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PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION

4. The authority citation for part 140 continues to read as follows:

Authority: 7 U.S.C. 2 and 12a.

5. In § 140.94, revise paragraphs (a)(4) and (a)(5) and add a new paragraph (a)(6) to read as follows:

§ 140.94 Delegation of authority to the Director of the Division of Clearing and Intermediary Oversight.

(a) * * *

(4) All functions reserved to the Commission in § 5.12 of this chapter, except for those relating to nonpublic treatment of reports set forth in § 5.12(i) of this chapter;

(5) All functions reserved to the Commission in § 5.14 of this chapter; and

(6) All functions reserved to the Commission in §§ 39.11(b)(1)(vi), (b)(2)(ii), (c)(1), (c)(2), (f)(1), and (f)(4) of this chapter.

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Issued in Washington, DC, on October 1, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010-25322 Filed 10-13-10; 8:45 am]

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 1 and 2

RIN 2009-AN72

Release of Information From Department of Veterans Affairs Records

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations governing the submission and processing of requests for information under the Freedom of Information Act (FOIA) in order to implement provisions of the E-FOIA Act and the Openness in Government Act, and to reorganize and clarify existing regulations. The proposed regulations would establish the procedures and rules necessary for VA to process requests for information

under the FOIA, including matters such as how to file a request or appeal, how requests for business information are handled, and how issues regarding fees are resolved. The intended effect of these regulations is to implement legislative changes made to the FOIA, as noted above, and to provide the public clear instructions and useful information regarding the filing and processing of FOIA requests.

DATES: Comments must be received on or before December 13, 2010.

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov/>; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AN72, Release of Information from Department of Veterans Affairs Records.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov/>.

FOR FURTHER INFORMATION CONTACT:

Catherine Nachmann, Staff Attorney, Office of the General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7684. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: The FOIA, codified at 5 U.S.C. 552, requires an agency to publish public guidance regarding its implementation of the statute, such as rules of procedure and substantive rules of general applicability. The Privacy Act of 1974, as amended, codified at 5 U.S.C. 552a, requires an agency to publish its rules and procedures implementing that statute. Section 501(a) of title 38, U.S.C., authorizes the Secretary of Veterans Affairs to prescribe rules and regulations to carry out the laws administered by VA, including when information may be released from claimant records under 38 U.S.C. 5701, what activities fall within 38 U.S.C. 5705 regarding confidentiality of medical quality assurance records, whether and to whom information pertaining to those activities may be released, and when information may be released from records covered by 38

U.S.C. 7332 regarding the identity, diagnosis, or treatment of drug abuse, alcoholism or alcohol abuse, infection with the human immunodeficiency virus, and sickle cell anemia.

We propose to amend VA's regulations pertaining to release of information under 5 U.S.C. 552. VA's current FOIA regulations are codified at 38 CFR 1.550 through 1.557, including reserved §§ 1.558 and 1.559. This proposed rule would implement the FOIA in §§ 1.550 through 1.562. The proposed rule would in large part cover the same issues as are covered in VA's current regulations, such as how to submit a request for records, how VA addresses a request for records, and fees for addressing record requests under the FOIA. We propose to update these regulations to accommodate current means of communication with VA, streamline the existing procedures based on our experience administering the FOIA, incorporate changes in the procedural requirements of the FOIA since promulgation of current regulations, make VA's procedures easier for the public to understand, and generally reorganize and renumber the applicable provisions.

In addition, we propose to add new provisions to explicitly implement the E-FOIA Act, Public Law 104-231, and the Openness in Government Act, Public Law 110-175. For additional resources on any of the procedural requirements of the FOIA, E-FOIA Act, or Openness in Government Act in particular, see the detailed information available at the U.S. Department of Justice (DOJ) website. For example, a copy of the FOIA can be located at <http://www.justice.gov/oip/amended-foia-redlined.pdf>. The current edition of the VA FOIA Reference Guide can be located at <http://www.foia.va.gov/docs/RequesterHandbook.pdf>, and specific information about implementing the FOIA and its amendments can be found in guidance issued by DOJ through its FOIA Updates and FOIA Post publications, located at <http://www.usdoj.gov/oip/foi-upd.htm> and <http://www.justice.gov/oip/foiapist/mainpage.htm>.

Changes to 38 CFR Part 1

1.550 Purpose

Current § 1.550 is entitled “General” and provides a general statement of VA policy regarding disclosure of information to the extent permitted by law, including when VA would otherwise be authorized to withhold the information, if the disclosure is for a useful purpose or when disclosure will not affect the proper conduct of official

agency business or constitute an invasion of personal privacy. Current § 1.550 does not provide all of the general information that may be useful to the public regarding a request for VA records, including information necessitated by recent FOIA amendments and VA policy updates.

We propose to amend § 1.550 to generally provide more detail regarding VA's FOIA program. Proposed § 1.550(a) would encourage requesters to read the VA FOIA regulations in conjunction with the FOIA. Based on our experience administering the FOIA, we believe that FOIA requesters will benefit from a greater awareness of the context in which their requests are addressed. In keeping with the legal and policy considerations associated with the administration of the FOIA, proposed § 1.550(a) would authorize release of information on a discretionary basis and without regard to otherwise applicable restrictions in VA's FOIA regulations when current law and governmental policy permit such disclosures. Proposed § 1.550(b) through (e) would advise requesters that other regulations also apply to requests for particular types of records, such as Privacy Act records.

1.551 Definitions

With the exception of current § 1.554a, regarding pre-disclosure notification, and current § 1.555, regarding fees, VA's current FOIA regulations do not contain definitions. Accordingly, we propose to add a definitions section in which we would consolidate all applicable definitions. By providing more definitions of terms commonly used in the FOIA process, proposed § 1.551(a) would clarify the regulations, provide greater understanding for requesters, and assist in the implementation of VA's FOIA regulations. These definitions are proposed for clarification purposes only. No substantive effect is intended.

1.552 General Provisions

Proposed § 1.552(a) would create a section that would refer requesters to an Internet link through which they may obtain access to VA's information that is electronically available under the FOIA and information regarding VA's processing of FOIA requests.

Section 552(a)(6)(B)(ii), as amended by the Openness in Government Act, requires Federal agencies to make available a Public Liaison to assist in disputes arising between the agency and individual requesters. Proposed § 1.552(b) would identify VA's Public Liaisons and provide contact information.

Section 552(e)(1) through (3) requires agencies to prepare an Annual Report that provides details regarding the agency's administration of its FOIA program. Proposed § 1.552(c) would advise the public of this requirement and provide information concerning the procedures for obtaining a copy of VA's Annual Report.

1.553 Public Reading Rooms

Proposed § 1.553 would replace current § 1.552(a). Current § 1.552(a), in part, provides (1) that statements of policy and interpretations adopted by VA but not published in the **Federal Register**, and administrative staff manuals and staff instructions that affect any member of the public, unless promptly published and copies offered for sale, will be indexed by VA; (2) that such indexes will be published, quarterly or more frequently, and distributed or that VA will provide copies at a cost not to exceed the direct cost of duplication and both the index and the materials indexed will be made available to the public for inspection and copying; and (3) that public reading facilities will be maintained by VA Central Office and VA field facilities for this purpose.

Proposed § 1.553(a) would advise the public that VA maintains a public reading room electronically at its FOIA home page on the Internet, which contains records and a current subject matter index of reading room records (updated quarterly or more frequently) that the FOIA requires to be regularly made available for public inspection and copying. In so doing, proposed § 1.553(a) would implement section 552(a)(2) of the FOIA, as amended by the E-FOIA Act, which requires that for records created after November 1, 1996, agencies make such information available by electronic means. Proposed § 1.553(a) would also prescribe that each VA component is responsible for determining which of its records are required to be made available electronically. Proposed § 1.553(a) would generally update VA's FOIA program with regard to public access to records by advising the public of the electronic availability of records. The information provided in this provision would be a useful starting point for an individual seeking access to VA records.

Section 552(a)(2), requires agencies to make available certain documents for public inspection and copying. Current § 1.552(b) implements 552(a)(2), stating that when publishing or making available to the public any opinion, order, statement of policy, interpretation, staff manual or instruction to staff, identifying details

will be deleted, and the deletion justified in writing, to the extent required to prevent a clearly unwarranted invasion of personal privacy. Similarly, proposed § 1.553(b) would prescribe that VA may delete some of the information that it is making publicly available, including, for example, when its release would result in an unwarranted invasion of an individual's privacy. In substance, proposed § 1.553(b) restates the provisions of current § 1.552(b).

Proposed § 1.553(c) would implement § 552(a)(2), which requires that the agency make public reading room material available for inspection and copying. It would provide that some VA components may maintain physical public reading rooms where individuals may obtain publicly available information. In part, current § 1.552(a) implements the same requirement, providing for the maintenance of public reading facilities. Proposed § 1.553(c), therefore, would replace that portion of current § 1.552(a) that implements this requirement. It would also provide that contact information regarding VA components having physical public reading rooms is available on VA's Internet home page. Proposed § 1.553(c) would facilitate an individual's access to a physical public reading room by providing easily accessible information regarding the availability of reading rooms within VA, thereby facilitating an individual's access to reading room material.

1.554 Requirements for Making Requests

Proposed § 1.554 would replace current § 1.553. Current § 1.553(a) prescribes that except for records made publicly available, requests for records will be processed under current § 1.553(b) (discussed below) and any other law applicable to the confidentiality of information. Current § 1.553(a) also provides that VA will consider making records available that it is permitted to withhold under the FOIA if it determines that such disclosure could be in the public interest.

Current § 1.553(b) prescribes the requirements for submitting a FOIA request, including that the request must be in writing over the signature of the requester, that it must contain a reasonable description of the record sought so that it may be located with relative ease, and that it should be made to the office having jurisdiction of the record desired. Proposed §§ 1.554(a) and 1.554(b) would replace current § 1.553(a) and (b) and clarify the procedure for submission of requests for

records under the FOIA. The proposed provisions would prescribe that VA will accept a facsimile (fax) or electronic mail (e-mail) FOIA request if it contains an image of the requester's handwritten signature. These amendments are necessary to clearly identify the acceptable methods of submitting requests and expand the methods by which requests may be made. They would also provide more flexibility for individuals in submitting a FOIA request to VA and would authorize requests in keeping with updated technology. Proposed § 1.554(a) also would clarify other administrative details with respect to making a FOIA request, such as referring the requester to VA's list of FOIA contacts, advising the requester to direct the request to the proper office, and referring the requester to VA's FOIA Reference Guide.

As a general rule, a record covered by the Privacy Act, 5 U.S.C. 552a, will only be released at the request of, or with the prior authorization by, the subject of the record. Proposed § 1.554(c) would add a provision advising requesters that if they wish to receive information about another individual, the requester should provide proof of his or her authorization to receive that information to cover instances where, after weighing personal privacy interest against the public interest under 5 U.S.C. 552(b)(6), FOIA does not require disclosure. Based on our experience in administering the FOIA, we believe that by providing more detailed information regarding the submission of FOIA requests and making such information available electronically, proposed § 1.554(a) through (c) would facilitate the submission of FOIA requests and would expedite the FOIA process, including by directing the request to the proper address.

Section 552(a)(3)(A) provides that upon a request for records that "reasonably describes" the records and is made in accordance with the agency's rules and procedures, the agency shall make such records available. Proposed § 1.554(d)(1) would clarify VA's implementation of the requirement that the request reasonably describe the records sought. Specifically, proposed § 1.554(d)(1) would expand current § 1.553(b) by requiring that requesters provide, to the extent possible, sufficient detail in requests to allow VA to formulate a response. It would also advise requesters that requests that lack specificity may not be considered "reasonably described." Based on our experience in administering the FOIA, we believe these proposed amendments will make the FOIA process more efficient in that it would clarify for

requesters the required level of detail for their requests, thereby allowing VA personnel to locate any responsive records more easily. The amendments would generally clarify the request process.

Proposed § 1.554(d)(2) would advise the requester that requests for voluminous amounts of records may be considered "complex" or may meet the criteria for "unusual circumstances" as set forth in proposed § 1.556; both concepts are discussed in detail below regarding proposed § 1.556.

Proposed § 1.554(d)(3) would expand current § 1.553(b) by prescribing an opportunity for requesters to modify their requests if they do not reasonably describe the records or otherwise do not meet the regulatory requirements for requests. Proposed § 1.554(d)(3) would allow VA to address a request even if the request does not initially meet regulatory requirements. Based on VA's experience, handling any insufficiencies or ambiguities in the request at the outset would avoid delay in addressing the request and provide the requester an avenue for early resolution of the request.

Under section 552(a)(3)(A), a FOIA request must reasonably describe the record sought. Upon receipt, VA must respond to the request, ordinarily, within 20 days (excepting Saturdays, Sundays, and Federal legal public holidays). Proposed § 1.554(d)(4) would prescribe that the time limit for addressing a FOIA request does not begin to run until VA determines that the requester has reasonably described the records and that, if clarification is sought and not received within ten business days, VA will close its file on the request. In our experience, the enforcement of this provision would assist in VA's administration of the FOIA by clarifying VA's process and providing a firm deadline by which an individual must respond to a request for clarifying information. In so doing, VA would place responsibility on the requester to follow request procedures, as required by section 552(a)(3)(A), and promptly reply to VA requests for clarifying information. VA cannot process a request that does not reasonably describe the records. Attempts to address such a request would be futile and may delay action on other requests that meet the requirements. It is imperative, therefore, that the requester reasonably describes the record that is the subject of the request.

Section 552(a)(4)(A) sets forth the requirements regarding the payment of fees for processing record requests. Proposed § 1.554(e) would provide

preliminary information regarding the payment of fees (fees are discussed in more detail in proposed § 1.561). It is included at an introductory level to notify requesters of the general fee guidelines. Proposed § 1.554(e) would restate current § 1.555(b)(2) regarding notification of an anticipated fee in excess of \$25.00 or the amount that the requester has indicated a willingness to pay. It would also restate current § 1.555(g)(4)(i) and (ii) regarding advance payment where the estimated fee is \$250.00 or higher or the requester has previously failed to pay a fee in a timely manner.

Proposed § 1.554(e) would also implement section 552(a)(6)(A)(ii), as amended by the Openness in Government Act, which authorizes an agency to toll the response due date if it is awaiting information from the requester or if clarification is being sought regarding fee issues. Proposed § 1.554(e) would prescribe tolling of the time limit for responding to a FOIA request if necessary to clarify issues regarding a fee assessment. It would also amend the provisions in current § 1.555 by advising requesters that the responding VA component has authority to require written assurance that the fee will be paid, and that if the component's FOIA Officer does not receive a response either to a request for more information or, under certain circumstances, a request for an advance payment, he or she may close the file. Further, proposed § 1.554(e) would advise requesters that even if they are seeking a fee waiver, they may indicate a willingness to pay a fee up to a certain amount. These amendments are necessary to clarify VA policy regarding the assessment of FOIA processing fees and how fee issues may affect the processing of an individual's request. Based on our experience, we believe that setting out the parameters of the FOIA process, including with respect to fees, will encourage resolution of administrative issues early in the processing of a request, thus streamlining the process and avoiding unnecessary delay.

Proposed § 1.554(f) would prescribe that a request must meet the requirements of proposed § 1.554 in order to be considered a perfected request. We propose this amendment to ensure that FOIA requesters understand that VA requirements must be met before the Department devotes resources to processing any request.

1.555 Responsibility for Responding to Requests

Proposed § 1.555 would replace current § 1.553a. Proposed § 1.555(a)

would provide at the outset that the component's FOIA Officer may process the request or refer it to the appropriate VA office, that office will provide the FOIA Officer with all documents in their possession, and that the search cut-off date generally is the date that the search begins, i.e., no documents created after that date will be considered responsive to the FOIA request. If another date is used, the requester will be advised. In our experience, this amendment is necessary to clarify the processing of requests within the agency. This amendment, for example, would resolve questions about the FOIA Officer's authority to access records potentially responsive to a FOIA request and would establish a cut-off date for searches. Removing any ambiguity that exists with regard to the application of the FOIA or VA's processing of FOIA requests would allow the system to operate more effectively and efficiently.

Proposed § 1.555(b) would replace current § 1.553a(a) and provide that the individual in each component who will be responsible for granting or denying a request is the "FOIA Officer" rather than the "proper employee designated." This amendment would clarify that the individual responsible for addressing FOIA requests is the FOIA Officer and is intended to encourage consistency throughout the agency in handling FOIA requests.

Proposed § 1.555(c) and (d) would replace current § 1.553a and prescribe that the FOIA Officer will transfer to, or consult with, another component or agency regarding, a request, including a request that involves classified information, when another component or agency is better able to address the request. Proposed § 1.555(e) would provide that the FOIA Officer will notify the requester when all or part of the request has been referred to another component or agency. We propose this amendment to provide as much information as possible to requesters about the processing of their requests. Informing requesters of the administrative actions that may occur with respect to their requests will assist in the effective administration of the FOIA program.

1.556 Timing of Responses to Requests

Proposed § 1.556 would replace current provisions and add provisions regarding the treatment of FOIA requests. Proposed § 1.556(a) would add a provision stating generally that VA components will respond to FOIA requests according to their order of receipt.

Proposed § 1.556(b)(1) would prescribe VA's use of a multitrack processing system in which, once received, FOIA requests are placed in one of two tracks based upon the work and time required to process the request. Proposed § 1.556(b)(2) would require VA processors to advise requesters of the track to which their request is assigned (simple or complex). Under the proposed rule, VA would provide the requester the opportunity to discuss his or her request with the processing VA component in order to qualify for the faster processing track. These proposed provisions implement sections 552(a)(6)(D)(i) and (ii), which authorize agency rulemaking regarding multitrack processing of records requests and the opportunity to qualify for the faster track. Multitrack processing would enable VA to organize its FOIA request intake in such a way as to provide a greater understanding of the nature and extent of the work required to address various requests. In addition, it would allow personnel to organize their workload in accordance with varying degrees of complexity of the requests presented. Lastly, it would allow requesters to modify their requests to enable VA to address the request more expeditiously. In our experience, requesters often frame requests in a way that would include more material than may be necessary to answer their inquiry. Allowing requesters to work with VA to clarify a request before the agency expends resources on gathering documents that the requester does not want would allow a quicker resolution for the requester and would allow the agency to allocate resources to other requests.

Proposed § 1.556(c) would amend current § 1.553a(d) in that it would set forth the circumstances under which VA may determine that unusual circumstances exist with regard to addressing a FOIA request. The definition of "unusual circumstances" is prescribed at 5 U.S.C. 552(a)(6)(B), and includes, for example, the need to collect records from a facility other than the office processing the request. Proposed § 1.556(c) would add a provision that if VA requires an extension of more than 10 business days to address the request, the requester may modify the request so that it may be processed within applicable time limits or arrange an alternative time period with the VA component that is processing the request. Similar to proposed § 1.556(b)(2), proposed § 1.556(c) would prescribe consultation with the requester to allow for modification of the request or arrange an

alternative time period within which VA must process the request. This provision encourages early clarification of the request and should promote expeditious processing. Our experience is that communication with the requester in cases such as this is beneficial to all parties, as it clarifies issues for the agency and notifies the requester that the agency is interested in processing the request as expeditiously as possible.

Proposed § 1.556(c)(1)(i) through (iii) would replace current § 1.553a(d)(1) through (3) and incorporate statutory requirements in section 552(a)(6)(B)(i) through (iv) regarding the meaning of "unusual circumstances."

Proposed § 1.556(c)(2) would authorize the aggregation of requests if VA determines that certain requests are from the same requester, or a group of requesters acting in concert, actually constitute the same request and that as such, the requests would otherwise meet the requirements for "unusual circumstances," as defined in section 552(a)(6)(B)(iii). This provision would allow VA to address the substance of a request rather than the form of the request; in other words, when a request, in substance, meets the unusual circumstances requirements, the agency would address it as such. The proposed revision in this regard would result in a more equitable distribution of FOIA requests and request workload as it would allow the agency to consider the nature of the request in determining how to characterize it.

Section 552(a)(6)(E)(i) through (vi) requires VA rulemaking regarding the procedures for expedited processing of requests. We propose to implement these procedures in § 1.556(d). Proposed § 1.556(d)(1) would prescribe the circumstances that represent a "compelling need" for the information, a requirement that must be met in order to meet the requirement for expedited review under the FOIA. Proposed § 1.556(d)(2) restates section 552(a)(6)(E)(vi), which provides that a requester seeking expedited processing must submit a certified statement to the processing agency regarding the request for expedited review. Proposed § 1.556(d)(3) restates section 552(a)(6)(E)(ii), which requires agencies to make a determination regarding a request for expedited processing within 10 days of the receipt of the request.

1.557 Responses to Requests

Proposed § 1.557(a) would require the processing VA component to acknowledge receipt of the request and assign a docket number to the request. This provision is intended as an

administrative tool that components would use to organize incoming requests and to provide the requester with pertinent information should he or she wish to contact VA for information.

Proposed § 1.557(b) would implement the provisions of section 552(a)(3)(B) through (C) to the extent that the proposed rule would require a component properly in receipt of a request to conduct a reasonable search for records, including records in electronic form or format, and to provide those records in the form or format requested by the individual, if readily reproducible in that form or format. In this regard, proposed § 1.557(b) would essentially restate the FOIA provisions. In addition, proposed § 1.557(b) would clarify that any responsive records would be those in the component's possession and control as of the date the search for responsive records begins and would provide for notification to the requester if a fee is due under proposed § 1.561. Adding this interpretation of the search date and initial fee assessment requirements would eliminate any ambiguity with regard to the time frame of the search and any resulting fee.

Proposed § 1.557(b) also would implement section 552(b), which requires deletion of certain exempt portions of records and identification of the FOIA exemption under which the deletion is made. This proposed revision would also restate, in part, current § 1.554(a), which prescribes that records will be provided after deletion of material exempt under the FOIA, as discussed in current § 1.554(a).

Proposed § 1.557(c) would restate section 552(a)(6)(A) and replace current § 1.553a(b). The proposed rule would prescribe a 20-day deadline in which a VA component will act upon a request and a 10-day limit for referring a request to another component.

Proposed § 1.557(d) would implement section 552(a)(6)(F), which requires agencies to provide requesters a statement regarding the amount of information withheld and the FOIA exemption under which information is withheld, unless providing such a statement would harm an interest protected by the applicable exemption, and would replace current § 1.557(a). The proposed rule would provide specific examples of the types of determinations that are adverse to requesters, restate the requirement to include the name of the individual responsible for the denial, and prescribe a statement of the reasons for the denial and notice regarding the right to appeal under proposed § 1.559. Placing the information that will be included in an

adverse determination in one provision will clarify the FOIA process and benefit all parties involved. Our intent in proposing this provision is to provide VA components clear and consistent direction regarding the requirements for adverse determinations and to ensure that requesters receive notice concerning the reasons for the determination and their appeal options.

1.558 Business Information

Section 552(b)(4) exempts from release matters that are trade secrets and commercial or financial information obtained from a person that is privileged and confidential. Executive Order 12,600 establishes the procedures to be followed when the agency believes that responsive records include such information. Ordinarily, these provisions apply when a request is received for information submitted by an individual doing business with VA who has provided to VA its business information, or information that he or she considers commercial or confidential; this individual is referred to as the "submitter" of the information. The "submitter" typically designates the information as protected, as discussed further below.

Proposed § 1.558 would replace current § 1.554a in addressing the issues raised by business information; it would replace the term "confidential commercial" information used in current § 1.554a with "business" information. This revision would provide individuals specific information at the outset concerning whether their request would involve such information. Proposed § 1.558(a) would replace current § 1.554a(a) and provide an introductory statement regarding the consideration of business information pursuant to proposed § 1.558. Proposed § 1.558(b) essentially would replace current § 1.554a(d), which outlines the requirements for a submitter to designate records as business information. Proposed § 1.558(b) varies from current § 1.554a(d) in that it would allow for the business information designation to take place within a reasonable time after submission of the information to VA. Current § 1.554a(d) contains the same language but qualifies the "reasonable time" as not later than 60 days after receipt of the information by VA. In addition, proposed § 1.558(b) would add a provision stating that the designation will be considered by the VA component processing the request, but will not control the FOIA Officer's determination. Based on VA's experience in administering current FOIA provisions, VA believes that these revisions would allow flexibility with

regard to the submitter's designation and would clarify the role of the designation for the submitter, i.e., the submitter should understand at the outset that while records may be designated as business information, the designation itself does not necessarily determine the outcome of the VA component's decision, which will be made in compliance with applicable laws.

Proposed § 1.558(c)(1) would replace current § 1.554a(c) and prescribe the requirements for notice to a submitter of business information whenever a request for that information is being processed under the FOIA. Proposed § 1.558(c)(1) would differ from current § 1.554a(c) by requiring the submitter to provide objections to the disclosure within the "time period specified" in the notice, as opposed to within 10 working days, as prescribed in current § 1.554a(c). This revision is repeated in proposed § 1.558(d). This revision would allow VA the flexibility to meet statutory time limits and/or change the number of days in which a response is required as a policy matter without requiring a change in its regulations. Proposed § 1.558(c)(1) also would delete the current requirement for the notice to be mailed by certified mail, return receipt requested. Our experience is that certified mail may unnecessarily delay the notification process when there are other suitable alternatives. Proposed § 1.558(c)(1) would add a provision allowing the FOIA Officer to post the notification in a place reasonably likely to accomplish the required notice when the notice concerns a large number of submitters. This proposed provision would allow the FOIA Officer greater flexibility and expedite notice by allowing electronic or other public notification of multiple submitters simultaneously.

Proposed § 1.558(d) would replace current § 1.554a(f) and eliminate "or designee" when referring to the submitter. We intend that this change will bring VA's FOIA regulations into compliance with Executive Order 12600, which established Federal policy regarding agency communication only with the submitter of information.

Proposed § 1.558(d) would require that the submitter's objections be contained in a single written response and that oral or multiple subsequent written responses ordinarily would not be considered. Based on our experience administering the FOIA with regard to business information, we believe that this revision would create a more efficient process by requiring a cohesive statement from the submitter rather than allowing continued or successive

submissions. Additionally, eliminating oral responses would better develop the administrative record for all parties.

Proposed § 1.558(d) would also provide that if the submitter does not respond to VA's notification within the specified time limit, the submitter will be considered to have no objection to the disclosure. This provision would impose a duty to respond within the time limit in order to ensure that the submitter's objections, if any, can be properly considered in an efficient and timely manner. This proposed provision would also eliminate the requirement that the submitter provide objections within 10 days after receipt by the submitter of notification of a request for the submitter's information. Instead, the proposed rule would allow the FOIA Officer to set forth a "specified time limit" within which to respond.

Proposed § 1.558(d) would eliminate the language in current § 1.554a(f), which prescribes that information provided by the submitter would itself be subject to the FOIA. Our experience is that the existing notice in current § 1.554a(f) has a chilling effect on submitters detailing their objections to disclosure and discussing the likelihood of disclosure causing substantial competitive harms. Additionally, any submission of information to the government may be subject to the FOIA, thus making that language superfluous.

Proposed § 1.558(e) would replace current § 1.554a(f)(3) regarding the FOIA Officer's consideration of the submitter's objections in making a determination whether to release information. While current § 1.554a(f)(3), for example, states that VA will consider a submitter's comments if received within a 10-day time limit, proposed § 1.558(e) states that information provided by the submitter after the "specified time limit" will not be considered. While a specific time frame is not expressly stated in the proposed regulation, the regulation does provide for consideration of comments within a time frame specified by the FOIA Officer.

Proposed § 1.558(e) also would replace current § 1.554a(f)(3) with regard to the information contained in the written notice to the submitter. The proposed regulation makes no substantive changes to this provision.

Proposed § 1.558(f) would replace current § 1.554a(i)(1) through (3), identifying when the pre-disclosure notification requirements need not be followed. It would add to the provisions in current § 1.554a(i)(3) that pre-disclosure notification is not required if the disclosure is required by regulation issued in accordance with Executive

Order 12600 or any other Executive Order. In this regard, the proposed rule would ensure that Executive Orders are included, as appropriate, as a basis for the disclosure of information. Proposed § 1.558(f) would delete references to current § 1.554a(i)(4) through (6) because VA's experience is that these provisions have not been utilized, and the revised provisions would, if necessary, cover the instances referred to in the referenced sections.

Proposed § 1.558(g) would replace current § 1.554a(g)(1) and would make no change to that provision. Current § 1.554a(g)(2) regarding notice to a requester when a submitter is given an opportunity to provide comments about the disclosure would be deleted because under the proposed rule requesters would be on notice regarding VA's contacts with submitters. Proposed § 1.558(g) would prescribe notice to a requester that the request is being processed under § 1.558, including the provisions in § 1.558(c) and (e) prescribing notice to submitters regarding opportunity to comment. Current § 1.554a(g)(3) regarding notice to a submitter and requester of a final decision on disclosure of business information would also be deleted as unnecessary. Submitters would instead be given notice of an impending agency decision on disclosure of business information under proposed § 1.558(e). The requester would be notified when a final agency decision is issued pursuant to proposed § 1.557.

1.559 Appeals

Section 552(a)(6)(A) provides that when an agency component responds to an initial request for records, it shall provide the requester with the right to appeal any adverse determination to the head of the agency.

Proposed § 1.559 would replace current § 1.557(b). Current § 1.557(b) states only that the final agency decisions in appeals will be made by the VA General Counsel or Deputy General Counsel. Proposed § 1.559(a) would allow for an informal resolution of the request prior to an appeal in appropriate cases. We believe that in appropriate cases, requesters may benefit from contact with the FOIA Officer or VA component addressing the request and an attempt to resolve outstanding issues with regard to the request. The requester may seek informal resolution, for example, when he or she has not received a response to the request. Direct communication between the FOIA Officer and the requester could resolve the issue and therefore make an appeal unnecessary.

Proposed § 1.559(b) would establish authority for the VA Office of Inspector General (OIG) to handle appeals related to OIG records. This would allow the OIG to establish its independence regarding its own records.

Proposed § 1.559(b) through (c) would provide details regarding how to file an appeal and the form that an appeal may take and a reference to additional information available online.

Proposed § 1.559(d) would establish a 60-day time limit from the date of any adverse determination concerning the FOIA request for the requester to file an appeal. Current regulations do not address the timeliness of an appeal.

Based upon our experience, we believe that prescribing a period within which an appeal may be filed provides an effective tool for establishing workload and allocating resources. We have determined that a 60-day time limit would be reasonable given the convenient means by which an individual may quickly file an appeal. We note that the proposed 60-day appeal period would be the same as the appeal period established by the Department of Justice for its FOIA appeals. We also believe that the requester should have the responsibility to follow through with the appeal if he or she wishes the request to be addressed and that the 60-day appeal period would provide ample time to exercise that responsibility. Further, the appeal process would be more seamless and effective if requesters included necessary information in their appeal notices, such as the information listed in proposed § 1.559(d). Based on our experience, we believe that encouraging requesters to initially provide as much information as possible would ease the administrative burdens of gathering relevant information and processing the appeal. Proposed § 1.559(d) would also provide that an appeal is not perfected until either the information requested is received or VA determines that the appeal is otherwise sufficiently defined. In our experience, appeals occasionally are so lacking in detail that it requires an excessive amount of time to identify the issues or records involved.

Requesters would provide more clarity and therefore would require less labor-intensive inquiries by VA if they initially provided the information that is necessary to process the appeal.

Proposed § 1.559(d) would also delegate authority to decide appeals to the VA Assistant General Counsel who has jurisdiction over FOIA matters. This amendment would add the Assistant General Counsel that has jurisdiction over records disclosure matters to the list of individuals authorized to make

such final agency determinations thus streamlining the appeal process while continuing to provide the thorough legal analyses currently afforded FOIA appeals.

Proposed § 1.559(e) would prescribe the content of a decision on appeal. Prescribing these requirements would facilitate consistency in decision-making and fully inform requesters regarding their right to a complete appellate decision from the agency.

Proposed § 1.559(f) would require a requester to file an appeal prior to seeking court review. This provision would provide the opportunity for resolution of the requester's concerns prior to initiating litigation and ensure that the matter is ready for judicial review.

1.560 Maintenance and Preservation of Records

The Federal Records Act, 44 U.S.C. chapter 31, addresses record preservation and destruction by Federal agencies. Section 3102 of title 44, U.S.C., requires that the head of an agency establish and maintain a records management system.

Proposed § 1.560(a) would require that VA components maintain FOIA requests and copies of pertinent records in accordance with NARA's General Records Schedule.

Proposed § 1.560(b) would require that the FOIA Officer maintain copies of records that are the subject of a pending request, appeal, or lawsuit under the FOIA. It would also prescribe that a copy of the records shall be provided to the Office of the General Counsel upon request.

These provisions would underscore the importance of maintaining records as appropriate and prescribe consistent compliance within VA. They would emphasize that administrative record-keeping is an important function in the FOIA program and that in order for VA components to build an administrative record, if required, information must be preserved as appropriate.

1.561 Fees

In accordance with section 552(a)(4)(A), an agency is required to promulgate regulations specifying the schedule of fees applicable to processing requests under the FOIA and establishing procedures and guidelines for determining when fees will be waived or reduced. In addition, agencies must implement the 1987 Fee Schedule and Guidelines published by the Office of Management and Budget (OMB). See The Freedom of Information Reform Act of 1986; Uniform FOIA Fee Schedule

and Guidelines, 52 FR 59 (27 March 1987).

Proposed § 1.561 replaces current § 1.555. In part, proposed § 1.561(a) would replace current § 1.555(b)(1) in providing a general introduction and rules regarding fees. Proposed § 1.561(a) would add that the VA component would collect prescribed fees before releasing copies of the information to the requester and would include a provision regarding payment of fees. Lastly, proposed § 1.561(a) would direct a requester's attention to other VA statutes that contain provisions related to access to records and the fees for such access. These amendments would provide introductory comments regarding VA's fee provisions and are intended to clarify and highlight VA's general framework for the assessment of fees.

Proposed § 1.561(b) would replace current § 1.555(a) and would contain the definitions of terms used regarding FOIA fees. Proposed § 1.561(b)(1) would restate that portion of current § 1.555(d)(4) that defines "all other requesters" as any requester that does not fit within any other category; the proposed inclusion of this definition in this section would ensure that all pertinent definitions are included.

Proposed § 1.561(b)(2) would replace current § 1.555(a)(1) and would restate the definition of "commercial use request." The proposed regulation would make no substantive change to current § 1.555(a)(1).

Proposed § 1.561(b)(3) would replace current § 1.555(a)(2) and would restate the definition of "direct costs." The proposed regulation would make no substantive change to current § 1.555(a)(2).

Proposed § 1.561(b)(4) would replace current § 1.555(a)(3) and would restate the definition of "duplication." The proposed regulation would make no substantive change to current § 1.555(a)(3).

Proposed § 1.561(b)(5) would replace current § 1.555(a)(4) and would restate the definition of "educational institution." The proposed regulation would make no substantive change to current § 1.555(a)(4).

Proposed § 1.561(b)(6) would replace current § 1.555(a)(5) and in large part, restate the definition of "non-commercial scientific institution." The proposed regulation would make no substantive change to the provisions of current § 1.555(a)(5) with the exception of the addition that the requester must show that the request is authorized by and made under the auspices of a qualifying institution. This amendment would clarify the requirement for

submitting such a request and would place responsibility on the requester to establish that it fits within this fee category. Our experience indicates that this requirement will assist in resolving the status of a fee requester at the outset and will clarify the requirements for such requesters.

Proposed § 1.561(b)(7) would replace current § 1.555(a)(6). It would restate current § 1.555(a)(6), but also implement the change in the definition of *news media* in section 552(a)(4)(A)(ii), which defines "representative of the news media" as described immediately below. The proposed rule would prescribe that a member of the news media is one who gathers information of potential interest to the public, uses his or her editorial skills to turn the raw material into a distinct work, and distributes that work to an audience. We propose to add language that alternative media sources may be considered news media if they otherwise meet the definition of news media. We believe this proposed language would underscore that the entity seeking classification as a news media must also meet the other criteria set forth in the definition of news media. Proposed § 1.561(b)(7) would also delete a reference to freelance journalists' option to seek a reduction or waiver of fees. We believe placing the reference here would be superfluous, as waiver or fee reduction is discussed in the introductory paragraph of proposed § 1.561(b)(7). In accordance with section 552(a)(4)(A)(ii), proposed § 1.561(b)(7) would add language that a representative of the news media must not be seeking records for a commercial use.

Proposed § 1.561(b)(8) would replace current § 1.555(a)(7). The proposed rule would essentially restate current § 1.555(a)(7) and would add examples of the types of records that are subject to review in a FOIA request. We believe that providing examples would provide more clarity for requesters concerning the potential assessment of fees.

Proposed § 1.561(b)(9) would replace the definition of *search* in current § 1.555(a)(8). The proposed rule would make no substantive change to current § 1.555(a)(8) with the exception of the deletion of the last sentence in current § 1.555(a)(8) regarding excluding review time. We believe that this language is unnecessary, as we have previously defined the term *search* in the context of the FOIA.

Proposed § 1.561(c) would replace current § 1.555(d) regarding categories of requesters and fees charged each category. The introductory language of proposed § 1.561(c) and (c)(1) (commercial use requesters) restates the

introductory language of current § 1.555(d) and (d)(1) (commercial use requesters), with the exception of adding language noting that the provisions apply unless a waiver or reduction of fees applies. We believe these proposed additions would clarify application of the fee provisions by directing the requester's attention to the exceptions that apply to the assessment of fees. In addition, proposed § 1.561(c)(1) would delete language from current § 1.559(d)(1) that states that a requester must reasonably describe the record requested. We believe that this language is superfluous in light of the full discussion of reasonably described records in proposed § 1.554(d).

Proposed § 1.561(c)(2) and (3) would replace current § 1.555(d)(2) and (3), respectively. Proposed § 1.561(c)(2) and (3) would refer the requester to the potential waiver or reduction of fees and would reiterate the charges assessed to an educational institution and a representative of the news media. It would delete language in current § 1.559(d)(2) and (3) regarding the requirements that must be met to be categorized as an educational and non-commercial scientific institution or a representative of the news media. The criteria for classification of these types of requesters would be clearly set forth in the definitions section.

Proposed § 1.561(c)(4) would replace current § 1.555(d)(4). Proposed § 1.561(c)(4) essentially restates the provisions of current § 1.555(d)(4) as to the charges that are assessed for an all other requester and its reference to the waiver or reduction of fees. Proposed § 1.561(c)(4) would delete language from current § 1.555(d)(4) that refers to requests for records retrievable by personal identifiers and the treatment of such requests. In doing so, the proposed rule would more clearly distinguish between requests made under the FOIA and requests made under other authority. Based on our experience, we believe that such distinctions are helpful in that requesters can determine which procedures are applicable to their requests and will be able to more clearly identify the action that is required. In addition, proposed § 1.550 provides information concerning the various disclosure statutes and the distinctions between those statutes. Including that information here would be superfluous.

Proposed § 1.561(d) would clarify the types of fees that VA may charge for processing requests. The introductory paragraph in proposed § 1.561 would provide a general statement notifying requesters that the fees to be charged are defined in proposed § 1.561. Proposed § 1.561(d)(1)(i) would clarify how a

search fee is assessed and would advise that fees are charged in quarter hour increments. This provision would better advise requesters concerning the potential for a fee assessment and how VA will assess the fee. This information may also be helpful to requesters seeking to identify more precisely the records that are the subject of their request.

Proposed § 1.561(d)(1)(ii), in part, would replace current § 1.555(c)(2). It would reiterate how fees are assessed in cases requiring a computer search and make no substantive change in that regard. As an administrative matter, it would add a reference to the proposed-rule provisions that discuss when a fee would not be charged and when 2 hours of free search time would be granted.

Proposed § 1.561(d)(2) and (3) would add provisions clarifying when duplication and review fees, respectively, apply, and how such fees are calculated. These provisions would provide VA and requesters clear rules for determining the level of fees that may be assessed, depending upon the request submitted. Proposed § 1.561(d)(3), for example, would prescribe in detail when a fee may be charged for consideration of an exemption and when it may not. We believe that this type of detail would be useful to requesters as a means of explaining why certain charges are made or not made and accordingly, would potentially assist in VA's administration of the FOIA.

Proposed § 1.561(e)(1) and (2) would implement administrative provisions regarding the assessment of fees. In accordance with proposed § 1.561(e)(2), for example, more than half of a quarter-hour period must be spent on search and review for the requester to be charged for that quarter-hour. This proposed provision represents VA's determination that it is administratively worthwhile only to collect a fee representing more than one half of a quarter-hour increment.

Proposed § 1.561(e)(3) would implement section 552(a)(4)(A)(viii) by prescribing that certain fees may not be charged to various types of requesters if the agency fails to meet the time limits set forth in agency regulations. The proposed provision clarifies that duplication fees may still be charged to commercial use requesters and "all other" requesters.

Proposed § 1.561(e)(4), in part, would replace current § 1.555(c) and prescribe that the agency will provide the first 100 one-sided pages and the first 2 hours of search time without charge. We do not intend any substantive change to this provision.

Proposed § 1.561(e)(5), in part, would replace current § 1.555(c), which provides that no fee will be charged if the cost of collecting the fee is equal to or greater than the fee itself. Proposed § 1.561(e)(5) would clarify that if the total fee calculated is less than \$25.00, no fee will be charged. Prescribing a dollar amount in this provision should clarify the regulation for requesters and remove any ambiguity that may exist in current regulations regarding permissible fees.

Proposed § 1.561(e)(6) would prescribe that VA may provide free copies of records or free services in response to requests from other government agencies or congressional offices when to do so would assist in providing medical care to a patient or to further VA's mission. This provision would allow the agency the flexibility to respond to certain requests promptly without addressing issues that may arise with regard to fees.

Proposed § 1.561(f) would add a chart that contains the categories of fee requesters and a summary of the types of fees that VA may charge. Proposed § 1.561(f) would provide a convenient administrative tool for VA officials and requesters, which would summarize information previously set forth in the proposed regulations and would not make any substantive changes.

Proposed § 1.561(g) would replace current § 1.555(e). Current § 1.555(e) consists of a schedule of fees in chart form. Proposed § 1.561(g) would add an introductory paragraph regarding the assessment of fees and would restate generally when the payment of fees is required. The proposed provision, for example, notes that VA would charge for special services used in responding to a FOIA request, that the fee schedule applies to requests under the Privacy Act as well, and that in cases in which the processing fee is less than \$25.00, or in cases in which the requirements for a waiver have been met, the fee would be waived.

Section 552(a)(4)(A)(i) requires agencies to promulgate regulations prescribing a schedule of fees applicable to processing FOIA requests. The fees must conform to OMB guidelines regarding a uniform schedule of fees for all agencies. Proposed § 1.561(g)(1) would implement the OMB guidance and prescribe the criteria that VA would use to calculate search and review fees when such fees are based upon VA employees' salaries.

Proposed § 1.561(g)(2) would also provide a fee schedule in chart form that describes the type of activity for which the fee is being assessed and the composition of the fee being assessed.

Proposed § 1.561(h), in part, would replace current § 1.555(b)(2) and would add that the requester will be notified of the assessment of a fee over \$25.00 or the amount set by OMB fee guidelines, whichever is higher. This provision would allow VA flexibility with regard to notifying requesters of fee assessments should the limit be changed in the future. It would also advise requesters of the potential for such a change. Proposed § 1.561(h) would add that any agreement made by the requester to pay a fee on a later date shall be in writing. Based on our experience, we believe that this requirement would help to avoid any ambiguity with regard to fee issues. Proposed § 1.561(h) would also expand the language in current § 1.555(b)(2) and authorize the FOIA Officer's contact with the requester regarding clarification of fee issues. Proposed § 1.561(h) would provide that the timeline for responding to the request shall be tolled until the fee issue is resolved. This proposed provision would implement section 552(a)(6)(A)(ii)(II), which authorizes tolling of the time limit if necessary to clarify issues regarding fee assessment. Proposed § 1.561(h) would also provide that if VA does not receive a response regarding a request for clarification of the fee issue within 10 days, it will close the file on the records request. We believe that setting a clear limit on the response time will avoid delay that results when a requester's intentions are unclear. Such a limit will also prevent VA from having to maintain cases on its docket that the requester has no interest in pursuing. Thus, it would be reasonable to place responsibility on the requester to follow through with the request that he or she initiated if the records sought are still desired.

Section 552 authorizes recovery of direct costs of search, duplication, and review in certain cases. Proposed § 1.561(i) would add a provision that when the agency chooses to provide a special service sought by the requester, such as certifying records, the direct cost of that service will be charged to the requester. This provision would allow the agency the flexibility to work with the requester to grant special services of this nature if possible, but allows the agency to recoup the costs of those services. This proposed provision would be promulgated pursuant to 31 U.S.C. 9701, which permits agencies to prescribe regulations establishing a charge for things of value provided by the agency.

Proposed § 1.561(j) would restate the provisions of current § 1.555(g) in all pertinent respects with regard to

charging interest on an unpaid bill. It also would replace current § 1.555(g)(5) regarding application of the Debt Collection Act of 1982 (Pub. L. 97–365). It would delete the requirement that the determination to charge interest will be made by a VA Central Office official or field facility head or designee. Based on our experience, we believe that this requirement does not make the process more efficient. By deleting the current delegation of authority provision, we intend to provide flexibility for other individuals to make the determination to charge interest but only according to the criteria prescribed in VA's regulations. The proposed rule would also delete references to VA procedures that ensure that a requester who has remitted payment is credited with the payment. We believe this provision to be superfluous, as any payment would ordinarily be credited as a matter of administrative regularity.

Proposed § 1.561(k) would restate the provisions of current § 1.555(g)(3) in all pertinent respects with regard to aggregating requests. Proposed § 1.561(k) would use the term "component" rather than "responsible Central Office official or field facility head or designee." Based on our experience, we believe that this requirement would allow more flexibility in determining whether a request should be aggregated according to the criteria in VA's regulations. It also would allow those most familiar with the FOIA process to make the determination, which we believe would add more administrative regularity to the process.

Proposed § 1.561(l)(1) would restate the introductory language set forth in current § 1.555(g)(4). Proposed § 1.561(l)(1) would add that payment for work already completed is not an advance payment. This language is an administrative provision intended to clarify what constitutes an advance payment.

Proposed § 1.561(l)(2) would restate the provisions of current § 1.555(g)(4)(i) in all pertinent respects with regard to advance payments. It would delete current provisions providing an option for the VA to notify the requester of the likely fee and obtain satisfactory assurance of full payment. Based on our experience, deleting this language would avoid any ambiguity with regard to the fee and would clarify that the component may require payment in advance. We believe this would assist in the administration of this provision.

Proposed § 1.561(l)(3) would generally restate the provisions in current § 1.555(g)(4)(ii). However, proposed § 1.561(l)(3) would delete the

option that a requester may demonstrate that a fee owed has been paid in order to allow VA to process the request. In our experience, the circumstances under which fee issues arise do not concern a requester who has already paid the fee. Typically, unresolved fee issues occur in the context of a fee that has not been paid. In order to address the typical situations in this regard, we propose the deletion of the language above as unnecessary.

Proposed § 1.561(l)(4) would add a provision that if a requester has a history of prompt payment, the FOIA Officer may accept assurance of full payment from the requester rather than require an advance payment.

Proposed § 1.561(l)(5) would restate current § 1.555(g)(4)(iii) with no substantive change.

Proposed § 1.561(m) would replace and restate current § 1.555(b)(4). Proposed § 1.561(m) would make no substantive change to current § 1.555(b)(4).

Proposed § 1.561(n)(1) would add language regarding the waiver or reduction of fees in general. It would direct the requester's attention to the requirements for fee waiver requests, and would require that the requester submit adequate justification for the fee waiver request and advise that without adequate justification, the waiver request will be denied. Proposed § 1.561(n)(1) also would provide the opportunity for the FOIA Officer to request additional information from the requester regarding the fee waiver request and close the file on the records request if VA does not receive the requested information within 10 days. This provision would advise the requester that it is important to submit adequate justification for the fee waiver request, which would avoid delay and fee waiver denials based simply on lack of adequate data. It would also provide for consistency in the administrative decision-making process by establishing a firm deadline for the submission of additional support. These provisions essentially would create a more efficient fee waiver request process, which would benefit both VA in its administration of the FOIA and requesters seeking records. In addition, proposed § 1.561(n)(1) would prescribe that fee waiver requests are determined on a case-by-case basis. This provision would clarify that each request for a fee waiver will be analyzed in its own right. A requester's history of having received a fee waiver in the past would have no bearing on future requests. We believe that this provision will also provide for greater administrative consistency in addressing fee waiver requests.

Proposed § 1.561(n)(2) through (4) would replace and restate the provisions of current § 1.555(f)(2). No substantive changes would be made in the provisions regarding the requirements to receive a fee waiver. Proposed § 1.561(n)(2) through (4) would also add clarifying language to each criterion considered in a fee waiver determination. The proposed rule would expand the fee waiver information provided in VA's regulations and should be helpful to requesters seeking waivers.

Proposed § 1.561(n)(5) would add a provision that if some of the records being released in response to a request meet the criteria for a fee waiver, then the assessment of a fee would be waived with regard to that portion of the records. This provision is administrative in nature and would advise requesters that it is possible to be provided a partial fee waiver. We intend that this provision would provide requesters as much information as possible regarding the parameters of fee waivers.

Proposed § 1.561(n)(6) is an administrative provision that requires requesters to provide the information requested by VA and provides notice regarding the administrative factors that enter into a component's fee waiver determination. It underscores that the component has some degree of discretion to consider such factors with regard to fee waiver requests. We believe that this addition would provide requesters with a more comprehensive understanding of the fee waiver process.

Proposed § 1.561(n)(7) would replace and restate current § 1.555(f)(4) regarding appeals from adverse fee waiver determinations. Proposed § 1.561(n)(7) makes no substantive change to the provision.

Proposed § 1.561(n)(8) would add a provision that when considering a fee waiver request, VA may require proof of identity. This provision would provide flexibility for components addressing fee waiver requests by allowing them to ensure that the proper party is providing the necessary information. This is an administrative provision and is intended to provide components with the flexibility to exercise options such as verification of identity in appropriate cases.

1.562 Other Rights and Services

Proposed § 1.562 would add a provision to advise requesters that nothing in this section shall be construed to entitle an individual to information to which the individual would not be entitled under the FOIA. This provision is an administrative addition, intended to underscore that

these regulations govern release of information under the FOIA and should be construed in that context only.

Changes to 38 CFR Part 2

2.6 Secretary's Delegations of Authority to Certain Officials (38 U.S.C. 512)

Proposed § 2.6(e)(10) would add the Assistant General Counsel that has jurisdiction over FOIA matters to the list of those individuals authorized to make final Departmental decisions on appeals under the FOIA, the Privacy Act, and 38 U.S.C. 5701, 5705, and 7332. This proposed amendment would allow for greater flexibility in addressing and processing appeals under the FOIA. At a time when requests and appeals filed under various confidentiality statutes are expanding, additional signature authority would enable VA to process more appeals and expedite the appeals process.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

The Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule generally pertains to requests for information submitted by individuals. Further, it would be extremely rare, if ever, that a request for information by a small entity would have a significant impact on the business of the small entity. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition,

jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There is no Catalog of Federal Domestic Assistance number for the program affected by this proposed rule.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on September 9, 2010, for publication.

List of Subjects

38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of information, Government contracts, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Privacy, Reporting and recordkeeping requirements, Seals and insignia, Security measures, Wages.

38 CFR Part 2

Authority delegations (Government agencies).

Dated: October 4, 2010.

Robert C. McFetridge,

*Director, Regulation Policy and Management,
Office of the General Counsel, Department
of Veterans Affairs.*

For the reasons stated in the preamble, VA proposes to amend 38 CFR parts 1 and 2 as follows:

PART 1—GENERAL PROVISIONS

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

Authority: 38 U.S.C. 501(a), and as noted in specific sections.

2. In Part 1, revise the undesignated center heading immediately preceding § 1.550 to read as follows:

Procedures for Disclosure of Records Under the Freedom of Information Act

2a. In Part 1, following the newly revised undesignated center heading remove the Note and authority citation preceding § 1.550.

3. Revise § 1.550 to read as follows:

§ 1.550 Purpose.

(a) Sections 1.550 through 1.562 contain the rules followed by VA in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These regulations should be read together with the FOIA, which provides the underlying legal basis for the regulations and other information regarding requests for records in the custody of a Federal agency. Information routinely provided to the public (press releases, for example) may be provided without following these sections. In addition, as a matter of policy, VA may make discretionary releases of records or information exempt from disclosure under the FOIA when permitted to do so in accordance with current law and governmental policy.

(b) Requests for records about an individual protected by the Privacy Act, 5 U.S.C. 552a, including one's own records and records that pertain to an individual and that may be sensitive, will be processed under the FOIA and the Privacy Act. In addition to the following FOIA regulations, *see* §§ 1.575 through 1.584 for regulations applicable to Privacy Act records.

(c) Requests for records relating to a claim administered by VA pursuant to 38 U.S.C. 5701 will be processed under the FOIA and 38 U.S.C. 5701. In addition to the following FOIA regulations, *see* §§ 1.500 through 1.527

for regulations implementing 38 U.S.C. 5701.

(d) Requests for records relating to healthcare quality assurance reviews pursuant to 38 U.S.C. 5705 will be processed under the FOIA and 38 U.S.C. 5705. In addition to the following FOIA regulations, *see* 38 CFR 17.500 through 17.511 for regulations implementing 38 U.S.C. 5705.

(e) Requests for records relating to treatment for the conditions specified in 38 U.S.C. 7332, such as drug abuse, alcoholism or alcohol abuse, infections with the Human Immunodeficiency Virus (HIV), or sickle cell anemia, will be processed under the FOIA and 38 U.S.C. 7332. In addition to the following FOIA regulations, *see* §§ 1.460 through 1.499 of this part for regulations implementing 38 U.S.C. 7332.

Authority: Sections 1.550 to 1.562 issued under 72 Stat. 1114; 38 U.S.C. 501, 552, 552a, 5701, 5705, 7332.

4. Add § 1.551 to read as follows:

§ 1.551 Definitions.

As used in §§ 1.550 through 1.562, the following definitions apply:

Agency means any executive department, military department, government corporation, government controlled corporation, or other establishment in the executive branch of the Federal government, or independent regulatory entity.

Appeal means a requester's written disagreement with an adverse determination under the FOIA.

Beneficiary means a veteran or other individual who has received benefits (including medical benefits) or has applied for benefits pursuant to title 38, United States Code.

Benefits records means an individual's records, which pertain to programs under any of the benefits laws administered by the Secretary of Veterans Affairs.

Business day means the time during which typical Federal government offices are open for normal business. It does not include Saturdays, Sundays, or Federal legal public holidays. The term "day" means business day unless otherwise specified.

Business information means confidential or privileged commercial or financial information obtained by VA from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

Component means each distinct VA entity, including Administrations, staff offices, services, or facilities.

Expedited processing means giving a FOIA request priority for processing ahead of other pending requests because

VA has determined that the requester has shown an exceptional need or urgency for the records as provided in these regulations.

Fees. For fees and fee-related definitions, *see* § 1.561(b).

FOIA Officer means the individual within a VA component whose responsibilities include addressing and granting or denying requests for records under the FOIA.

Perfect request means a written FOIA request that meets the requirements set forth in § 1.554 of this part and for which there are no remaining issues about the payment of applicable fees or any other matter that requires resolution prior to processing.

Reading room means space made available, as needed, in VA components where records are available for review pursuant to 5 U.S.C. 552(a)(2). Ordinarily, the VA component providing a public reading room space will be the component that maintains the record.

Record means a document, a portion of a document, and information contained within a document, and can include information derived from a document or a database. Such documents may be maintained in paper, electronic, and other forms, but do not include objects, such as tissue slides, blood samples, or computer hardware.

Request means a demand for records under the FOIA as described below. The term *request* includes any action emanating from the initial demand for records, including an appeal related to the initial demand.

Requester means, generally, any individual, partnership, corporation, association, or foreign or state or local government, which has made a demand to see or receive a copy of an agency record.

Sensitive medical or mental health records mean documents containing information that, with a reasonable degree of medical certainty, are likely to have a serious adverse effect on an individual's mental or physical health if revealed to him or her.

Submitter means any person or entity (including corporations, state, local and tribal governments and foreign governments) from whom VA obtains trade secrets or confidential commercial or financial information either directly or indirectly.

VA means the Department of Veterans Affairs.

VA Central Office (VACO) means the headquarters of the Department of Veterans Affairs. The mailing address is 810 Vermont Avenue, NW., Washington, DC 20420.

Written or in writing means communications such as letters, photocopies of letters, electronic mail, and facsimiles (faxes), and does not include any form of oral communication.

5. Revise §§ 1.552 and 1.553 to read as follows:

§ 1.552 General provisions.

(a) *Additional information.* The following Internet link will provide access to VA's information that is electronically available under the FOIA: <http://www.foia.va.gov/>.

(b) *Public Liaisons.* VA has made available to the requester FOIA Public Liaisons to assist in the resolution of disputes between the agency and the requester. Contact information for VA's FOIA Public Liaisons can be found on VA's FOIA homepage. See § 1.552(a) for the pertinent Internet address.

(c) *FOIA Annual Report.* Under 5 U.S.C. 552(e), VA is required to prepare an annual report regarding its FOIA activities. The report includes information about FOIA requests and appeals. Copies of VA's annual FOIA report may be obtained from the Department's Chief FOIA Officer or by visiting VA's FOIA Web site. See § 1.552(a) for the pertinent Internet address.

§ 1.553 Public reading rooms.

(a) VA maintains a public reading room electronically at its FOIA home page on the Internet, which contains the records that the FOIA requires to be regularly made available for public inspection and copying. See § 1.552(a) for the pertinent Internet address. Each VA component is responsible for determining which of its records are required to be made available and for making its records available electronically. VA also makes available for public inspection and copying current subject-matter indices of its reading room records that are available electronically. Each index shall be updated regularly, at least quarterly, with respect to newly included records.

(b) VA may delete some of the information in the records that it is making publicly available. Information in a public reading room record will be redacted, for example, if its release would be a clearly unwarranted invasion of an individual's personal privacy.

(c) Some VA components may also maintain physical public reading rooms. Information regarding these components and their contact information is available on VA's FOIA home page on the Internet. See § 1.552(a) for the pertinent Internet address. If you do not

have access to the Internet and wish to obtain information regarding publicly available information or components that have a physical reading room, you may write the Department's Chief FOIA Officer at the following address: Department of Veterans Affairs, FOIA Service (005R1C), 810 Vermont Avenue, NW., Washington, DC 20420.

§ 1.553a [Removed]

6. Remove § 1.553a.

7. Revise § 1.554 to read as follows:

§ 1.554 Requirements for making requests.

(a) *Requests by letter and facsimile (fax).* The FOIA request must be in writing. VA accepts facsimiles (faxes) as written FOIA requests. If the request concerns documents protected by records to which another confidentiality statute applies, the request must contain an image of the requester's handwritten signature. To make a request for VA records, write directly to the FOIA Officer for the VA component that maintains the records. If requesting records from a particular medical facility or regional office, for example, the request should be sent to the FOIA Office at the address listed for that component. If seeking records from a component within VA's Central Office, the request should be sent to the Central Office address of the FOIA Office listed for that component. A list of FOIA contacts is available on the Internet. A legible return address must be included with your FOIA request; you may wish to include other contact information as well, such as a telephone number and an electronic mail (e-mail) address. If you are not sure where to send your request, you should seek assistance from the FOIA Contact for the office that you believe manages the programs whose records you are requesting or send the request to the Director, FOIA Service (005R1C), 810 Vermont Avenue, NW., Washington, DC 20420, who will refer it for action to the FOIA contact at the appropriate component. For the quickest possible handling, the request letter and the envelope of any FOIA request should be marked "Freedom of Information Act Request." You may find it helpful to refer to VA's FOIA home page on the Internet when making your request; available reference material includes VA's FOIA Reference Guide and the text of the FOIA. See § 1.552(a) for the pertinent Internet address.

(b) *Requests by e-mail.* VA will accept an e-mail request. If the request concerns documents protected by records to which another confidentiality statute applies, the email transmission must contain an image of the requester's handwritten signature, such as an

attachment that shows the individual's handwritten signature. In order to assure prompt processing, e-mail FOIA requests must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA requests. An e-mail FOIA request that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA request. Mailbox addresses designated to receive e-mail FOIA requests are available on VA's FOIA home page. See § 1.552(a) for the pertinent Internet address.

(c) *Making a request for another individual's records.* If you are requesting records about another individual, it will be helpful under certain circumstances to provide proof that you are authorized to obtain the records, such as a legally sufficient prior written authorization for the release of information signed by that individual, proof that the individual is deceased (e.g., a copy of a death certificate), or proof that the requester is the authorized representative of the individual or the individual's estate. This information will assist in determining whether and to what degree the records may be released.

(d) *Description of records sought.* (1) You must describe the records that you seek in enough detail to allow VA personnel to locate them with a reasonable amount of effort. To the extent possible, you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the document. Generally, the more information you provide about the record you are seeking, the more likely VA personnel will be able to locate any responsive records. Wide-ranging requests that lack specificity, or contain descriptions of very general subject matters, with no description of specific records, may be considered "not reasonably described" and thus not subject to further processing.

(2) Requests for voluminous amounts of records may be placed in a complex track of a multitrack processing system pursuant to § 1.556(b); such requests also may meet the criteria for "unusual circumstances," which are processed in accordance with § 1.556(c) and may require more than twenty (20) business days to process despite the agency's exercise of due diligence.

(3) If the FOIA Officer determines that your request does not reasonably describe the records sought, the FOIA Officer will tell you why the request is insufficient. The FOIA Officer will also provide an opportunity to discuss your request by documented telephonic communication or written

correspondence in order to modify it to meet the requirements of this section and place your request into a more expedient track.

(4) The time limit for VA to process your FOIA request will not start it determines that you have reasonably described the records that you seek in the FOIA request. If VA seeks additional clarification regarding your request and does not receive your written response within thirty (30) calendar days of the date of its communication with you, VA will conclude that you are no longer interested in pursuing your request and will close its files on your request.

(e) *Agreement to pay fees.* The time limit for processing your request will be tolled while any fee issue is unresolved. If the FOIA Officer anticipates that the fees for processing your request will exceed the amount that you that you have stated that you are willing to pay or will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify you. In such cases, the FOIA Officer may require you to agree in writing to pay the estimated fee. In addition, if the estimated fee amount exceeds \$250.00 or you previously have failed to pay a FOIA fee in a timely manner, the FOIA Officer may require you to pay the FOIA fee in advance, before beginning to process your FOIA request. If the FOIA Officer does not receive your written response within ten (10) business days of the date of the FOIA Officer's communication with you, she or he will conclude that you are no longer interested in pursuing your request and will close your request. If you request a fee waiver under § 1.561, you nonetheless may state your willingness to pay a fee up to an identified amount in the event that the fee waiver is denied; this will allow the component to process your FOIA request while considering your fee waiver request. If you are required to pay a fee in advance, and you paid the fee, and if VA later determines that you overpaid or that you are entitled to a full or partial fee waiver, a refund will be made. (For more information on the collection of fees under the FOIA, see § 1.561.)

(f) You must meet all of the requirements of this section in order for your request to be perfected.

§ 1.554a [Removed]

8. Remove § 1.554a.

9. Revise §§ 1.555 through 1.557 to read as follows:

§ 1.555 Responsibility for responding to requests.

(a) *General.* Except as stated in paragraphs (c) and (d) of this section, the FOIA Officer of the component that first receives a request for records is responsible for either processing the request or referring it to the designated FOIA Officer for the appropriate component. Offices within the component that is responsible for processing the FOIA request shall provide the FOIA Officer all documents responsive to the request that are in their possession as of the date the search for responsive records begins.

(b) *Authority to grant or deny requests.* Each component shall designate a FOIA Officer who is responsible for making determinations pursuant to the FOIA.

(c) *Consultations and referrals.* When a component receives a request for a record, the FOIA Officer shall determine whether the request would be more properly addressed by another component of VA or by another entity within the Federal government. If the FOIA Officer of the component that receives the request determines that the component is best able to address the request, then the component shall do so. If the FOIA Officer determines that the component that receives the FOIA request is not best able to process the request, then she or he shall:

(1) Process the request after consulting with the component or agency best able to determine whether to disclose the record and with any other component or agency that has a substantial interest in it; or

(2) Refer the request for the record and the responsibility for responding to that request to the VA component or Federal agency best able to address the request. Ordinarily, VA will presume that the component or agency that created the record is best able to determine whether to disclose it.

(d) *Classified information.* The FOIA Officer will refer requests for records containing classified information to the component or agency that classified the information for processing.

(e) *Notice of referral.* Whenever a FOIA Officer refers all or part of a request and responsibility for processing the request to another component or agency, the FOIA Officer will notify the requester in writing of the referral and provide the requester the name and contact information of the entity to which the request has been referred, after consulting with the entity to which the request is to be referred to ensure that the request is being referred to the correct entity. If only part of the request was referred, the FOIA Officer will

inform the requester and identify the referred part at the time of the referral or in the final response.

§ 1.556 Timing of responses to requests.

(a) *General.* Components ordinarily shall respond to requests according to their order of receipt and within the time frames established under the FOIA.

(b) *Multitrack processing.* (1) VA will use two processing tracks to distinguish between the complexity of a request for records: Simple and complex, based upon the amount of work and/or time needed to process the request, including consideration of the number of pages involved.

(2) The FOIA Officer shall advise the requester of the track into which the request has been placed and of the criteria of the faster track. The FOIA Officer will provide requesters in the slower track the opportunity to limit the scope of their requests in order to qualify for processing in the faster track. The FOIA Officer may contact the requester either by telephone or in writing, whichever the FOIA Officer determines is most efficient and expeditious; telephonic communication will be documented.

(c) *Unusual circumstances.* (1) FOIA Officers may encounter "unusual circumstances," where it is not possible to meet the statutory time limits for processing the request. In such cases, the FOIA Officer will extend the twenty (20)-business day time limit for ten (10) more business days and notify the requester in writing of the unusual circumstances and of the date by which it expects to complete processing of the request. Where the extension is for more than ten (10) business days, the FOIA Officer will provide the requester with an opportunity to either modify the request so that it may be processed within the time limits or to arrange an alternative time period with the FOIA Officer for processing the request or a modified request. Unusual circumstances consist of the following:

(i) The need to search for and collect the requested records from field facilities or other components other

than the office processing the request;

(ii) The need to search for, collect and examine a voluminous amount of separate and distinct records that are the subject of a single request; or

(iii) The need for consultation with two or more components or another agency having a substantial interest in the subject matter of a request.

(2) Where the FOIA Officer reasonably believes that certain requests from the same requester, or a group of requesters acting in concert, actually constitute the same request that would otherwise

satisfy the unusual circumstances specified in this paragraph, and the requests involve clearly related matters, the FOIA Officer may aggregate those requests. Multiple requests involving unrelated matters will not be aggregated.

(d) *Expedited processing.* (1) Requests will be processed out of the order in which they were received by the component responsible for processing the FOIA request and given expedited treatment when VA determines that there is a compelling need to process the FOIA request promptly and out of order. A compelling need exists when VA determines that:

(i) The failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) There is an urgency to inform the public concerning actual or alleged Federal government activity, if the request is made by a person primarily engaged in disseminating information;

(iii) In the discretion of the FOIA Officer, the regulations warrant such treatment; or

(iv) Where there is widespread and exceptional interest in which possible questions exist about the government's integrity which affect public confidence.

(2) A requester who is seeking expedited processing must submit a statement, certified to be true to the best of that person's knowledge and belief, providing a detailed basis for how there is a compelling need. VA may waive the requirement for certification of the statement of compelling need as a matter of administrative discretion.

(3) Within ten (10) calendar days of its receipt of a request for expedited processing, the FOIA Officer shall determine whether to grant the request and will provide the requester written notice of the decision. If the FOIA Officer grants a request for expedited processing, the FOIA Officer shall give the request priority and process it as soon as practicable. If the FOIA Officer denies the request for expedited processing, the requester may appeal the denial, which appeal shall be addressed expeditiously.

§ 1.557 Responses to requests.

(a) *Acknowledgement of requests.* When a request for records is received by a component designated to receive requests, the component's FOIA Officer will assign a request number for future reference and send the requester a written acknowledgement of receipt.

(b) *Processing of requests.* Upon receipt of a perfected request by the appropriate component, the FOIA Officer will make a reasonable effort to

search for records responsive to the request. The FOIA Officer ordinarily will include as responsive those records in its possession and control as of the date the search for responsive records began. This includes searching for records in electronic form or format, unless to do so would interfere significantly with the agency's automated information systems. If fees for processing the request are due under § 1.561, the FOIA Officer shall inform the requester of the amount of the fee as provided in § 1.554(e) and § 1.561.

Where a FOIA Officer grants the request in part, the FOIA shall mark, redact, or annotate the records to be released to show the amount of information deleted and the exemption under which the deletion is made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also will be indicated on the record, if technically feasible. The FOIA Officer will also provide the records in the form or format requested by the individual, if readily reproducible in that form or format.

(c) *Time limits for processing requests.* Ordinarily, a component will have twenty (20) business days from the date of VA's receipt of the request to make a determination whether to grant a request in its entirety, grant in part, or deny a request in its entirety. If the request must be referred to another component, it will be referred as quickly as possible, but no later than ten (10) business days after the referring office receives the FOIA request.

(d) *Adverse determinations of requests.* Whenever a component makes an adverse determination denying a request in any respect, the component FOIA Officer shall promptly notify the requester of the adverse determination in writing. Adverse determinations include the following: A determination to withhold a requested record in whole or in part; a determination that the requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been sought is not a record subject to the FOIA; a determination on any disputed fee matter, including the denial of a fee waiver; and a denial of a request for expedited treatment. The adverse determination notice must be signed by the component head or the component's FOIA Officer, and will include the following:

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

(2) A brief statement of the reason(s) for the denial, including any FOIA exemptions applied by the FOIA Officer in denying the request;

(3) The amount of information withheld in number of pages or other reasonable form of estimation; an estimate is not necessary if the volume is indicated on redacted pages disclosed in part or if providing an estimate would harm an interest provided by an applicable exemption; and

(4) Notice that the requester may appeal the adverse determination and a description of the requirements for an appeal under § 1.559 of this part.

10. Add §§ 1.558 through 1.562 to read as follows:

*	*	*	*	*
Sec.				
1.558	Business information.			
1.559	Appeals.			
1.560	Maintenance and preservation of records.			
1.561	Fees.			
1.562	Other rights and services.			
*	*	*	*	*

§ 1.558 Business information.

(a) *General.* Business information received by VA from a submitter will be considered under the FOIA pursuant to this section and in accordance with the requirements set forth in § 1.557 of this part.

(b) *Designation of business information.* A submitter of business information may designate that specific records or portions of records submitted are business information, at the time of submission or within a reasonable time thereafter. The submitter must use good faith efforts in designating records that the submitter claims could be expected to cause substantial competitive harm and thus warrant protection under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). The submitter may mark the record submission as confidential or use the words "business information" or describe the specific records that contain business information. Such designation will be considered, but will not control, the FOIA Officer's decision on disclosing the material. A designation will remain in effect for a period of not more than 10 years after receipt by VA, unless the submitter provides acceptable justification for a longer period. A submitter may designate a shorter period by including an expiration date.

(c) *Notices to submitters.* (1) The FOIA Officer shall promptly notify a submitter in writing of a FOIA request seeking the submitter's business information whenever the FOIA Officer has reason to believe that the information may be protected under

FOIA Exemption 4, 5 U.S.C. 552(b)(4), regarding business information. The written notice will provide the submitter an opportunity to object to disclosure of any specified portion of the records within the time period specified in the notice. The notice will either describe in detail the business information requested (e.g., an entire contract identified by a unique number) or shall provide copies of the requested record(s) or record portions containing the business information. When notification of a voluminous number of submitters is required, the FOIA Officer may notify the submitters by posting or publishing the notice in a place reasonably likely to accomplish notification.

(2) If the FOIA Officer determines to release business information over the objection(s) of a submitter, the FOIA Officer will notify the submitter pursuant to paragraph (e) of this section.

(3) Whenever the FOIA Officer notifies a requester of a final decision, the FOIA Officer will also notify the submitter by separate correspondence. This notification may be contained in VA's FOIA decision.

(4) Exceptions to this notice provision are contained in paragraph (f) of this section.

(d) *Opportunity to object to disclosure.* When notification to a submitter is made pursuant to paragraph (c)(1) of this section, the submitter may object to the disclosure of any specified portion(s) of the record(s). The submitter's objection(s) must be in writing, addressed to the FOIA Officer, and must be received by the reasonable date specified in the FOIA Officer's notice in order for VA to consider such objections. If the submitter has any objection to disclosure of the record(s) requested, or any specified portion(s) thereof, the submitter must identify the specific record(s) or portion(s) of records for which objection(s) are made. The objection will specify in detail all grounds for withholding any record(s) or portion(s) of the record(s) upon which disclosure is opposed under any exemption of the FOIA. In particular, if the submitter is asserting that the record is protected under Exemption 4, 5 U.S.C. 552(b)(4), it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. The submitter must explain in detail how and why disclosure of the specified records would likely cause substantial competitive harm in the case of a required submission or state whether the records would customarily be disclosed by the submitter upon a request from the public in the case of a

voluntary submission. The submitter's objections must be contained within a single written response; oral responses or subsequent, multiple responses generally will not be considered. If a submitter does not respond to the notice described in paragraph (c)(1) of this section within the specified time limit, the submitter will be considered to have no objection to disclosure of the information.

(e) *Consideration of objection(s) and notice of intent to disclose.* The FOIA Officer will consider all pertinent factors, including but not limited to a submitter's timely objection(s) to disclosure and the specific grounds provided by the submitter for non-disclosure in deciding whether to disclose business information. Information provided by the submitter after the specified time limit and after the component has made its disclosure decision generally will not be considered. In addition to meeting the requirements of § 1.557, when a FOIA Officer decides to disclose business information over the objection of a submitter, the FOIA Officer will provide the submitter with written notice, which includes:

- (1) A statement of the reason(s) why each of the submitter's disclosure objections were not sustained;
- (2) A description of the business information to be disclosed; and
- (3) A specified disclosure date of not less than ten (10) days from the date of the notice (to allow the submitter time to take necessary legal action).

(f) *Exceptions to notice requirements.* The notice requirements set forth in paragraphs (c) and (g) of this section will not apply if:

- (1) The FOIA Officer determines that the information should not be disclosed;
- (2) The information lawfully has been published or has been officially made available to the public; or
- (3) Disclosure of the information is required by statute, other than the FOIA, or by a regulation issued in accordance with the requirements of Executive Order 12600 or any other Executive Order.

(g) *Notice to requesters.* When VA receives a request for records that may contain confidential commercial information protected by FOIA Exemption 4, 5 U.S.C. 552(b)(4), regarding business information, the requester will be notified that the request is being processed under the provisions of this regulation and, as a consequence, there may be a delay in receiving a response. The notice to the requester will not include any of the specific information contained in the records being requested.

§ 1.559 Appeals.

(a) *Informal resolution prior to appeal.* Before filing an appeal, you may wish to communicate with the contact person listed in the FOIA response or the component's FOIA Officer to see if the issue can be resolved informally. Informal resolution of your concerns may be appropriate, for example, where the agency has not responded to your request or where you believe the search conducted was not adequate; in this example, additional information may assist in resolving the matter.

(b) *How to file and address a written appeal.* You may appeal an adverse determination denying your request, in any respect, to the VA Office of the General Counsel (024), 810 Vermont Avenue, NW., Washington, DC, 20420. Any appeals concerning any Office of Inspector General records should be referred to the VA Office of Inspector General, Office of Counselor (50), 810 Vermont Avenue, NW., Washington, DC 20420. The FOIA appeal must be in writing. VA accepts facsimiles (faxes) as written FOIA appeals. If the appeal concerns documents protected by records to which another confidentiality statute applies, the appeal must contain an image of the requester's handwritten signature, such as an attachment that shows the individual's handwritten signature. Information regarding where to fax your FOIA appeal is available on VA's FOIA home page on the Internet. See § 1.552(a) for the pertinent Internet address. A legible return address must be included with your FOIA appeal; you may include other contact information as well, such as a telephone number and an electronic mail (e-mail) address.

(c) *How to file an e-mail appeal.* VA will accept a FOIA appeal by e-mail. If the request concerns documents protected by records to which another confidentiality statute applies, the email transmission must contain an image of the requester's handwritten signature, such as an attachment that shows the individual's handwritten signature. In order to assure prompt processing, e-mail FOIA appeals must be sent to official VA FOIA mailboxes established for the purpose of receiving FOIA appeals; an e-mail FOIA appeal that is sent to an individual VA employee's mailbox, or to any other entity, will not be considered a perfected FOIA appeal. Mailbox addresses designated to receive e-mail FOIA appeals are available on VA's FOIA home page. See § 1.552(a) for the pertinent Internet address.

(d) *Time limits and content of appeal.* Your appeal to the VA OGC (024), or VA Office of Inspector General (50), as appropriate, must be postmarked no later than sixty (60) calendar days of the

date of the adverse determination. Your appeal must clearly identify the determination that you are appealing, including any assigned request number. Other information should also be included, such as the name of the FOIA officer, the address of the component, the date of component's determination, if any, and the precise subject matter of your appeal. If you are appealing only a portion of the component's determination, you must specify which part of the determination you are appealing. You should include copies of your request and VA's response, if any. An appeal is not perfected until VA either receives the information identified above or the appeal is otherwise sufficiently defined. Appeals should be marked "Freedom of Information Act Appeal." The General Counsel, Deputy General Counsel, or Assistant General Counsel with jurisdiction over information disclosure matters (024) will act on behalf of the Secretary on all appeals under this section, except those pertaining to the Office of Inspector General. The designated official in the Office of Inspector General will act on all appeals pertaining to Office of Inspector General records. A determination by the General Counsel, Deputy General Counsel, or Assistant General Counsel, or designated official within the Office of Inspector General, will be the final VA action.

(e) *Responses to appeals.* The Office of the General Counsel or the Office of Inspector General, as appropriate, will provide you a decision on your appeal in writing that includes a brief statement of the reasons for its determination, including, if applicable, any FOIA exemptions applied.

(f) *Court review.* You must first appeal the adverse determination in accordance with this section before seeking review by a court.

§ 1.560 Maintenance and preservation of records.

(a) Each component will preserve all correspondence pertaining to FOIA requests as well as copies of pertinent records, until disposition is authorized under title 44, U.S.C., or the National Archives and Records Administration's General Records Schedule 14.

(b) The FOIA Officer must maintain copies of records that are the subject of a pending request, appeal, or lawsuit under the FOIA. A copy of all records shall be provided promptly to the Office of the General Counsel upon request.

§ 1.561 Fees.

(a) *General.* Components will charge for processing requests under the FOIA

in accordance with paragraph (c) of this section, except where fees are limited under paragraph (e) of this section or where a waiver or reduction of fees is granted under paragraph (n) of this section. The FOIA Officer will collect all applicable fees before releasing copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States. Note that fees associated with requests from VA beneficiaries, applicants for VA benefits, or other individuals, for records retrievable by their names or individual identifiers processed under 38 U.S.C. 5701 (records associated with claims for benefits) and 5 U.S.C. 552a (the Privacy Act), will be assessed fees in accordance with the applicable regulatory fee provisions relating to VA benefits and VA Privacy Act records.

(b) *Definitions.* For purposes of assessing or determining fees, the following definitions apply:

(1) *All other requests* means a request that does not fit into any of the categories in this section.

(2) *Commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, to include furthering those interests through litigation. To the extent possible, the FOIA Officer shall determine the use to which a requester will put the requested records. When the intended use of the records is unclear from the request or when there is reasonable cause to doubt the use to which the requester will put the records sought, the FOIA Officer will provide the requester a reasonable opportunity to submit further clarification.

(3) *Direct costs* mean expenses that VA incurs in responding to a FOIA request, including searching for and duplicating (and in the case of commercial use requesters, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits costs) and the cost of operating duplication machinery. Direct costs do not include overhead expenses, such as the costs of space or heating and lighting of the facility where the records are kept.

(4) *Duplication* means making a copy of a record necessary to respond to a FOIA request; copies may take the form of paper, microform, audiovisual 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.

(5) *Educational institution* means a pre-school, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, or an institution of vocational education, which operates a program or programs of scholarly research. To be in this category, the FOIA Officer must make a determination that the request is authorized by and made under the auspices of a qualifying institution and that the records are sought to further a scholarly research goal of the institution and not the individual goal of the requester or a commercial goal of the institution.

(6) *Non-commercial scientific institution* means an institution that is not operated on a "commercial" basis (as that term is defined in paragraph (b)(2) of this section) and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not sought for a commercial use.

(7) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 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 if such entities qualify as disseminators of "news") who make their products available for purchase or subscription or free distribution to the general public. These examples are not all-inclusive. As methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media that otherwise meet the criteria for news media shall be considered to be news-media entities. Freelance journalists may be regarded as working for a news-media entity if they can demonstrate a solid basis for expecting publication through that entity, even though not actually employed by it. A publication contract would be the clearest proof, but the requester's publication history may also

be considered. To be in this category, a requester must not be seeking the requested records for a commercial use; a records request supporting the requester's news-dissemination function shall not be considered to be for a commercial use.

(8) *Review* means examining a record including audiovisual, electronic mail, data bases, documents and the like in response to a commercial use request to determine whether any portion of it is exempt from disclosure. Review includes the deletion of exempt material or other processing necessary to prepare the record(s) for disclosure. Review time includes time spent contacting any submitter and considering or responding to any objections to disclosure made by a submitter under § 1.558(d) but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if, after review, a record is not disclosed.

(9) *Search* means the process of looking for and retrieving records that are responsive to a request, including line-by-line or page-by-page identification of responsive information within records. *Search* also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The component will conduct searches in the most efficient and least expensive manner reasonably possible. For example, line-by-line searches will not be conducted when duplicating an entire document is a less expensive and quicker method of complying with a request.

(c) *Categories of requesters and fees to be charged each category.*

There are four categories of FOIA requesters: Commercial use requesters, educational and non-commercial scientific institutional requesters, representatives of the news media, and all other requesters. Unless a waiver or reduction of fees is granted under paragraph (n) of this section or is limited in accordance with paragraph (e) of this section, specific levels of fees will be charged for each category as follows:

(1) *Commercial use requesters.* Subject to the limitations in paragraph (e) of this section, commercial use requesters will be charged the full direct costs of the search, review, and duplication of records sought. Commercial use requesters are not entitled to 2 hours of free search time or the first 100 pages of reproduced documents free of charge. The FOIA Officer may charge a commercial use requester for time spent searching even

if they do not locate any responsive record(s) or if they withhold the record(s) located as entirely exempt from disclosure.

(2) *Educational and non-commercial scientific institution requesters.* Subject to the limitations in paragraph (e) of this section, educational and non-commercial scientific institution requesters will be charged for the cost of reproduction only, excluding charges for the first 100 pages.

(3) *Representative of the news media.* Subject to the limitations in paragraph (e) of this section, representatives of the news media will be charged for the cost of reproduction only, excluding charges for the first 100 pages.

(4) *All other requesters.* Subject to the limitations in paragraph (e) of this section, a requester who does not fit into any of the categories in this section will be charged fees to recover the full, reasonable direct cost of searching for and reproducing records responsive to a request, except that the first 2 hours of search time and the first 100 pages of reproduction will be furnished without cost. The FOIA Officer may charge all other requesters for time spent searching even if the component does not locate any responsive record(s) or if they withhold the record(s) located as entirely exempt from disclosure.

(d) *Fees to be charged.* The following fees will be used when calculating the fee owed pursuant to a request or appeal. The fees also apply to making documents available for public inspection and copying under § 1.553 of this part.

(1) *Search.* (i) *Search fees.* When a FOIA Officer determines that a search fee applies, the fee will be based on the hourly salary of VA personnel performing the search, plus 16 percent of the salary. The type and number of personnel involved in addressing the request or appeal depends on the nature and complexity of the request and responsive records. Fees are charged in quarter hour increments.

(ii) *Computer search.* In cases where a computer search is required, the requester will be charged the direct costs of conducting the search, although certain requesters (as provided in paragraph (e)(1) of this section) will be charged no search fee and certain other requesters (as provided in paragraph (e)(4) of this section) will be entitled to the cost of 2 hours of employee search time without charge. When a computer search is required, VA will combine the hourly cost of operating the computer with the employee's salary, plus 16 percent of the salary. When the cost of the search (including the employee time, to include the cost of developing

a search methodology, and the cost of the computer to process a request) equals the dollar amount of 2 hours of the salary of the employee performing the search, VA will begin to assess charges for a computer search.

(2) *Duplication.* When a duplication fee applies, the FOIA Officer will charge a fee of 15 cents per one-sided page for a paper photocopy of a record; no more than one copy will be provided. For copies produced by computer, such as tapes and discs, the FOIA Officer will charge the direct costs of producing the copy, including employee time. For other forms of duplication, the FOIA Officer will charge the direct costs of that duplication.

(3) *Review.* When review fees apply, review fees will be charged at the initial level of review only, when the component responsible for processing the request determines whether an exemption applies to a record or portion of a record. For review at the appeal level, no fee will be charged for an exemption that has already been applied and is determined to still apply. However, record or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable. Review fees will be charged at the same rates as those charged for search under paragraph (d)(1) of this section.

(e) *Limitations on charging fees.*

(1) No search fee will be charged for requests by educational institutions, non-commercial scientific institutions, or representatives of the news media.

(2) No search or review fee will be charged for a quarter hour period unless more than half of that period is required for search or review.

(3) No search fee (or duplication fee, 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) will be charged in accordance with this section if the agency fails to comply with the time limit under § 1.556(a), and if no unusual or exceptional circumstances apply to the processing of the request pursuant to § 1.556(c). Duplication and search fees may still be charged to commercial use requesters. Duplication fees may still be charged for "all other" requesters.

(4) Except for requesters seeking records for a commercial use, the following will be provided without charge:

- (i) The first 100 pages of duplication (or the cost equivalent).
- (ii) The first 2 hours of search time (or the cost equivalent).
- (5) Whenever a total fee calculated under paragraph (d) of this section is less than \$25.00, no fee will be charged.

(6) VA may provide free copies of records or free services in response to an official request from other government agencies and Congressional offices and when a component head or designee determines that doing so will assist in

providing medical care to a VA patient or will otherwise assist in the performance of VA's mission.

(f) The following table summarizes the chargeable fees for each category of requester.

Category	Search fees	Review fees	Duplication fees
(1) Commercial Use	Yes	Yes	Yes.
(2) Educational Institution	No	No	Yes (100 pages free).
(3) Non-Commercial Scientific Institution	No	No	Yes (100 pages free).
(4) News Media	No	No	Yes (100 pages free).
(5) All other	Yes (2 hours free)	No	Yes (100 pages free).

(g) *Fee schedule.* If it is determined that a fee will be charged for processing your FOIA request, VA will charge you to search for, review, and duplicate the requested records according to your fee category (*see* § 1.561(c)) and the following fee schedule. In addition, VA will charge you for any special handling or services performed in connection with processing your request and/or appeal. The following fees will be used by VA; these fees apply to services performed in making documents available for public inspection and copying under § 1.553 as well. The duplicating fees also are applicable to

records provided in response to requests made under the Privacy Act. Fees will not be charged under either the FOIA or the Privacy Act where the total amount of fees for processing the request is \$25.00 or less or where the requester has met the requirements for a statutory fee waiver.

(1) Search and review (review applies to commercial-use requesters only). Fees are based on the average hourly salary (base salary plus DC locality payment), plus 16 percent for benefits, of employees in the following three categories. Fees will be increased annually consistent with

Congressionally approved pay increases. Fees are charged in quarter-hour increments.

(i) Clerical—Based on GS-6, Step 5, pay (all employees at GS-7 and below).

(ii) Professional—Based on GS-11, Step 7, pay (all employees at GS-8 through GS-12).

(iii) Managerial—Based on GS-14, Step 2, pay (all employees at GS-13 and above).

Note: Fees for the current fiscal year are posted on VA's FOIA home page (*see* § 1.552(a) for the pertinent Internet address).

(2) Schedule of fees:

Activity	Fees
(i) Duplication of standard size (8½" × 11"; 8½" × 14"; 11" × 14") paper records	\$0.15 per page
(ii) Duplication of non-paper items (e.g., x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings), or other items which do not fall under category (1), in paragraph (c)(1) of this section.	Direct cost to VA.
(iii) Record search by manual (non-automated) methods	Basic hourly salary rate of the employee(s), plus 16 percent *Note —If a component uses a single class of personnel for a search, e.g., all clerical or professional, an average rate for the grades of employees involved in the search may be used.
(iv) Record search using automated methods, such as by computer	Direct cost to perform search.
(v) Record review (for Commercial Use Requesters only)	Basic hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
(vi) Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the federal government is not a party to, and does not have an interest in, the litigation.	Direct cost to VA.

(h) *Notification of fee estimate or other fee issues.* (1) Threshold for charging fees: Except for situations covered by § 1.556(k), VA will not charge you if the fee is \$25.00 or less.

(2) When a FOIA Officer determines or estimates that the fees to be charged under this section will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify you in writing of the actual or estimated amount of the fees, and ask you to provide written

assurance of the payment of all fees or fees up to a designated amount, unless you have indicated a willingness to pay fees as high as those anticipated. Any such agreement to pay the fees shall be memorialized in writing. In addition, when a requester does not provide sufficient information upon which VA can identify a fee category (*see* paragraphs (c)(1) through (4) of this section), or an issue otherwise arises regarding fee assessment, the FOIA Officer may seek clarification from the

requester. In either case, the timeline for responding to the request will be tolled and no further work will be done on it until the fee issue has been resolved. If VA does not receive a written response from you within ten (10) days after contacting you regarding a fee issue, it will assume that you no longer wish to pursue the request and will close the file on your request.

(i) *Charges for other services.* Apart from the other provisions of this section, when special service, such as certifying

that records are true copies or sending them by other than ordinary mail, is requested, and the FOIA Officer chooses to provide such a service as a matter of administrative discretion, the direct costs of providing the service ordinarily will be charged.

(j) *Charging interest.* The FOIA Officer may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue until payment is received by the component. Components will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(k) *Aggregating requests.* Whenever a FOIA Officer reasonably believes that a requester or group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the FOIA Officer may aggregate those requests and charge accordingly. FOIA Officers may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, the FOIA Officer will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(l) *Advance payments.* (1) For requests other than those described in paragraphs (l)(2) and (l)(3) of this section, a FOIA Officer shall not require the requester to make an advance payment—in other words, a payment made before work is begun or continued on a request. Payment owed for work already completed (i.e., a prepayment before copies are sent to a requester) is not an advance payment.

(2) Where a FOIA Officer determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any component within thirty (30) days of the date of billing, a FOIA Officer may require the requester to pay the full amount due, plus any applicable interest as specified in this section, and to make an advance payment of the full amount of any anticipated fee, before the FOIA Officer begins to process a

new request or continues to process a pending request from that requester.

(4) When a requester has a history of prompt payment, the FOIA Officer may accept a satisfactory assurance of full payment from a requester rather than an advance payment.

(5) In cases in which a FOIA Officer requires advance payment or payment is due under this section, the timeline for responding to the request will be tolled and further work will not be done on it until the required payment is received.

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

(n) *Requirements for waiver or reduction of fees.* (1) Waiving or reducing fees. Fees for processing your request may be waived if the requester meets the criteria listed in this section. The requester must submit adequate justification for a fee waiver; without adequate justification, the request will be denied. The FOIA Officer may, at the FOIA Officer's discretion, communicate with you to request additional information if necessary regarding your fee waiver request. If such additional information is not received within ten (10) business days, VA will assume that the requester does not agree to pay the required fees and the file will be closed pending receipt of your notice that you will pay the required fee. Requests for fee waivers are decided on a case-by-case basis; receipt of a fee waiver in the past does not establish entitlement to a fee waiver each time a request is submitted.

(2) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (d) of this section where a FOIA Officer determines, based on all available evidence, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(3) To determine whether the first fee waiver requirement is met, the FOIA

Officer will consider the following factors:

(i) *The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government.”* The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.* The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.”* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.* The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The FOIA Officer will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is important enough to be made public.

(4) To determine whether the second fee waiver requirement is met, the FOIA Officer will consider the following factors:

(i) *The existence and magnitude of a commercial interest: Whether the*

requester has a commercial interest that would be furthered by the requested disclosure. The FOIA Officer shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b)(2) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The FOIA Officer ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(5) Where only some of the records to be released satisfy the requirements for a waiver of fees, a fee waiver will be granted only for those records which so qualify.

(6) Requests for the waiver or reduction of fees should address the factors listed in paragraph (n)(3) and (4) of this section, insofar as they apply to each request. FOIA Officers will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in this decision-making process, however, in deciding to grant waivers or reductions of fees.

(7) An appeal from an adverse fee determination will be processed in accordance with § 1.559.

(8) When considering a request for fee waiver, VA may require proof of identity.

§ 1.562 Other rights and services.

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

(Authority: Sections 1.550 to 1.562 issued under 72 Stat. 1114; 38 U.S.C. 501)

PART 2—DELEGATIONS OF AUTHORITY

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

Authority: 5 U.S.C. 302, 552a; 38 U.S.C. 501, 512, 515, 1729, 1729A, 5711; 44 U.S.C. 3702, and as noted in specific sections noted.)

12. Revise paragraph (e)(10) of § 2.6 to read as follows:

§ 2.6 Secretary's delegations of authority to certain officials (38 U.S.C. 512).

* * * * *

(e) * * *

(10) The General Counsel, Deputy General Counsel, and the Assistant General Counsel for Professional Staff Group IV are authorized to make final Departmental decisions on appeals under the Freedom of Information Act, the Privacy Act, and 38 U.S.C. 5701, 5705 and 7332.

Authority: 38 U.S.C. 512

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[FR Doc. 2010-25362 Filed 10-13-10; 8:45 am]

BILLING CODE 8320-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2010-0715; FRL-9214-3]

Approval and Promulgation of Implementation Plans—Maricopa County (Phoenix) PM-10 Nonattainment Area; Serious Area Plan for Attainment of the 24-Hour PM-10 Standard; Clean Air Act Section 189(d)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of comment period.

SUMMARY: On September 9, 2010 (75 FR 54806), EPA published a proposed rule proposing to approve in part and disapprove in part State implementation plan (SIP) revisions submitted by the State of Arizona to meet, among other requirements, section 189(d) of the Clean Air Act (CAA) for the serious Maricopa County (Phoenix) nonattainment area (Maricopa area). Specifically, EPA proposed to disapprove provisions of the 189(d) plan because they do not meet applicable CAA requirements for emissions inventories as well as for attainment, five percent annual emission reductions, reasonable further progress and milestones, and contingency measures. EPA also proposed to disapprove the 2010 motor vehicle

emission budget in the 189(d) plan as not meeting the requirements of CAA section 176(c) and 40 CFR 93.118(e)(4). EPA also proposed a limited approval and limited disapproval of State regulations for the control of PM-10 from agricultural sources. Finally, EPA proposed to approve various provisions of State statutes relating to the control of PM-10 emissions in the Maricopa area.

EPA is extending the comment period on the proposed rule from October 12, 2010 to October 20, 2010.

DATES: Any comments must arrive by October 20, 2010.

ADDRESSES: Submit comments, identified by docket number EPA-R09-OAR-2010-0715, by one of the following methods:

1. *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the on-line instructions.
2. *E-mail:* nudd.gregory@epa.gov.
3. *Mail or deliver:* Gregory Nudd (Air-2), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901.

Instructions: All comments will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through <http://www.regulations.gov> or e-mail. <http://www.regulations.gov> is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at <http://www.regulations.gov> and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.