under this paragraph (g)(2) only if, after consideration of any timely comments submitted by the business, the General Counsel determines that the information is relevant to the subject of the proceeding and the EPA office conducting the proceeding determines that the public interest would be served by making the information available to the public. Any affected business shall be given at least 5 days' notice by the General Counsel prior to making the information available to the public.

(3) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies which may be entitled to confidential treatment may be made available to the public, or to one or more parties of record to the proceeding, upon EPA's initiative, under this paragraph (g)(3). An EPA office

proposing disclosure of information under this paragraph (g)(3), shall so notify the presiding officer in writing. Upon receipt of such a notification, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(3) has been proposed, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed under this paragraph (g)(3) only if, after consideration of any timely comments submitted by the business, the EPA office determines in writing that, for reasons directly associated with the conduct of the proceeding, the contemplated disclosure would serve the public interest, and the presiding officer determines in writing that the information is relevant to a matter in controversy in the proceeding. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information for confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to the public or to one or more of the parties of record to the proceeding.

(4) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies may be made available to one or more parties of record to the proceeding, upon request of a party, under this paragraph (g)(4). A party of record seeking disclosure of information shall direct his request to the presiding officer. Upon receipt of such a request, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(4) has been requested, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed to a party of record under this para-

Environmental Protection Agency**§ 2.301**

graph (g)(4) only if, after consideration of any timely comments submitted by the business, the presiding officer determines in writing that (i) the party of record has satisfactorily shown that with respect to a significant matter which is in controversy in the proceeding, the party's ability to participate effectively in the proceeding will be significantly impaired unless the information is disclosed to him, and (ii) any harm to an affected business that would result from the disclosure is likely to be outweighed by the benefit to the proceeding and to the public interest that would result from the disclosure. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information to confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to one or more of the parties of record to the proceeding.

(h) *Disclosure to authorized representatives.* (1) Under sections 114, 208 and 307(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h) (2) or (3) of this section.

(2)(i) A person under contract or subcontract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act may be considered an authorized representative of the United States for purposes of this paragraph (h). Subject to the limitations in this paragraph (h)(2), information to which this section applies may be disclosed to such a person if the EPA program office managing the contract or subcontract first determines in writing

that such disclosure is necessary in order that the contractor or subcontractor may carry out the work required by the contract or subcontract.

(ii) No information shall be disclosed under this paragraph (h)(2), unless this contract or subcontract in question provides:

(A) That the contractor or subcontractor and the contractor's or subcontractor's employees shall use the information only for the purpose of carrying out the work required by the contract or subcontract, shall refrain from disclosing the information to anyone other than EPA without the prior written approval of each affected business or of an EPA legal office, and shall return to EPA all copies of the information (and any abstracts or extracts therefrom) upon request by the EPA program office, whenever the information is no longer required by the contractor or subcontractor for the performance of the work required under the contract or subcontract, or upon completion of the contract or subcontract;

(B) That the contractor or subcontractor shall obtain a written agreement to honor such terms of the contract or subcontract from each of the contractor's or subcontractor's employees who will have access to the information, before such employee is allowed such access; and

(C) That the contractor or subcontractor acknowledges and agrees that the contract or subcontract provisions concerning the use and disclosure of business information are included for the benefit of, and shall be enforceable by, both EPA and any affected business having an interest in information concerning it supplied to the contractor or subcontractor by EPA under the contract or subcontract.

(iii) No information shall be disclosed under this paragraph (h)(2) until each affected business has been furnished notice of the contemplated disclosure by the EPA program office and has been afforded a period found reasonable by that office (not less than 5 working days) to submit its comments. Such notice shall include a description of the information to be disclosed, the identity of the contractor or subcontractor, the contract or

§ 2.302

40 CFR Ch. I (7-1-88 Edition)

subcontract number, if any, and the purposes to be served by the disclosure.

(iv) The EPA program office shall prepare a record of each disclosure under this paragraph (h)(2), showing the contractor or subcontractor, the contract or subcontract number, the information disclosed, the date(s) of disclosure, and each affected business. The EPA program office shall maintain the record of disclosure and the determination of necessity prepared under paragraph (h)(2)(i) of this section for a period of not less than 36 months after the date of the disclosure.

(3) A state or local governmental agency which has duties or responsibilities under the Act, or under regulations which implement the Act, may be considered an authorized representative of the United States for purposes of this paragraph (h). Information to which this section applies may be furnished to such an agency at the agency's written request, but only if—

(i) The agency has first furnished to the EPA office having custody of the information a written opinion from the agency's chief legal officer or counsel stating that under applicable state or local law the agency has the authority to compel a business which possesses such information to disclose it to the agency, or

(ii) Each affected business is informed of those disclosures under this paragraph (h)(3) which pertain to it, and the agency has shown to the satisfaction of an EPA legal office that the agency's use and disclosure of such information will be governed by state or local law and procedures which will provide adequate protection to the interests of affected businesses.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40002, Sept. 8, 1978; 43 FR 42251, Sept. 20, 1978; 50 FR 51662, Dec. 18, 1985]

§ 2.302 Special rules governing certain information obtained under the Clean Water Act.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Clean Water Act, as amended, 33 U.S.C. 1251 et seq.

(2)(i) "Effluent data" means, with reference to any source of discharge of

any pollutant (as that term is defined in section 502(6) of the Act, 33 U.S.C. 1362 (6))—

(A) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source (or of any pollutant resulting from any discharge from the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of the pollutants which, under an applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be "effluent data" only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any product, method, device, or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(3) "Standard or limitation" means any prohibition, any effluent limitation, or any toxic, pre-treatment or

Environmental Protection Agency**§ 2.302**

new source performance standard established or publicly proposed pursuant to the Act or pursuant to regulations under the Act, including limitations or prohibitions in a permit issued or proposed by EPA or by a State under section 402 of the Act, 33 U.S.C. 1342.

(4) "Proceeding" means any rule-making, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this part.

(b) *Applicability.* (1) This section applies only to business information—

(i) Provided to or obtained by EPA under section 308 of the Act, 33 U.S.C. 1318, by or from the owner or operator of any point source, for the purpose of carrying out the objective of the Act (including but not limited to developing or assisting in the development of any standard or limitation under the Act, or determining whether any person is in violation of any such standard or limitation); or

(ii) Provided to or obtained by EPA under section 509(a) of the Act, 33 U.S.C. 1369(a).

(2) Information will be considered to have been provided or obtained under section 308 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 308, or if its submission could have been required under section 308, regardless of whether section 308 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 309(a)(3) of the Act, 33 U.S.C. 1319(a)(3), whether a civil action was brought under section 309(b) of the Act, 33 U.S.C. 1319(b), and whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 509(a) of the Act if it was provided in response to a subpoena issued under section 509(a), or if its production could have been required by subpoena under section 509(a), regardless of whether section 509(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued

an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(4) This section specifically does not apply to information obtained under section 310(d) or 312(g)(3) of the Act, 33 U.S.C. 1320(d), 1322(g)(3).

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, 2.209, 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is effluent data or a standard or limitation is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Effluent data, standards or limitations, and any other information provided or obtained under section 308 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Effluent data and standards or limitations provided in response to a subpoena issued under section 509(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than effluent data and standards or limitations) provided in response to a subpoena issued under section 509(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

(g) *Disclosure of information relevant to a proceeding.* (1) Under sections 308 and 509(a) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to

§ 2.303**40 CFR Ch. I (7-1-88 Edition)**

a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)-(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively of this section.

(h) *Disclosure to authorized representatives.* (1) Under sections 308 and 509(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)-(3) The provisions of § 2.301(h) (2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.303 Special rules governing certain information obtained under the Noise Control Act of 1972.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Noise Control Act of 1972, 42 U.S.C. 4901 et seq.

(2) "Manufacturer" has the meaning given it in 42 U.S.C. 4902(6).

(3) "Product" has the meaning given it in 42 U.S.C. 4902(3).

(4) "Proceeding" means any rule-making, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 13 of the Act, 42 U.S.C. 4912, by or from any manufacturer of any product to which regulations under section 6 or 8 of the Act (42 U.S.C. 4905, 4907) apply. Information will be deemed to have been provided or obtained under section 13 of the Act, if it was provided in

response to a request by EPA made for the purpose of enabling EPA to determine whether the manufacturer has acted or is acting in compliance with the Act, or if its submission could have been required under section 13 of the Act, regardless of whether section 13 was cited as authority for the request, whether an order to provide such information was issued under section 11(d) of the Act, 42 U.S.C. 4910(d), and whether the information was provided directly to EPA by the manufacturer or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 13 of the Act, any information to which this section applies may be released by EPA because of its relevance to a matter in controversy in a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)-(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.304 Special rules governing certain information obtained under the Safe Drinking Water Act.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Safe Drinking Water Act, 42 U.S.C. 300f et seq.

(2) "Contaminant" means any physical, chemical, biological, or radiological substance or matter in water.

Environmental Protection Agency**§ 2.304**

(3) "Proceeding" means any rule-making, adjudication, or licensing process conducted by EPA under the Act or under regulations which implement the Act, except for any determination under this part.

(b) *Applicability.* (1) This section applies only to information—

(i) Which was provided to or obtained by EPA pursuant to a requirement of a regulation which was issued by EPA under the Act for the purpose of—

(A) Assisting the Administrator in establishing regulations under the Act;

(B) Determining whether the person providing the information has acted or is acting in compliance with the Act; or

(C) Administering any program of financial assistance under the Act; and

(ii) Which was provided by a person—

(A) Who is a supplier of water, as defined in section 1401(5) of the Act, 42 U.S.C. 300f(5);

(B) Who is or may be subject to a primary drinking water regulation under section 1412 of the Act, 42 U.S.C. 300g-1;

(C) Who is or may be subject to an applicable underground injection control program, as defined in section 1422(d) of the Act, 42 U.S.C. 300h-1(d);

(D) Who is or may be subject to the permit requirements of section 1424(b) of the Act, 42 U.S.C. 300h-3(b);

(E) Who is or may be subject to an order issued under section 1441(c) of the Act, 42 U.S.C. 300j(c); or

(F) Who is a grantee, as defined in section 1445(e) of the Act, 42 U.S.C. 300j-4(e).

(2) This section applies to any information which is described by paragraph (b)(1) of this section if it was provided in response to a request by EPA or its authorized representative (or by a State agency administering any program under the Act) made for any purpose stated in paragraph (b)(1) of this section, or if its submission could have been required under section 1445 of the Act, 42 U.S.C. 300j-4, regardless of whether such section was cited in any request for the information, or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, 2.209, and 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.* Section 2.210 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water shall be available to the public notwithstanding any other provision of this part.

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 1445(d) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)-(4) The provisions of § 2.301(g) (2), (3), (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

(h) *Disclosure to authorized representatives.* (1) Under section 1445(d) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)-(3) The provisions of § 2.301(h) (2) and (3) are incorporated by refer-

§ 2.305

ence as paragraphs (h) (2) and (3), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.305 Special rules governing certain information obtained under the Solid Waste Disposal Act, as amended.

(a) *Definitions.* For purposes of this section:

(1) "Act" means the Solid Waste Disposal Act, as amended, including amendments made by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 *et seq.*

(2) "Person" has the meaning given it in section 1004(15) of the Act, 42 U.S.C. 6903(15).

(3) "Hazardous waste" has the meaning given it in section 1004(5) of the Act, 42 U.S.C. 6903(5).

(4) "Proceeding" means any rule-making, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act including the issuance of administrative orders and the approval or disapproval of plans (e.g. closure plans) submitted by persons subject to regulation under the Act, but not including determinations under this subpart.

(b) *Applicability.* This section applies to information provided to or obtained by EPA under section 3001(b)(3)(B), 3007, or 9005 of the Act, 42 U.S.C. 6921(b)(3)(B), 6927, or 6995. Information will be considered to have been provided or obtained under sections 3001(b)(3)(B), 3007, or 9005 of the Act if it was provided in response to a request from EDA made for any of the purposes stated in the Act or if its submission could have been required under those provisions of the Act regardless of whether a specific section was cited as the authority for any request for the information or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Sec-

40 CFR Ch. I (7-1-88 Edition)

tion 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant in a proceeding.* (1) Under sections 3007(b) and 9005(b) of the Act (42 U.S.C. 6927(b) and 6995(b)), any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(2)-(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

(h) *Disclosure to authorized representatives.* (1) Under sections 3001(b)(3)(B), 3007(b), and 9005(b) of the Act (42 U.S.C. 6921(b)(3)(B), 6927(b), and 6995(b)), EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)-(3) The provisions of § 2.301(h) (2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

(4) At the time any information is furnished to a contractor, subcontractor, or state or local government agency under this paragraph (h), the EPA office furnishing the information to the contractor, subcontractor, or state or local government agency shall notify the contractor, subcontractor, or state or local government agency that the information may be entitled to confidential treatment and that any knowing and willful disclosure of the information may subject the contractor, subcontractor, or state or local

Environmental Protection Agency**§ 2.306**

government agency and its employees to penalties in section 3001(b)(3)(B), 3007(b)(2), or 9005(b)(1) of the Act (42 U.S.C. 6921(b)(3)(B), 6927(b), or 6995(b)).

[43 FR 40003, Sept. 8, 1978, as amended at 50 FR 51662, Dec. 18, 1985]

§ 2.306 Special rules governing certain information obtained under the Toxic Substances Control Act.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Toxic Substances Control Act, 15 U.S.C. 2601 et seq.

(2) "Chemical substance" has the meaning given it in section 3(2) of the Act, 15 U.S.C. 2602(2).

(3)(i) "Health and safety data" means the information described in paragraphs (a)(3)(i)(A), (B), and (C) of this section with respect to any chemical substance or mixture offered for commercial distribution (including for test marketing purposes and for use in research and development), any chemical substance included on the inventory of chemical substances under section 8 of the Act (15 U.S.C. 2607), or any chemical substance or mixture for which testing is required under section 4 of the Act (15 U.S.C. 2603) or for which notification is required under section 5 of the Act (15 U.S.C. 2604).

(A) Any study of any effect of a chemical substance or mixture on health, on the environment, or on both, including underlying data and epidemiological studies; studies of occupational exposure to a chemical substance or mixture; and toxicological, clinical, and ecological studies of a chemical substance or mixture;

(B) Any test performed under the Act; and

(C) Any data reported to, or otherwise obtained by, EPA from a study described in paragraph (a)(3)(i)(A) of this section or a test described in paragraph (a)(3)(i)(B) of this section.

(ii) Notwithstanding paragraph (a)(3)(i) of this section, no information shall be considered to be "health and safety data" if disclosure of the information would--

(A) In the case of a chemical substance or mixture, disclose processes

used in the manufacturing or processing the chemical substance or mixture or,

(B) In the case of a mixture, disclose the portion of the mixture comprised by any of the chemical substances in the mixture.

(4) [Reserved]

(5) "Mixture" has the meaning given it in section 3(8) of the Act, 15 U.S.C. 2602(8).

(6) "Proceeding" means any rule-making, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(b) *Applicability.* This section applies to all information submitted to EPA for the purpose of satisfying some requirement or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose and either relied upon to avoid some requirement or condition of the Act or incorporated into a submission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. Information will be considered to have been provided under the Act if the information could have been obtained under authority of the Act, whether the Act was cited as authority or not, and whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that the provisions of paragraph (e)(3) of this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under § 2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that--

(1) Notwithstanding § 2.205(i), the General Counsel (or his designee), rather than the regional counsel, shall

§ 2.306**40 CFR Ch. I (7-1-88 Edition)**

make the determinations and take the actions required by § 2.205;

(2) In addition to the statement prescribed by the second sentence of § 2.205(f)(2), the notice of denial of a business confidentiality claim shall state that under section 20(a) of the Act, 15 U.S.C. 2619, the business may commence an action in an appropriate Federal district court to prevent disclosure.

(3) The following sentence is substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the date of the business' receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business' commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure."; and

(4) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (e)(3) of this section, shall not be shortened without the consent of the business.

(f) [Reserved]

(g) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies, except that health and safety data are not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(h) *Disclosure in special circumstances.* Section 2.209 applies to information to which this section applies, except that the following two additional provisions apply to § 2.209(c):

(1) The official purpose for which the information is needed must be in connection with the agency's duties under any law for protection of health or the environment or for specific law enforcement purposes; and

(2) EPA notifies the other agency that the information was acquired

under authority of the Act and that any knowing disclosure of the information may subject the officers and employees of the other agency to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(i) *Disclosure of information relevant in a proceeding.* (1) Under section 14(a)(4) of the Act (15 U.S.C. 2613(a)(4)), any information to which this section applies may be disclosed by EPA when the information is relevant in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. However, any such disclosure shall be made in a manner that preserves the confidentiality of the information to the extent practicable without impairing the proceeding. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (i).

(2)-(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (i) (2), (3), and (4), respectively, of this section.

(j) *Disclosure of information to contractors and subcontractors.* (1) Under section 14(a)(2) of the Act (15 U.S.C. 2613(a)(2)), any information to which this section applies may be disclosed by EPA to a contractor or subcontractor of the United States performing work under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Subject to the limitations in this paragraph (j), information to which this section applies may be disclosed to a contractor or subcontractor if the EPA program office managing the contract or subcontract, or (in the case of contractors or subcontractors with agencies other than EPA) the General Counsel, determines in writing that such disclosure is necessary for the satisfactory performance by the contractor or subcontractor of the contract or subcontract.

(2)-(4) The provisions of § 2.301(h)(2) (ii), (iii), and (iv) are incorporated by reference as paragraphs (j) (2), (3), and (4), respectively, of this section.

Environmental Protection Agency**§ 2.307**

(5) At the time any information is furnished to a contractor or subcontractor under this paragraph (j), the EPA office furnishing the information to the contractor or subcontractor shall notify the contractor or subcontractor that the information was acquired under authority of the Act and that any knowing disclosure of the information may subject the contractor or subcontractor and its employees to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(k) *Disclosure of information when necessary to protect health or the environment against an unreasonable risk of injury.* (1) Under section 14(a)(3) of the Act (15 U.S.C. 2613(a)(3)), any information to which this section applies may be disclosed by EPA when disclosure is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment. However, any disclosure shall be made in a manner that preserves the confidentiality of the information to the extent not inconsistent with protecting health or the environment against the unreasonable risk of injury. Disclosure of information to which this section applies because of the need to protect health or the environment against an unreasonable risk of injury shall be made only in accordance with this paragraph (k).

(2) If any EPA office determines that there is an unreasonable risk of injury to health or the environment and that to protect health or the environment against the unreasonable risk of injury it is necessary to disclose information to which this section applies that otherwise might be entitled to confidential treatment under this subpart, the EPA office shall notify the General Counsel in writing of the nature of the unreasonable risk of injury, the extent of the disclosure proposed, how the proposed disclosure will serve to protect health or the environment against the unreasonable risk of injury, and the proposed date of disclosure. Such notification shall be made as soon as practicable after discovery of the unreasonable risk of injury. If the EPA office determines that the risk of injury is so imminent that it is impracticable to furnish writ-

ten notification to the General Counsel, the EPA office shall notify the General Counsel orally.

(3) Upon receipt of notification under paragraph (k)(2) of this section, the General Counsel shall make a determination in writing whether disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury. The General Counsel shall also determine the extent of disclosure necessary to protect against the unreasonable risk of injury as well as when the disclosure must be made to protect against the unreasonable risk of injury.

(4) If the General Counsel determines that disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury, the General Counsel shall furnish notice to each affected business of the contemplated disclosure and of the General Counsel's determination. Such notice shall be made in writing by certified mail, return receipt requested, at least 15 days before the disclosure is to be made. The notice shall state the date upon which disclosure will be made. However, if the General Counsel determines that the risk of injury is so imminent that it is impracticable to furnish such notice 15 days before the proposed date of disclosure, the General Counsel may provide notice by means that will provide receipt of the notice by the affected business at least 24 hours before the disclosure is to be made. This may be done by telegram, telephone, or other reasonably rapid means.

[43 FR 40003, Sept. 8, 1978, as amended at 44 FR 17674, Mar. 23, 1979]

§ 2.307 Special rules governing certain information obtained under the Federal Insecticide, Fungicide and Rodenticide Act.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Federal Insecticide, Fungicide and Rodenticide Act,

§ 2.307

40 CFR Ch. I (7-1-88 Edition)

as amended, 7 U.S.C. 136 et seq., and its predecessor, 7 U.S.C. 135 et seq.

(2) "Applicant" means any person who has submitted to EPA (or to a predecessor agency with responsibility for administering the Act) a registration statement or application for registration under the Act of a pesticide or of an establishment.

(3) "Registrant" means any person who has obtained registration under the Act of a pesticide or of an establishment.

(b) *Applicability.* This section applies to all information submitted to EPA by an applicant or registrant for the purpose of satisfying some requirement or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose but incorporated by the applicant or registrant into a submission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. This section does not apply to information supplied to EPA by a petitioner in support of a petition for a tolerance under 21 U.S.C. 346a(d), unless the information is also described by the first sentence of this paragraph.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that the provisions of paragraph (e) of this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under § 2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding § 2.205(i), the General Counsel (or his designee), rather than the Regional Counsel, shall make the determinations and take the actions required by § 2.205;

(2) In addition to the statement prescribed by the second sentence of § 2.205(f)(2), the notice of denial of a business confidentiality claim shall state that under section 10(c) of the

Act, 7 U.S.C. 136h(c), the business may commence an action in an appropriate Federal district court for a declaratory judgment;

(3) The following sentence is substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination or to obtain a declaratory judgment under section 10(c) of the Act and to obtain preliminary injunctive relief against disclosure."; and

(4) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (e)(3) of this section, shall not be shortened without the consent of the business.

(f) [Reserved]

(g) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(h) *Disclosure in special circumstances.* (1) Section 2.209 applies without change to information to which this section applies. In addition, under section 12(a)(2)(D) of the Act, 7 U.S.C. 136j(a)(2)(D), EPA possesses authority to disclose any information to which this section applies to physicians, pharmacists, and other qualified persons needing such information for the performance of their duties, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority under section 12(a)(2)(D) of the Act may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it might other-

Environmental Protection Agency**§ 2.308**

wise be entitled to confidential treatment under this subpart) to physicians, pharmacists, hospitals, veterinarians, law enforcement personnel, or governmental agencies with responsibilities for protection of public health, and to employees of any such persons or agencies, or to other qualified persons, when and to the extent that disclosure is necessary in order to treat illness or injury or to prevent imminent harm to persons, property, or the environment, in the opinion of the Administrator or his designee.

(3) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise might be entitled to confidential treatment under this subpart) to a person under contract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedure and requirements of § 2.301(h)(2) (ii) through (iv).

(4) Information to which this section applies, and which relates to formulas of products, may be disclosed at any public hearing or in findings of fact issued by the Administrator, to the extent and in the manner authorized by the Administrator or his designee.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§ 2.308 Special rules governing certain information obtained under the Federal Food, Drug and Cosmetic Act.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Federal Food, Drug and Cosmetic Act, as amended, 21 U.S.C. 301 et seq.

(2) "Petition" means a petition for the issuance of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance, pursuant to section 408(d) of the Act, 21 U.S.C. 346a(d).

(3) "Petitioner" means a person who has submitted a petition to EPA (or to a predecessor agency).

(b) *Applicability.* (1) This section applies only to business information submitted to EPA (or to an advisory committee established under the Act) by a petitioner, solely in support of a petition which has not been acted on by the publication by EPA of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance, as provided in section 408(d) (2) or (3) of the Act, 21 U.S.C. 346a(d) (2) or (3).

(2) Section 2.307, rather than this section, applies to information described by the first sentence of § 2.307(b) (material incorporated into submissions in order to satisfy the requirements of the Federal Insecticide, Fungicide and Rodenticide Act, as amended), even though such information was originally submitted by a petitioner in support of a petition.

(3) This section does not apply to information gathered by EPA under a proceeding initiated by EPA to establish a tolerance under section 408(e) of the Act, 21 U.S.C. 346a(e).

(c) *Basic rules which apply without change.* Sections 2.201, 2.202, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Effect of submission of information without claim.* Section 2.203 (a) and (b) apply without change to information to which this section applies. Section 2.203(c), however, does not apply to information to which this section applies. A petitioner's failure to assert a claim when initially submitting a petition shall not constitute a waiver of any claim the petitioner may have.

(e) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that—

(1) Unless the EPA office has on file a written waiver of a petitioner's claim, a petitioner shall be regarded as an affected business, a petition shall be treated as if it were covered by a business confidentiality claim, and an EPA office acting under § 2.204(d) shall determine that the information

§ 2.308**40 CFR Ch. I (7-1-88 Edition)**

in the petition is or may be entitled to confidential treatment and shall take action in accordance with § 2.204(d)(1);

(2) In addition to other required provisions of any notice furnished to a petitioner under § 2.204(e), such notice shall state that—

(i) Section 408(f) of the Act, 21 U.S.C. 346a(f), affords absolute confidentiality to information to which this section applies, but after publication by EPA of a regulation establishing a tolerance (or exempting the pesticide chemical from the necessity of a tolerance) neither the Act nor this section affords any protection to the information;

(ii) Information submitted in support of a petition which is also incorporated into a submission in order to satisfy a requirement or condition of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 et seq., is regarded by EPA as being governed, with respect to business confidentiality, by § 2.307 rather than by this section;

(iii) Although it appears that this section may apply to the information at this time, EPA is presently engaged in determining whether for any reason the information is entitled to confidential treatment or will be entitled to such treatment if and when this section no longer applies to the information; and

(iv) Information determined by EPA to be covered by this section will not be disclosed for as long as this section continues to apply, but will be made available to the public thereafter (subject to § 2.210) unless the business furnishes timely comments in response to the notice.

(f) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding § 2.205(i), the General Counsel or his designee, rather than the Regional counsel, shall in all cases make the determinations and take the actions required by § 2.205;

(2) In addition to the circumstances mentioned in § 2.205(f)(1), notice in the form prescribed by § 2.205(f)(2) shall be furnished to each affected business whenever information is

found to be entitled to confidential treatment under section 408(f) of the Act but not otherwise entitled to confidential treatment. With respect to such cases, the following sentences shall be substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure; provided, that the information will not be made available to the public for so long as it is entitled to confidential treatment under section 408(f) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(f)."; and

(3) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (f)(2) of this section, shall not be shortened without the consent of the business.

(g) [Reserved]

(h) *Substantive criteria for use in confidentiality determinations.* Section 2.208 does not apply to information to which this section applies. Such information shall be determined to be entitled to confidential treatment for so long as this section continues to apply to it.

(i) *Disclosure in special circumstances.* (1) Section 2.209 applies to information to which this section applies. In addition, under Section 408(f) of the Act, 21 U.S.C. 346a(f), EPA is authorized to disclose the information to other persons. Such authority under section 408(f) of the Act may be exercised only in accordance with paragraph (i)(2) or (i)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise might be entitled to confidential treatment under this subpart) to a person

Environmental Protection Agency**§ 2.310**

under contract to EPA to perform work for EPA in connection with the Act, with the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, or regulations which implement either such Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedures and requirements of § 2.301(h)(2)(ii) through (iv).

(3) Information to which this section applies may be disclosed by EPA to an advisory committee in accordance with section 408(d) of the Act, 21 U.S.C. 345a(d).

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§ 2.309 Special rules governing certain information obtained under the Marine Protection, Research and Sanctuaries Act of 1972.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 et seq.

(2) "Permit" means any permit applied for or granted under the Act.

(3) "Application" means an application for a permit.

(b) *Applicability.* This section applies to all information provided to or obtained by EPA as a part of any application or in connection with any permit.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) *Substantive criteria for use in confidentiality determinations.* Section 2.208 does not apply to information to which this section applies. Pursuant to section 104(f) of the Act, 33 U.S.C. 1414(f), no information to which this section applies is eligible for confidential treatment.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§ 2.310 Special rules governing certain information obtained under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

(a) *Definitions.* For purposes of this section:

(1) "Act" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 et seq.

(2) "Person" has the meaning given it in section 101(21) of the Act, 42 U.S.C. 9601(21).

(3) "Facility" has the meaning given it in section 101(9) of the Act, 42 U.S.C. 9601(9).

(4) "Hazardous substance" has the meaning given it in section 101(14) of the Act, 42 U.S.C. 9601(14).

(5) "Release" has the meaning given it in section 101(22) of the Act, 42 U.S.C. 9601(22).

(6) "Proceeding" means any rule-making or adjudication conducted by EPA under the Act or under regulations which implement the Act (including the issuance of administrative orders under section 106 of the Act), or any administrative determination made under section 104 of the Act, but not including determinations under this subpart.

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 104 of the Act, 42 U.S.C. 9604, by or from any person who stores, treats, or disposes of hazardous wastes; or where necessary to ascertain facts not available at the facility where such hazardous substances are located, by or from any person who generates, transports, or otherwise handles or has handled hazardous substances. Information will be considered to have been provided or obtained under section 104 of the Act if it was provided in response to a request from EPA or a representative of EPA made for any of the purposes stated in section 104, or if its submission could have been required under section 104, regardless of whether section 104 was cited as authority for any request for the information or whether the information was provided directly to EPA or through some third person.

§ 2.311

40 CFR Ch. I (7-1-88 Edition)

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§ 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g)(1) Under section 104(e)(2)(A) of the Act (42 U.S.C. 9604(e)(2)(A)) any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(2) The provisions of § 2.301(g)(2) are to be used as paragraph (g)(2) of this section.

(3) The provisions of § 2.301(g)(3) are to be used as paragraph (g)(3) of this section.

(4) The provisions of § 2.301(g)(4) are to be used as paragraph (g)(3) of this section.

(h) *Disclosure to authorized representatives.* (1) Under section 104(e)(2) of the Act (42 U.S.C. 9604(e)(2)), EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2) The provisions of § 2.301(h)(2) are to be used as paragraph (h)(2) of this section.

(3) The provisions of § 2.301(h)(3) are to be used as paragraph (h)(3) of this section.

(4) At the time any information is furnished to a contractor, subcontractor, or state or local government

agency under this paragraph (h), the EPA office furnishing the information to the contractor, subcontractor, or state or local government agency shall notify the contractor, subcontractor, or state or local government agency that the information may be entitled to confidential treatment and that any knowing and willful disclosure of the information may subject the contractor, subcontractor, or state or local government agency and its employees to penalties in section 104(e)(2)(B) of the Act (42 U.S.C. 9604(e)(2)(B)).

[50 FR 51663, Dec. 18, 1985]

§ 2.311 Special rules governing certain information obtained under the Motor Vehicle Information and Cost Savings Act.

(a) *Definitions.* For the purposes of this section:

(1) "Act" means the Motor Vehicle Information and Cost Savings Act, as amended, 15 U.S.C. 1901 et seq.

(2) "Average fuel economy" has the meaning given it in section 501(4) of the Act, 15 U.S.C. 2001(4).

(3) "Fuel economy" has the meaning given it in section 501(6) of the Act, 15 U.S.C. 2001(6).

(4) "Fuel economy data" means any measurement or calculation of fuel economy for any model type and average fuel economy of a manufacturer under section 503(d) of the Act, 15 U.S.C. 2003(d).

(5) "Manufacturer" has the meaning given it in section 501(9) of the Act, 15 U.S.C. 2001(9).

(6) "Model type" has the meaning given it in section 501(11) of the Act, 15 U.S.C. 2001(11).

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under Title V, Part A of the Act, 15 U.S.C. 2001 through 2012. Information will be considered to have been provided or obtained under Title V, Part A of the Act if it was provided in response to a request from EPA made for any purpose stated in Title V, Part A, or if its submission could have been required under Title V Part A, regardless of whether Title V Part A was cited as the authority for any request for information or whether the information

Environmental Protection Agency**§ 2.402**

was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§ 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies, except that information this is fuel economy data is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 505(d)(1) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding under Title V, Part A of the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2) The provisions of § 2.301(g)(2) are to be used as paragraph (g)(2) of this section.

(3) The provisions of § 2.301(g)(3) are to be used as paragraph (g)(3) of this section.

(4) The provisions of § 2.301(g)(4) are to be used as paragraph (g)(3) of this section.

[50 FR 51663, Dec. 18, 1985]

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States Is Not a Party

AUTHORITY: 5 U.S.C. 301; Reorganization Plan No. 3 of 1970, 5 U.S.C. App.: 33 U.S.C. 361(a); 42 U.S.C. 300j-9; 42 U.S.C. 6911a, 42 U.S.C. 7601(a).

SOURCE: 50 FR 32387, Aug. 9, 1985, unless otherwise noted.

§ 2.401 Scope and purpose.

This subpart sets forth procedures to be followed when an EPA employee

is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee's official status. (In such cases, employees must state for the record that their testimony does not necessarily represent the official position of EPA. If they are called to state the official position of EPA, they should ascertain that position before appearing.) These procedures also apply to subpoenas *duces tecum* for any document in the possession of EPA and to requests for certification of copies of documents.

(a) These procedures apply to:

(1) State court proceedings (including grand jury proceedings);

(2) Federal civil proceedings, except where the United States, EPA or another Federal agency is a party; and

(3) State and local legislative and administrative proceedings.

(b) These procedures do not apply:

(1) To matters which are not related to EPA;

(2) To Congressional requests or subpoenas for testimony or documents;

(3) Where employees provide expert witness services as approved outside activities in accordance with 40 CFR Part 3, Subpart E (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA);

(4) Where employees voluntarily testify as private citizens with respect to environmental matters (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA).

(c) The purpose of this subpart is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA.

§ 2.402 Policy on presentation of testimony and production of documents.

(a) With the approval of the cognizant Assistant Administrator, Office

§ 2.403

Director, Staff Office Director or Regional Administrator or his designee, EPA employees (as defined in 40 CFR 3.102 (a) and (b)) may testify at the request of another Federal agency, or, where it is in the interests of EPA, at the request of a State or local government or State legislative committee.

(b) Except as permitted by paragraph (a) of this section, no EPA employee may provide testimony or produce documents in any proceeding to which this subpart applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee under §§ 2.403 through 2.406.

§ 2.403 Procedures when voluntary testimony is requested.

A request for testimony by an EPA employee under § 2.402(b) must be in writing and must state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA. Such requests are immediately sent to the General Counsel or his designee (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee) with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator, or Staff Office Director (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee), determines whether compliance with the request would clearly be in the interests of EPA and responds as soon as practicable.

§ 2.404 Procedures when an employee is subpoenaed.

(a) Copies of subpoenas must immediately be sent to the General Counsel or his designee with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director, determines whether compliance with the subpoena would clearly be in the

40 CFR Ch. I (7-1-88 Edition)

interests of EPA and responds as soon as practicable.

(b) If the General Counsel or his designee denies approval to comply with the subpoena, or if he has not acted by the return date, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn), produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(c) Where employees in the Office of Inspector General are subpoenaed, the Inspector General or his designee makes the determination under paragraphs (a) and (b) of this section in consultation with the General Counsel.

(d) The General Counsel will request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Agency and the employee.

§ 2.405 Subpoenas duces tecum.

Subpoenas *duces tecum* for documents or other materials are treated the same as subpoenas for testimony. Unless the General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director (or, as to employees in the Office of Inspector General, the Inspector General) determines that compliance with the subpoena is clearly in the interests of EPA, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn) and respectfully refuse to produce the subpoenaed materials. However, where a subpoena *duces tecum* is essentially a written request for documents, the requested documents will be provided or denied in accordance with Subparts A and B of this part where approval to respond to the subpoena has not been granted.

Environmental Protection Agency

§ 2.406 Requests for authenticated copies of EPA documents.

Requests for authenticated copies of EPA documents for purposes of admissibility under 28 U.S.C. 1733 and Rule 44 of the Federal Rules of Civil Procedure will be granted for documents which would otherwise be released pursuant to Subpart A. For purposes of Rule 44 the "person having legal custody of the record" is the cognizant Assistant Administrator, Regional Administrator, Staff Office Director or Office Director or his designee. The advice of the Office of General Counsel should be obtained concerning the proper form of authentication.