

**GENERAL SERVICES
ADMINISTRATION****41 CFR Part 105-60**

RIN 3090-AG16

**Public Availability of Agency Records
and Information Materials**AGENCY: Office of Management and
Workplace Programs, (GSA).

ACTION: Final rule.

SUMMARY: The General Services Administration, GSA is revising its regulations that implement the Freedom of Information Act (FOIA), to incorporate changes since publication in 1988 of GSA's last final rule implementing the FOIA. This rule also issues instructions to current and former GSA employees concerning the response to subpoenas and other demands in litigation before judicial and administrative tribunals.

DATES: This rule is effective December 8, 1997.

FOR FURTHER INFORMATION CONTACT: Mary Cunningham, GSA Freedom of Information Act (FOIA) Officer (202-501-3415); or Helen C. Maus, Office of General Counsel (202-501-1460).

SUPPLEMENTARY INFORMATION: A proposal to revise GSA's regulations that implement FOIA were published in the **Federal Register** on March 25, 1997, 62 FR 14081. This rule was not submitted to the Office of Management and Budget pursuant to Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, because it is not a significant regulatory action as defined in Executive Order 12866. GSA has based all administrative decisions underlying this rule on adequate information concerning the need for and the consequences of this rule, particularly the subpart that governs responses to subpoenas and other judicially enforceable demands for material or information. Specifically, the increase in the number of subpoenas and other demands to its employees in judicial or administrative proceedings, particularly in cases in which neither GSA nor the United States is a party, necessitates detailed and uniform instructions to be followed by current and former GSA employees.

The Paperwork Reduction Act does not apply because the rule does not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

The principles of Executive Order 12988 of February 5, 1996, Civil Justice

Reform, have been incorporated where applicable.

The Administrator certifies that this regulatory amendment will 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. Pursuant to 5 U.S.C. 605(b) this rule is therefore exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

Interested persons have been afforded an opportunity to participate in the making of this rule. Due consideration has been given to the comments received.

Comprehensive Summary*I. Implementation of the FOIA*

These regulations implement the FOIA, which codified Pub. L. 89-487 and amended section 3 of the Administrative Procedure Act, formerly 5 U.S.C. 1002 (1964 ed.). These regulations also implement Pub. L. 93-502, popularly known as the Freedom of Information Act Amendments of 1974, as amended by Pub. L. 99-570, the Freedom of Information Reform Act of 1986; and Executive Order 12600, Predisclosure Notification Procedures for Confidential Commercial Information, of June 23, 1987.

The revisions incorporate predisclosure notification procedures for confidential commercial information. The revisions also:

- (a) Update organizational reference;
- (b) Clarify the definition of available records to include electronic records;
- (c) Revise fees for manual searches by clerical staff from \$9 to \$13 per hour or fraction of an hour and for manual searches and review by professional staff from \$18 to \$29 per hour or fraction of an hour, to more accurately reflect the full cost of searches and document review.
- (d) Clarify GSA policy with regard to: (1) reconstructing records and providing incomplete records; (2) explaining compelling reasons for denial of access to records; and (3) requiring assurance of payment;
- (e) Provide instructions on submission of FOIA requests via Telefax and fee payment by credit card;
- (f) Extend the time limit for administrative appeal within GSA from 30 to 120 days; and
- (g) Clarify GSA policy with respect to the availability of records from other sources that have statutory authority to provide information to the public at set fees.

(h) Incorporate, as appropriate, policies in Executive Order 12988 of February 5, 1996 on Civil Justice Reform.

II. Response to Demands in Judicial or Administrative Proceedings

This rule also amends 41 CFR 105-60.6, which pertains to production of information pursuant to demands in judicial or administrative proceedings. 41 CFR 105-60.6 is amended to prescribe instructions and procedures to be followed by current and former GSA employees with respect to the production and disclosure of material or information acquired as a result of performance of the person's official duties or because of the person's official status in response to judicially enforceable subpoenas or demands in judicial or administrative proceedings, except demands from the Congress or in Federal grand jury proceedings. Included are detailed factors to be considered by the appropriate authority within the General Services Administration in determining the Agency's response to a subpoena or other judicially enforceable demand, including widely acknowledged areas of privilege that may render disclosure or production inappropriate. Instructions concerning the appropriate response by employees and former employees to courts and other authorities are included.

The rules governing responses to subpoenas and demands in judicial or administrative proceedings provide instructions and procedures for employees and former employees regarding the internal operations of GSA and is not intended to be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the General Services Administration.

(a) GSA is amending this subpart to set forth uniform prescribed instructions and procedures to be complied with by current and former GSA employees concerning disclosure or production of agency materials or information in judicial or administrative proceedings in response to a judicially enforceable subpoena or demand. These instructions establish policy, assign responsibilities and prescribe procedures for responding to demands for GSA materials or testimony of current and former GSA employees in judicial and administrative proceedings. The instructions in 41 CFR subpart 105-60.6 do not apply to requests unrelated to litigation before judicial or administrative tribunals, to requests

made pursuant to the FOIA or Privacy Act, 5 U.S.C. 552 and 552a, respectively, to demands from the Congress, or to demands in Federal grand jury proceedings.

(b) These instructions are intended solely to provide an orderly means by which current and former GSA employees respond to demands for material and information covered by this rule, and to protect the interests of the United States, including the safeguarding of privileged or otherwise sensitive information. This rule is consistent with the decision in the landmark case of *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) in which the Supreme Court upheld the ability of an agency head to issue regulations for the preservation of agency records, determined that an agency employee, acting pursuant to such instructions, could not be held in contempt of court for declining to produce records in response to a subpoena duces tecum. Accordingly, current and former GSA employees shall respond to the party on whose behalf the demand is issued only in accordance with the instructions and procedures required by 41 CFR subpart 105-60.6. Furthermore, the GSA can refuse to disclose materials or make information available based on the factors set forth in 41 CFR 105-60.605. These instructions and procedures are not intended to preclude disclosures or productions in compliance with court orders except where disclosure would be inappropriate even if required by a court, e.g., where disclosure would be legally prohibited or would be contrary to a recognized privilege.

Summary of Comments

GSA received two comments in response to its proposed rule. One comment was from an internal agency component and the other was external.

I. Comments on FOIA-Related Sections of the Rule

Both commenters indicated that the proposed rule does not address amendments to the FOIA required by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. 104-231. The intent of the proposed rule was to amend GSA's current FOIA regulations to address changes occasioned by reorganizations within GSA, to incorporate formally procedures for notifying submitters of commercial or financial information of a request, entertain reasons for nondisclosure, and to provide procedures, for responding to subpoenas for GSA materials or information. This rule is not intended to address the recent amendments to the

FOIA. Changes required by the amendments will be the subject of a subsequent proposed rule.

The internal GSA comment raised a number of issues—some nonsubstantive/editorial comments have been adopted. For the reasons which follow, substantive internal and external comments have or have not been adopted.

Subsection. 105-60.103-1. It is suggested that the FOIA does not require that GSA perform "minor reprogramming" when doing so is not costly or burdensome. We have adopted this suggestion and amended this subsection to read that GSA "may perform minor reprogramming" when doing so is not costly or burdensome.

Subsection. 105-60.103-2. It is recommended that the final rule modify or eliminate the requirement that a denial of information requested under the FOIA cite the compelling reason for denying access. The reason being that the current FOIA statutory exemptions already describe the basis for nondisclosure.

We have adopted this suggestion by eliminating the "compelling reason" language because other provisions of the rule encompass the intent. GSA's existing FOIA procedures state that the reasons for withholding will be clearly described in the letter to the requester, and GSA will not invoke an exemption if disclosure will cause no demonstrable harm to any governmental or private interest. 41 CFR 150-60.501(b), (c). We consider a demonstrable harm to any governmental or private interest to be a compelling reason for invoking a FOIA exemption. We have therefore eliminated the "compelling reason" language and substituted language stating that the harm to a Governmental or private interest will be specifically described in the denial letter to the requester.

Subsection. 105-60.305-1(d). As proposed, this subsection stated that GSA "will" provide a copy of the material in a form usable by the requester unless administratively burdensome to do so. It is recommended that this language be changed to read that to the extent "practicable" GSA will provide a copy of the material in the form specified by the requester. We have adopted this suggestion because the phrase "to the extent practicable" is deemed to encompass the concept of "administratively burdensome."

Subsection. 105-60.305-4(b). This subsection, as proposed, includes a provision that GSA will make copies of voluminous records available to a requester as quickly as possible and provide a number of "additional" copies

of requested material when commercial reproduction services are not available to a requester. It is suggested that the first sentence of this provision be deleted because it is inconsistent with a provision in § 105-60.305-4(a) which allows GSA discretion to provide a requester the opportunity to receive copies or to review originals for inspection and copying. These subsections were not intended to be inconsistent or mutually exclusive. We have therefore made the following adjustments. Subsections 60.105-305-4(a) and (b) are amended to provide that GSA may offer a requester who seeks voluminous records not subject to exemption an option to review them at a mutually agreeable place and time and thereby avoid duplication fees for records not desired by the requester.

II. Comments on Subpoena-Related Section of the Proposed Rule

One commenter stated that so-called "*Touhy*" regulations of this kind are not separate authority to withhold information. It is not the intent of the proposed rule to confer such authority. Authority to withhold information in a litigative context is typically predicated on grounds and privileges recognized in statute, judicial interpretation, rules applicable to a particular forum or the Common Law. We have therefore added language to clarify that this regulation is not an independent authority to withhold information.

A commenter indicated that in cases where the agency/U.S. Government is a party a *Touhy* regulation cannot interfere with the application of the Federal Rules of Civil Procedure. It is not the intent of these regulations to do so. We have therefore added introductory language that states that where GSA is a party to a proceeding, nothing in these regulations shall operate or be interpreted to supersede or circumvent rules of procedures applicable to the forum in which the matter is pending. We have also made a conforming adjustment to the language in § 105-60.605(b). We have not, however, altered the language in § 105-60.105(b) which provides that the appropriate authority may, at the request of the U.S. Department of Justice, waive the requirements in this rule where the United States is a party. Because the U.S. Department of Justice typically represents the United States and its departments and agencies in litigation, we believe the extent to which a waiver in such cases is or is not appropriate in a particular case should be the result of a collaborative effort between our agencies.

Subsection 105-60.605(a). Both commenters questioned GSA's authority and/or ability to control the testimony of former employees. For reasons which follow, we have not adopted any suggestion that the regulations should not apply to former employees. A primary purpose behind the *Touhy* regulations is the establishment of a systematic means by which an agency can evaluate requests for production of official agency information and determine the extent to which there are legally defensible reasons for objection to production. These legitimate agency interests exist regardless of whether the requested information is in the possession for current or former agency employees.

When GSA becomes aware of a subpoena to a former employee for production of official GSA information through testimony or document production, it intends to use legally available means to ensure that agency interests are protected.

Subsection 105-60.605(b). A commenter suggested that an appropriate basis for waiver of the requirements in this rule are cases in which the United States has an interest in addition to cases in which the United States is a party. The situation may arise in so-called "qui tam" suits. We have added language to this section that recognizes this type of litigation which may, in coordination with the U.S. Department of Justice, be a situation in which a waiver may be appropriate.

Subsection 105-60.605(e). A commenter recommended that the list of factors to be considered by the appropriate authority in responding to demands contain the language "include, but are not limited to:." The factors in § 105-60.605(e) already contemplate "[A]ny additional factors unique to a particular demand for proceeding." Because this provision already incorporates the commenter's suggestion it has not been adopted.

List of Subjects in 41 Part 105-60

Freedom of information.

For the reasons set out in the preamble, 41 CFR part 105-60 is revised to read as follows:

PART 105-60—PUBLIC AVAILABILITY OF AGENCY RECORDS AND INFORMATIONAL MATERIALS

Sec.

105-60.000 Scope of part.

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Subpart 105-60.4—Described Records

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Subpart 105-60.6—Production or Disclosure by Present or Former General Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings.

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105-60.603 Acceptance of service of a subpoena duces tecum or other legal demand on behalf of the General Services Administration.

105-60.604 Production or disclosure prohibited unless approved by the Appropriate Authority.

105-60.605 Procedure in the event of a demand for production or disclosure.

105-60.606 Procedure where response to demand is required prior to receiving instructions.

105-60.607 Procedure in the event of an adverse ruling.

105-60.608 Fees, expenses, and costs.

Authority: 5 U.S.C. 301 and 552; 40 U.S.C. 486(c).

§ 105-60.000 Scope of part.

(a) This part sets forth policies and procedures of the General Services Administration (GSA) regarding public access to records documenting:

(1) Agency organization, functions, decisionmaking channels, and rules and regulations of general applicability;

(2) Agency final opinions and orders, including policy statements and staff manuals;

(3) Operational and other appropriate agency records; and

(4) Agency proceedings.

(b) This part also covers exemptions from disclosure of these records, procedures for the public to inspect or obtain copies of GSA records, and instructions to current and former GSA employees on the response to a subpoena or other legal demand for material or information received or generated in the performance of official duty or because of the person's official status.

(c) Any policies and procedures in any GSA internal or external directive inconsistent with the policies and procedures set forth in this part are superseded to the extent of that inconsistency.

Subpart 105-60.1—General Provisions

§ 105-60.101 Purpose.

This part 105-60 implements the provisions of the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552. The regulations in this part also implement Executive Order 12600, Predisclosure Notification Procedures for Confidential Commercial Information, of June 23, 1987 (3 CFR, 1987 Comp., p. 235). This part prescribes procedures by which the public may inspect and obtain copies of GSA records under the FOIA, including administrative procedures that must be exhausted before a requester invokes the jurisdiction of an appropriate United States District Court for GSA's failure to respond to a proper request within the statutory time limits, for a denial of agency records or challenge to the adequacy of a search, or for a denial of a fee waiver.

§ 105-60.102 Application.

This part applies to all records and informational materials generated, maintained, and controlled by GSA that come within the scope of 5 U.S.C. 552.

§ 105-60.103 Policy.

§ 105-60.103-1 Availability of records.

The policies of GSA with regard to the availability of records to the public are:

(a) GSA records are available to the greatest extent possible in keeping with the spirit and intent of the FOIA. GSA will disclose information in any existing GSA record, with noted exceptions, regardless of the form or format of the record. For example, records maintained in an electronic form, as part of a data base, will be provided on request using existing programming. GSA will provide the record in the form or format requested if the record is readily reproducible by the agency in that form or format. GSA will make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(b) the person making the request does not need to demonstrate an interest in the records or justify the request.

(c) The FOIA does not give the public the right to demand that GSA compile a record that does not already exist. For example, FOIA does not require GSA to collect and compile information from multiple sources to create a new record or to develop a new computer program to extract requested records. GSA may compile records or perform minor reprogramming when doing so will not significantly interfere with the operation of the automated system already in existence.

(d) Similarly, FOIA does not require GSA to reconstruct records that have been destroyed in compliance with disposition schedules approved by the Archivist of the United States. However, GSA will not destroy records after a member of the public has requested access to them and will process the request even if destruction has already been scheduled.

(e) If the record requested is not complete at the time of the request, GSA may, at its discretion, inform the requester that the complete record will be provided when it is available, with no additional request required, if the record is not exempt from disclosure.

(f) Requests must be addressed to the office identified in § 105-60.402-1.

(g) Fee for locating and duplicating records are listed in § 105-60.305-10.

§ 108-60.103-2 Applying exemptions.

GSA may deny a request for a GSA record if it falls within an exemption under the FOIA outlined in subpart 105-60.5 of this part. Except when a record is classified or when disclosure would violate any Federal statute, the authority to withhold a record from disclosure will likely cause harm to a Governmental or private interest. GSA will explain the harm to requesters when a record is denied under FOIA.

§ 105-60.104 Records of other agencies.

If GSA receives a request for access to records that are known to be the primary responsibility of another agency, GSA will refer the request to the agency concerned for appropriate action. For example, GSA will refer requests to the appropriate agency in cases in which GSA does not have sufficient knowledge of the action or matter that is the subject of the requested records to determine whether the records must be released or may be withheld under one of the exemptions listed in § 105-60.5. If GSA does not have the requested records, the agency will attempt to determine whether the requested records exist at another agency and, if possible, will forward the request to that agency. GSA will inform the requester that GSA has forwarded the request to another agency.

Subpart 105-60.2—Publication of General Agency Information and Rules in the Federal Register

§ 105-60.201 Published information and rules.

In accordance with 5 U.S.C. 552(a)(1), GSA publishes in the **Federal Register**, for the guidance of the public, the following general information concerning GSA:

(a) Description of the organization of the Central Office and regional offices and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

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

(c) Rules of procedure, descriptions of forms available or the places where forms may be obtained, and instructions on the scope and contents of all papers, reports, or examinations;

(d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by GSA; and

(e) Each amendment, revision, or repeal of the materials described in this section.

§ 105-60.202 Published materials available for sale to the public.

(a) Substantive rules of general applicability adopted by GSA as authorized by law which this agency publishes in the **Federal Register** and which are available for sale to the public by the Superintendent of Documents at

pre-established prices are: The General Services Administration Acquisition Regulation (48 CFR Ch. 5), the Federal Acquisition Regulation (48 CFR Ch. 1), the Federal Property Management Regulations (41 CFR Ch. 101), and the Federal Travel Regulation (41 CFR Ch. 301-304).

(b) GSA also provides technical information, including manuals and handbooks, to other Federal entities, e.g., the National Technical Information Service, with separate statutory authority to make information available to the public at pre-established fees.

(c) Requests for information available through the sources in paragraphs (a) and (b) of this section will be referred to those sources.

Subpart 105-60.3—Availability of Opinions, Orders, Policies, Interpretations, Manuals, and Instructions

§ 105-60.301 General.

GSA makes available to the public the materials described under 5 U.S.C. 552(a)(2), which are listed in § 105-60.302, at the locations listed in § 105-60.303. An Index of those materials as described in § 105-60.304 is available at GSA's Central Office in Washington, DC. Reasonable copying services are provided at the fees specified in § 105-60.305.

§ 105-60.302 Available materials.

GSA materials available under this subpart 105-60.3 are as follows:

(a) Final opinions, including concurring and dissenting opinions and orders, made in the adjudication of cases.

(b) Those statements of policy and interpretations that have been adopted by GSA and are not published in the **Federal Register**.

(c) Administrative staff manuals and instructions to staff affecting a member of the public unless these materials are promptly published and copies offered for sale.

§ 105-60.303 Rules for public inspection and copying.

(a) *Locations.* Selected areas containing the materials available for public inspection and copying, described in § 105-60.302, are located in the following places:

Central Office (GSA Headquarters)

General Services Administration,
Washington, DC, Telephone: 202-501-
2262 or 202-501-1659, FAX: 202-501-
2727, 1800 F Street, NW. (CAI),
Washington, DC 20405

Office of the Inspector General

FOIA Officer, Office of Inspector General (J),
General Services Administration, 1800 F
Street NW., Room 5324, Washington, DC
20405

New England Region

General Services Administration (1AB)
(Comprised of the States of Connecticut,
Maine, Massachusetts, New Hampshire,
Rhode Island, and Vermont), Thomas P.
O'Neill, Jr., Federal Building, 10 Causeway
Street, Boston, MA 02222, Telephone: 617-
565-8100, FAX: 617-565-8101

Northeast and Caribbean Region

(Comprised of the States of New Jersey, New
York, the Commonwealth of Puerto Rico,
and the Virgin Islands), General Services
Administration (2AR), 26 Federal Plaza,
New York, NY 10278, Telephone: 212-
264-1234, FAX: 212-264-2760.

Mid-Atlantic Region

(Comprised of the States of Delaware,
Maryland, Pennsylvania, Virginia, and
West Virginia, excluding the Washington,
D.C. metropolitan area), General Services
Administration (3ADS), 100 Penn Square
East, Philadelphia, PA 19107, Telephone:
215-656-5530, FAX: 215-656-5590

Southeast Sunbelt Region

(Comprised of the States of Alabama, Florida,
Georgia, Kentucky, Mississippi, North
Carolina, South Carolina, and Tennessee),
General Services Administration (4E), 401
West Peachtree Street, Atlanta, GA, 30365,
Telephone: 404-331-5103, FAX: 404-331-
1813

Great Lakes Region

(Comprised of the States of Illinois, Indiana,
Ohio, Minnesota, Michigan, and
Wisconsin), General Services
Administration (5ADB), 230 South
Dearborn Street, Chicago, IL 60604,
Telephone: 312-353-5383, FAX: 312-886-
9893

Heartland Region

(Comprised of the States of Iowa, Kansas,
Missouri, and Nebraska), General Services
Administration (6ADB), 1500 East
Bannister Road, Kansas City, MO 64131,
Telephone: 816-926-7203, FAX: 816-823-
1167

Greater Southwest Region

(Comprised of the States of Arkansas,
Louisiana, New Mexico, Texas, and
Oklahoma), General Services
Administration (7CPA), 819 Taylor Street,
Fort Worth, TX 76102, Telephone: 817-
978-3902, FAX: 817-978-4867

Rocky Mountain Region

(Comprised of the States of Colorado, North
Dakota, South Dakota, Montana, Utah, and
Wyoming), Business Service Center,
General Services Administration (8PB-B),
Building 41, Denver Federal Center,
Denver, CO 80225, Telephone: 303-236-
7408, FAX: 303-236-7403

Pacific Rim Region

(Comprised of the States of Hawaii,
California, Nevada, Arizona, Guam, and
Trust Territory of the Pacific), Business
Service Center, General Services
Administration (9ADB), 525 Market Street,
San Francisco, CA 94105, Telephone: 415-
522-2715, FAX: 415-522-2705

Northwest/Arctic Region

(Comprised of the States of Alaska, Idaho,
Oregon, and Washington), General Services
Administration (10L), GSA Center, 15th
and C Streets, SW, Auburn, WA 98002,
Telephone: 206-931-7007, FAX: 206-931-
7195

National Capital Region

(Comprised of the District of Columbia and
the surrounding metropolitan area),
General Services Administration, (WPFA-
L), 7th and D Streets SW., Washington, DC
20407, Telephone: 202-708-5854, FAX:
202-205-2478

(b) *Time*. The reading rooms or
selected areas will be open to the public
during the business hours of the GSA
office where they are located.

(c) *Reading room and selected area
rules.*—(1) *Handling of materials*. The
removal or mutilation of materials is
forbidden by law and is punishable by
fine or imprisonment or both. When
requested by a reading room or selected
area attendant, a person inspecting
materials must present for examination
any briefcase, handbag, notebook,
package, envelope, book or other article
that could contain GSA informational
materials.

(2) *Reproduction services*. The GSA
Central Office or the Regional Business
Service Centers will furnish reasonable
copying and reproduction services for
available materials at the fees specified
in § 105-60.305.

§ 105-60.304 Index.

GSA will make available to any
member of the public who requests it a
current index identifying information
for the public regarding any matter
described in § 105-60.302.

§ 105-60.305 Fees.**§ 105-60.305-1 Definitions.**

For the purpose of this part:

(a) A statute specifically providing for
setting the level of fees for particular
types of records (5 U.S.C.
552(a)(4)(A)(vii)) means any statute that
specifically requires a Government
agency to set the level of fees for
particular types of records, as opposed
to a statute that generally discusses such
fees. Fees are required by statute to:

- (1) Make Government information
conveniently available to the public and
to private sector organizations;
- (2) Ensure that groups and individuals
pay the cost of publications and other

services that are for their special use so
that these costs are not borne by the
general taxpaying public;

(3) Operate an information
dissemination activity on self-sustaining
basis to the maximum extent possible;
or

(4) Return revenue to the Treasury for
defraying, wholly or in part,
appropriated funds used to pay the cost
of disseminating Government
information.

(b) The term *direct costs* means those
expenditures that GSA actually incurs
in searching for and duplicating (and in
the case of commercial requesters,
reviewing and redacting) documents 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),
and the cost of operating duplicating
machinery. Overhead expenses such as
costs of space, and heating or lighting
the facility where the records are stored
are not included in direct costs.

(c) The term *search* includes all time
spent looking for material that is
responsive to a request, including line-
by-line identification of material within
documents. Searches will be performed
in the most efficient and least expensive
manner so as to minimize costs for both
the agency and the requester. Line-by-
line searches will not be undertaken
when it would be more efficient to
duplicate the entire document. "Search"
for responsive material is not the same
as "review" of a record to determine
whether it is exempt from disclosure in
whole or in part (see paragraph (e) of
this section). Searches may be done
manually or by computer using existing
programming.

(d) The term *duplication* means the
process of making a copy of a document
in response to a FOIA request. Copies
can take the form of paper, microfilm,
audiovisual materials, or magnetic tapes
or disks. To the extent practicable, GSA
will provide a copy of the material in
the form specified by the requester.

(e) The term *review* means the process
of examining documents located in
response to a request to determine if any
portion of that document is permitted to
be withheld and processing any
documents for disclosure. See § 105-
60.305-6.

(f) The term *commercial-use request*
means a request from or on behalf of one
who seeks information for a use or
purpose that furthers the commercial,
trade, or profit interests of the requester
or person on whose behalf the request
is made. GSA will determine whether a
requester properly belongs in this

category by determining how the requester will use the documents.

(g) The term *educational institution* means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that operates a program or programs of scholarly research.

(h) The term *noncommercial scientific institution* means an institution that is not operated on a "commercial" basis as that term is used in paragraph (f) of this section and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(i) The term *representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. "Freelance" journalists will be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization even though they are not actually employed by it.

§ 105-60.305-2 Scope of this subpart.

This subpart sets forth policies and procedures to be followed in the assessment and collection of fees from a requester for the search, review, and reproduction of GSA records.

§ 105-60.305-3 GSA records available without charge.

GSA records available to the public are displayed in the Business Service Center for each GSA region. The address and phone number of the Business Service Centers are listed in § 105-60.303. Certain material related to bids (excluding construction plans and specifications) and any material displayed are available without charge upon request.

§ 105-60.305-4 GSA records available at a fee.

(a) GSA will make a record not subject to exemption available at a time and place mutually agreed upon by GSA and the requester at fees shown in § 105-

60.305-10. Waivers of these fees are available under the conditions described in § 105-60.305-13. GSA will agree to:

- (1) Show the originals to the requester; or
- (2) Make one copy available at a fee; or
- (3) A combination of these alternatives.

(b) GSA will make copies of voluminous records as quickly as possible. GSA may, in its discretion, make a reasonable number of additional copies for a fee when commercial reproduction services are not available to the requester.

§ 105-60.305-5 Searches.

(a) GSA may charge for the time spent in the following activities in determining "search time" subject to applicable fees as provided in § 105-60.305-10:

(1) Time spent in trying to locate GSA records that come within the scope of the request;

(2) Time spent in either transporting a necessary agency searcher to a place of record storage, or in transporting records to the locations of a necessary agency searcher; and

(3) Direct costs of the use of computer time to locate and extract requested records.

(b) GSA will not charge for the time spent in monitoring a requester's inspection of disclosed agency records.

(c) GSA may assess fees for search time even if the search proves unsuccessful or if the records located are exempt from disclosure.

§ 105-60.305-6 Reviews.

(a) GSA will charge only commercial-use requesters for review time.

(b) GSA will charge for the time spent in the following activities in determining "review time" subject to applicable fees as provided in § 105-60.305-10:

(1) Time spent in examining a requested record to determine whether any or all of the record is exempt from disclosure, including time spent consulting with submitters of requested information; and

(2) Time spent in deleting exempt matter being withheld from records otherwise made available.

(c) GSA will not charge for:

(1) Time spent in resolving issues of law or policy regarding the application of exemptions; or

(2) Review at the administrative appeal level of an exemption already applied. However, records or portions of records withheld in full under an exemption that is subsequently

determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. GSA will charge for such subsequent review.

§ 105-60.305-7 Assurance of payment.

If fees for search, review, and reproduction will exceed \$25 but will be less than \$250, the requester must provide written assurance of payment before GSA will process the request. If this assurance is not included in the initial request, GSA will notify the requester that assurance of payment is required before the request is processed. GSA will offer requesters an opportunity to modify the request to reduce the fee.

§ 105-60.305-8 Prepayment of fees.

(a) *Fees over \$250.* GSA will require prepayment of fees for search, review, and reproduction that are likely to exceed \$250. When the anticipated total fee exceeds \$250, the requester will receive notice to prepay and at the time will be given an opportunity to modify his or her request to reduce the fee. When it is anticipated that fees will exceed \$250, GSA will notify the requester that it will not start processing a request until payment is received.

(b) *Delinquent payments.* As noted in § 105-60.305-12(d), requesters who are delinquent in paying for previous requests will be required to repay the old debt and to prepay for any subsequent request. GSA will inform the requester that it will process no additional requests until all fees are paid.

§ 105-60.305-9 Form of payment.

Requesters should pay fees by check or money order made out to the General Services Administration and addressed to the official named by GSA in its correspondence. Payment may also be made by means of Mastercard or Visa. For information concerning payment by credit cards, call 816-926-7551.

§ 105-60.305-10 Fee schedule.

(a) When GSA is aware that documents responsive to a request are maintained for distribution by an agency operating a statutory fee based program, GSA will inform the requester of the procedures for obtaining records from those sources.

(b) GSA will consider only the following costs in fees charged to requesters of GSA records:

(1) Review and search fees.

Manual searches by clerical staff: \$13 per hour or fraction of an hour.

Manual searches and reviews by professional staff in cases in which clerical

staff would be unable to locate the requested records: \$29 per hour or fraction of an hour.

Computer searches: Direct cost to GSA.

Transposition or special handling of records: Direct cost to GSA.

(2) Reproduction fees.

Pages no larger than 8½ by 14 inches, when reproduced by routine electrostatic copying: \$0.10 per page.

Pages over 8½ by 14 inches: Direct cost of reproduction to GSA.

Pages requiring reduction, enlargement, or other special services: Direct cost of reproduction to GSA.

Reproduction by other than routine electrostatic copying:

Direct cost of reproduction to GSA.

(c) Any fees not provided for under paragraph (b) of this section, shall be calculated as direct costs, in accordance with § 105-60.305-1(b).

(d) GSA will assess fees based on the category of the requester as defined in § 105-60.305-1(f)-(i); i.e., commercial-use, educational and noncommercial scientific institutions, news media, and all other. The fees listed in paragraph (b) of this section apply with the following exceptions:

(1) GSA will not charge the requested fee if the fee is \$25 or less as the cost of collection would be greater than the fee.

(2) Educational and noncommercial scientific institutions and the news media will be charged for the cost of reproduction alone. These requesters are entitled to the first 100 pages (paper copies) of duplication at no cost. The following are examples of how these fees are calculated:

(i) A request that results in 150 pages of material. No fee would be assessed for duplication of 150 pages. The reason is that these requesters are entitled to the first 100 pages at no charge. The charge for the remaining 50 pages would be \$7.50. This amount would not be billed under the preceding section.

(ii) A request that results in 450 pages of material. The requester in this case would be charged \$35. The reason is that the requester is entitled to the first 100 pages at no charge. The charge for the remaining 350 pages would be \$35.

(3) Noncommercial requesters who are not included under paragraph (d)(2) of this section will be entitled to the first 100 pages (paper copies) of duplication at no cost and two hours of search without charge. The term "search time" generally refers to manual search. To apply this term to searches made by computer, GSA will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of search (including the operator time and the cost of operating the computer to process a request) equals

the equivalent dollar amount of two hours of the salary of the person performing a manual search, GSA will begin assessing charges for computer search.

(4) GSA will charge commercial-use requesters fees which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial-use requester are not entitled to two hours of free search time.

(e) Determining the category of a requester. GSA may ask any requester to provide additional information at any time to determine his or her fee category.

§ 105-60.305-11 Fees for authenticated and attested copies.

The fees set forth in § 105-60.305-10 apply to requests for authenticated and attested copies of GSA records.

§ 105-60.305-12 Administrative actions to improve assessment and collection of fees.

(a) *Charging interest.* GSA may charge requesters who fail to pay fees interest on the amount billed starting on the 31st day following the month on which the billing was sent. Interest will be at the rate prescribed in 31 U.S.C. 3717.

(b) *Effect of the Debt Collection Act of 1982.* GSA will take any action authorized by the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), including disclosure to consumer reporting agencies, use of collection agencies, and assessment of penalties and administrative costs, where appropriate, to encourage payment.

(c) *Aggregating requests.* When the GSA reasonably believes that a requester, or group of requesters acting in concert, is attempting to break down a request into a series of requests related to the same subject for the purpose of evading the assessment of fees, GSA will combine any such requests and charges accordingly, including fees for previous requests where charges were not assessed. GSA will presume that multiple requests of this type within a 30-day period are made to avoid fees.

(d) *Advance payments.* Whenever a requester is delinquent in paying the fee for a previous request (i.e., within 30 days of the date of the billing), GSA will require the requester to pay the full amount owed plus any applicable interest penalties and administrative costs as provided in paragraph (a) of this section or to demonstrate that he or she has, in fact, paid the fee. In such cases, GSA will also require advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester. When advance payment

is required under this section, the administrative time limits in subsection (a)(6) of the FOIA (i.e., 10 working days from receipt of appeals from initial denial plus permissible time extensions) will begin only after GSA has received the fee payments described in § 105-60.305-8.

§ 105-60.305-13 Waiver of fee.

(a) Any request for waiver or reduction of a fee should be included in the initial letter requesting access to GSA records under § 105-60.402-1. The waiver request should explain how disclosure of the information would contribute significantly to public understanding of the operations or activities of the Government and would not be primarily in the commercial interest of the requester. In responding to a request, GSA will consider the following factors:

(1) Whether the subject of the requested records concerns "the operations or activities of the Government." The subject matter of the requested records must specifically concern identifiable operations or activities of the Federal Government. The connection between the records and the operations or activities must be direct and clear, not remote or attenuated.

(2) Whether the disclosure is "likely to contribute" to an understanding of Government operations or activities. In this connection, GSA will consider whether the requested information is already in the public domain. If it is, then disclosure of the information would not be likely to contribute to an understanding of Government operations or activities, as nothing new would be added to the public record.

(3) Whether disclosure of the requested information will contribute to "public understanding." The focus here must be on the contribution to public understanding rather than personal benefit to be derived by the requester. For purposes of this analysis, the identity and qualifications of the requester should be considered, to determine whether the requester is in a position to contribute to public understanding through the requested disclosure.

(4) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so: whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

(b) GSA will ask the requester to furnish additional information if the initial request is insufficient to evaluate the merits of the request. GSA will not start processing a request until the fee waiver issue has been resolved unless the requester has provided written assurance of payment in full if the fee waiver is denied by the agency.

Subpart 105-60.4—Described Records

§ 105-60.401 General.

(a) Except for records made available in accordance with subparts 105-60.2 and 105-60.3 of this part, GSA will make records available to a requester promptly when the request reasonably describes the records unless GSA invokes an exemption in accordance with Subpart 105-60.5 of this part. Although the burden of reasonable description of the records rests with the requester, whenever practical GSA will assist requesters to describe records more specifically.

(b) Whenever a request does not reasonably describe the records requested, GSA may contact the requester to seek a more specific description. The 10-workday time limit set forth in § 105-60.402-2 will not start until the official identified in § 105-60.402-1 or other responding official receives a request reasonably describing the records.

§ 105-60.402 Procedures for making records available.

This subpart sets forth initial procedures for making records available when they are requested, including administrative procedures to be exhausted prior to seeking judicial review by an appropriate United States District Court.

§ 105-60.402-1 Submission of requests.

For records located in the GSA Central Office, the requester must submit a request in writing to the GSA FOIA Officer, General Services Administration (CAIR), Washington, DC 20405. Requesters may FAX requests to (202) 501-2727, or submit a request by e-mail to gsa.foi@gsa.gov. For records located in the Office of Inspector General, the requester must submit a request to the FOIA Officer, Office of Inspector General, General Services Administration, 1800 F Street NW., Room 5324, Washington, DC 20405. For records located in the GSA regional offices, the requester must submit a request to the FOIA Officer for the relevant region, at the address listed in § 105-60.303(a). Requests should include the words "Freedom of Information Act Request" prominently marked on both the face of the request

letter and the envelop. The 10-workday time limit for agency decisions set forth in § 105-60.402-2 begins with receipt of a request in the office of the official identified in this section, unless the provisions under §§ 105-60.305-8 and 105-60.305-12(d) apply. Failure to include the words "Freedom of Information Act Request" or to submit a request to the official identified in this section will result in processing delays. A requester with questions concerning a FOIA request should contact the GSA FOIA Office, General Services Administration (CAI), 1800 F Street, NW, Washington, DC 20405, (202) 501-2262 or (202) 501-1659.

§ 105-60.402-2 Response to initial requests.

GSA will respond to an initial FOIA request which reasonably describes requested records, including a fee waiver request, within 10 workdays (that is, excluding Saturdays, Sundays, and legal holidays) after receipt of a request by the office of the appropriate official specified in § 105-60.402-1. This letter will provide the agency's decision with respect to disclosure or nondisclosure of the requested records, or, if appropriate, a decision on a request for a fee waiver. If the records to be disclosed are not provided with the initial letter, the records will be sent as soon as possible thereafter. In unusual circumstances, as described in § 105-60.404, GSA will inform the requester of the agency's need to take an extension of time, not to exceed and additional 10 workdays.

§ 105-60.403 Appeal within GSA.

(a) A requester who receives a denial of a request, in whole or in part, or a denial of a fee waiver request, may appeal that decision within GSA. A requester may also appeal the adequacy of the search if GSA determines that it has searched for but has no requested records. The requester must send the appeal to the GSA FOIA Officer, General Services Administration (CAI), 1800 F Street NW, Washington, DC 20405, regardless of whether the denial being appealed was made in the Central Office or in a regional office. For denials that originate in the Office of Inspector General, the requester must send the appeal to the Inspector General, General Services Administration, 1800 F Street NW., Washington, DC 20405.

(b) The GSA FOIA Officer must receive an appeal no later than 120 calendar days after receipt by the requester of the initial denial of access or fee waiver.

(c) An appeal must be in writing, include a brief statement of the reasons

the requester thinks GSA should release the records, and enclose copies of the initial request and denial.

The appeal letter must include the words "Freedom of Information Act Appeal" on both the face of the appeal letter and on the envelope. Failure to follow these procedures will delay processing of the appeal. GSA has 20 workdays after receipt of a proper appeal to issue a determination of the appeal. The 20-workday time limit shall not begin until the GSA FOIA Officer receives the appeal. As noted in § 105-60.404, the GSA FOIA Officer may extend this time limit in unusual circumstances.

(d) A requester who receives a denial of an appeal, or who has not received a response to an appeal or initial request within the statutory timeframe may seek judicial review in the United States District Court in the district in which the requester resides or has a principal place of business, or where the records are situated, or in the United States District Court for the District of Columbia.

§ 105-60.404 Extension of time limits.

(a) In unusual circumstances, the GSA Central Office FOIA Officer or the regional FOIA Officer may extend the time limits prescribed in §§ 105-60.402 and 105-60.403. For purposes of this section, the term *unusual circumstances* means:

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

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are described in a single request;

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

(4) The need to consult with the submitter of the requested information.

(b) If necessary, GSA may take more than one extension of time. However, the total extension of time to respond to any single request shall not exceed 10 workdays. The extension may be divided between the initial and appeal stages or within a single stage. GSA will provide written notice to the requester of any extension of time limits.

§ 105-60.405 Processing requests for confidential commercial information.

(a) *General.* The following additional procedures apply when processing

requests for confidential commercial information.

(b) *Definitions.* For the purposes of this section, the following definitions apply:

(1) *Confidential commercial information* means records provided to the government by a submitter that contain material arguably exempt from release under 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) *Submitter* means a person or entity that provides to the Government information that may constitute confidential commercial information. The term "submitter" includes, but is not limited to, individuals, partnerships, corporations, State governments, and foreign governments.

(c) *Designating confidential commercial information.* Since January 1, 1988, submitters must designate confidential commercial information as such when it is submitted to GSA or at a reasonable time thereafter. For information submitted in connection with negotiated procurements, the requirements of Federal Acquisition Regulation 48 CFR 15.407(c)(8) and 52.215-12 also apply.

(d) *Procedural requirements—consultation with the submitter.* (1) If GSA receives a FOIA request for potentially confidential commercial information, it will notify the submitter immediately by telephone and invite an opinion whether disclosure will or will not cause substantial competitive harm.

(2) GSA will follow up the telephonic notice promptly in writing before releasing any records unless paragraph (f) of this section applies.

(3) If the submitter indicates an objection to disclosure, GSA will give the submitter seven workdays from receipt of the letter to provide GSA with a detailed written explanation of how disclosure of any specified portion of the records would be competitively harmful.

(4) If the submitter verbally states that there is no objection to disclosure, GSA will confirm this fact in writing before disclosing any records.

(5) At the same time GSA notifies the submitter, it will also advise the requester that there will be a delay in responding to the request due to the need to consult with the submitter.

(6) GSA will review the reasons for nondisclosure before independently deciding whether the information must be released or should be withheld. If GSA decides to release the requested information, it will provide the submitter with a written statement explaining why his or her objections are

not sustained. The letter to the submitter will contain a copy of the material to be disclosed or will offer the submitter an opportunity to review the material in one of GSA's offices. If GSA decides not to release the material, it will notify the submitter orally or in writing.

(7) If GSA determines to disclose information over a submitter's objections, it will inform the submitter that GSA will delay disclosure for five workdays from the estimated date the submitter receives GSA's decision before it releases the information. The decision letter to the requester shall state that GSA delay disclosure of material it has determined to disclose to allow for the notification of the submitter.

(e) *When notice is required.* (1) For confidential commercial information submitted prior to January 1, 1988, GSA will notify a submitter whenever it receives a FOIA request for such information:

(i) If the records are less than 10 years old and the information has been designated by the submitter as confidential commercial information; or

(ii) If GSA has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) For confidential commercial information submitted on or after January 1, 1988, GSA will notify a submitter whenever it determines that the agency may be required to disclose records:

(i) That the submitter has previously designated as privileged or confidential; or

(ii) That GSA believes could reasonably be expected to cause substantial competitive harm if disclosed.

(3) GSA will provide notice to a submitter for a period of up to 10 years after the date of submission.

(f) *When notice is not required.* The notice requirements of this section will not apply if:

(1) GSA determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by a law other than the FIOA;

(4) Disclosure is required by an agency rule that—

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under FIOA; and

(iii) Provides in exceptional circumstances for notice when the

submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm;

(5) The information is not designated by the submitter as exempt from disclosure under paragraph (c) of this section, unless GSA has substantial reason to believe that the disclosure of the information would be competitively harmful; or

(6) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous; except that, in such cases, the agency must provide the submitter with written notice of any final administrative decision five workdays prior to disclosing the information.

(g) *Lawsuits.* If a FIOA requester sues the agency to compel disclosure of confidential commercial information, GSA will notify the submitter as soon as possible. If the submitter sues GSA to enjoin disclosure of the records, GSA will notify the requester.

Subpart 105-60.5—Exemptions

§ 105-60.501 Categories of records exempt from disclosure under the FIOA.

(a) 5 U.S.C. 552(b) provides that the requirements of the FIOA do not apply to matters that are:

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

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

(3) Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

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

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

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

(7) Records or information compiled for law enforcement purposes, but only

to the extent that the production of such law enforcement records or information:

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

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

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

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful natural security intelligence investigation, information furnished by a confidential source;

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

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

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

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

(b) GSA will provide any reasonably segregable portion of a record to a requester after deletion of the portions that are exempt under this section. If GSA must delete information from a record before disclosing it, this information, and the reasons for withholding it, will be clearly described in the cover letter to the requester or in an attachment.

(c) GSA will invoke no exemption under this section to deny access to records that would be available pursuant to a request made under the Privacy Act of 1974 (5 U.S.C. 522a) and implementing regulations, 41 CFR part 105-64, or if disclosure would cause no demonstrable harm to any governmental or private interest.

(d) Whenever a request is made that involves access to records described in § 105-60.501(a)(7)(i) and the investigation or proceeding involves a possible violation of criminal law, and there is reason to believe that the subject of the investigation or proceeding is not aware of it, and disclosure of the

existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

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

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

Subpart 105-60.6—Production or Disclosure by Present or Former General Services Administration Employees in Response to Subpoenas or Similar Demands in Judicial or Administrative Proceedings

§ 105-60.601 Purpose and scope of subpart.

(a) By virtue of the authority vested in the Administrator of General Services by 5 U.S.C. 301 and 40 U.S.C. 486(c) this subpart establishes instructions and procedures to be followed by current and former employees of the General Services Administration in response to subpoenas or similar demands issued in judicial or administrative proceedings for production or disclosure of material or information obtained as part of the performance of a person's official duties or because of the person's official status. Nothing in these instructions applies to responses to subpoenas or demands issued by the Congress or in Federal grand jury proceedings.

(b) This subpart provides instructions regarding the internal operations of GSA and the conduct of its employees, and is not intended and does not, and may not, be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against GSA.

(c) These regulations provide for procedures and a systematic means by which GSA can evaluate whether it

should comply with a demand for official GSA information or whether applicable privileges or statutes provide a legitimate basis for withholding the demanded information. These regulations do not provide independent authority to withhold information. In proceedings to which GSA is a party, these regulations shall not be interpreted or applied to supersede or frustrate established rules of procedure applicable to the forum in which the matter is pending.

§ 105-60.602 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Material* means any document, record, file or data, regardless of the physical form or the media by or through that it is maintained or recorded, that was generated or acquired by a current or former GSA employee by reason of the performance of that person's official duties or because of the person's official status, or any other tangible item, e.g., personal property possessed or controlled by GSA.

(b) *Information* means any knowledge or facts contained in material, and any knowledge or facts acquired by current or former GSA employee as part of the performance of that person's official duties or because of that person's official status.

(c) *Demand* means any subpoena, order, or similar demand for the production or disclosure of material, information or testimony regarding such material or information, issued by a court or other authority in a judicial or administrative proceeding, excluding congressional subpoenas or demands in Federal Grand Jury proceedings, and served upon a present or former GSA employee.

(d) *Appropriate Authority* means the following officials who are delegated authority to approve or deny responses to demands for material, information or testimony:

(1) The Counsel to the Inspector General for material and information that is the responsibility of the GSA Office of Inspector General or testimony of current or former employees of the Office of the Inspector General;

(2) The Counsel to the GSA Board of Contract Appeals for material and information that is the responsibility of the Board of Contract Appeals or testimony of current or former Board of Contract Appeals employees;

(3) The GSA General Counsel, Associate General Counsel(s) or Regional Counsel(s) for all material, information, or testimony not covered by paragraphs (d)(1) and (2) of this section.

§ 105-60.603 Acceptance of service of a subpoena duces tecum or other legal demand on behalf of the General Services Administration.

(a) The Administrator of General Services Administration and the following officials are the only GSA personnel authorized to accept service of a subpoena or other legal demand on behalf of GSA: The GSA General Counsel and Associate General Counsel(s) and, with respect to material or information that is the responsibility of a regional office, the Regional Administrator and the Regional Counsel. The Inspector General and Counsel to the Inspector General, as well as the Chairman and Vice Chairman of the Board of Contract Appeals, are authorized to accept service for material or information which is the responsibility of their respective organizations.

(b) A present or former GSA employee not authorized to accept service of a subpoena or other demand for material, information or testimony obtained in an official capacity shall respectfully inform the process server that he or she is not authorized to accept service on behalf of GSA and refer the process server to an appropriate official listed in paragraph (a) of this section.

(c) A Regional Administrator or Regional Counsel shall notify the General Counsel of a demand that may raise policy concerns or affect multiple regions.

§ 105-60.604 Production or disclosure prohibited unless approved by the Appropriate Authority.

No current or former GSA employee shall, in response to a demand, produce any material or disclose, through testimony or other means, any information covered by this subpart, without prior approval of the Appropriate Authority.

§ 105-60.605 Procedure in the event of a demand for production or disclosure.

(a) Whenever service of demand is attempted in person or via mail upon a current or former GSA employee for the production of material or the disclosure of information covered by this subpart, the employee or former employee shall immediately notify the Appropriate Authority through his or her supervisor or his or her former service, staff, or regional office. The supervisor shall notify the Appropriate Authority. For current or former employees of the Office of Inspector General located in regional offices, Counsel to the Inspector General shall be notified through the immediate supervisor or former employing field office.

(b) The Appropriate Authority shall require that the party seeking material or testimony provide the Appropriate Authority with an affidavit, declaration, statement, and/or a plan as described in paragraphs (c)(1), (2) and (3) of this section if not included with or described in the demand. The Appropriate Authority may in his or her discretion waive this requirement for a demand arising out of proceedings to which GSA or the United States is a party and in proceedings in which the United States or GSA is not a party but has an interest such as so-called Qui Tam proceedings, or where the Appropriate Authority has independent knowledge of facts relevant to the matter upon which an informed determination can be made. Any waiver will be coordinated with the United States Department of Justice (DOJ) in proceedings in which GSA, its current or former employees, or the United States are represented by DOJ.

(c)(1) Oral testimony. If oral testimony is sought by a demand, the Appropriate Authority shall require the party seeking the testimony or the party's attorney to provide, by affidavit or other statement, a detailed summary of the testimony sought and its relevance to the proceedings. Any authorization for the testimony of a current or former GSA employee shall be limited to the scope of the demand as summarized in such statement or affidavit.

(2) Production of material. When information other than oral testimony is sought by a demand, the Appropriate Authority shall require the party seeking production or the party's attorney to provide a detailed summary, by affidavit or other statement, of the information sought and its relevance to the proceeding.

(3) The Appropriate Authority may require a plan or other information from the party seeking testimony or production of material of all demands reasonably foreseeable, including, but not limited to, names of all current and former GSA and employees from whom testimony or production is or will likely be sought, areas of inquiry, for current employees the length of time away from duty anticipated, and identification of documents to be used in each deposition or other testimony, where appropriate.

(d) The Appropriate Authority will notify the current or former employee, the appropriate supervisor, and such other persons as circumstances may warrant, whether disclosure or production is authorized, and of any conditions or limitations to disclosure or production.

(e) Factors to be considered by the Appropriate Authority in responding to demands:

(1) Whether disclosure or production is appropriate under rules of procedure governing the proceeding out of which the demand arose;

(2) The relevance of the testimony or documents to the proceedings;

(3) The impact of the relevant substantive law concerning applicable privileges recognized by statute, common law; judicial interpretation or similar authority;

(4) The information provided by the issuer of the demand in response to requests by the Appropriate Authority pursuant to paragraphs (b) and (c) of this section;

(5) The steps taken by the issuer of the demand to minimize the burden of disclosure or production on GSA, including but not limited to willingness to accept authenticated copies of material in lieu of personal appearance by GSA employees;

(6) The impact on pending or potential litigation involving GSA or the United States as a party;

(7) In consultation with the head of the GSA organizational component affected, the burden to GSA that disclosure or production would entail; and

(8) Any additional factors unique to a particular demand or proceeding.

(f) Examples of situations in which authority for production will likely be denied by the Appropriate Authority are those in which production would:

(1) Violate a statute or a specific regulation;

(2) Reveal classified information, unless appropriately declassified by the originating agency;

(3) Reveal a confidential source or informant, unless the investigative agency and the source or informant consent;

(4) Reveal records or information compiled for law enforcement purposes that would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would be impaired;

(5) Reveal trade secrets or commercial or financial information that is privileged or confidential without prior consultation with the person from whom it was obtained; or

(6) Be contrary to a recognized privilege.

(g) The Appropriate Authority's determination, including any reasons for denial or limitations on disclosure or production, shall be made as expeditiously as possible and shall be communicated in writing to the issuer

of the demand and appropriate current or former GSA employee(s). In proceedings in which GSA, its current or former employees, or the United States are represented by DOJ the determination shall be coordinated with DOJ, which may respond to the issuer of the subpoenas or demand in lieu of the Appropriate Authority.

§ 105–60.606 Procedure where response to demand is required prior to receiving instructions.

(a) If a response to a demand is required before the Appropriate Authority's decision is issued, a GSA attorney designated by the Appropriate Authority for the purpose shall appear with the employee or former employee upon whom the demand has been made, and shall furnish the judicial or other authority with a copy of the instructions contained in this subpart. The attorney shall inform the court or other authority that the demand has been or is being referred for the prompt consideration by the Appropriate Authority. The attorney shall respectfully request the judicial or administrative authority to stay the demand pending receipt of the requested instructions.

(b) The designated GSA attorney shall coordinate GSA's response with DOJ's Civil Division or the relevant Office of the United States Attorney and may request that a DOJ or Assistant United States Attorney appear with the employee in addition to or in lieu of a designated GSA attorney.

(c) If an immediate demand for production or disclosure is made in circumstances which preclude the appearance of a GSA or DOJ attorney on the behalf of the employee or the former employee, the employee or former employee shall respectfully make a request to the demanding authority for sufficient time to obtain advice of counsel.

§ 105–60.607 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 105–60.606 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions by the Appropriate Authority not to produce the material or disclosure the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply, citing these instructions and the decision of the United States Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 105–60.608 Fees, expenses, and costs.

(a) In consultation with the Appropriate Authority, a current employee who appears as a witness pursuant to a demand shall ensure that he or she receives all fees and expenses, including travel expenses, to which witnesses are entitled pursuant to rules applicable to the judicial or administrative proceedings out of which the demand arose.

(b) Witness fees and reimbursement for expenses received by a GSA employee shall be disposed of in accordance with rules applicable to Federal employees in effect at the time.

(c) Reimbursement to the GSA for costs associated with producing material pursuant to a demand shall be determined in accordance with rules applicable to the proceedings out of which the demand arose.

Dated: October 28, 1997.

David J. Barram,

Administrator.

[FR Doc. 97–29061 Filed 11–5–97; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 21 and 74

[MM Docket No. 97–217; FCC 97–360]

MDS and ITFS Two-Way Transmissions

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this Notice of Proposed Rulemaking (“NPRM”), the Commission seeks comment on the proposed amendment of its rules to enable Multipoint Distribution Service (“MDS”) and Instructional Television Fixed Service (“ITFS”) licensees to engage in fixed two-way transmissions. The Commission seeks comment on its proposals to enhance the flexibility of MDS and ITFS operations through facilitated use of response stations, use of booster stations with program origination capability in a cellular configuration, and use of variable bandwidth (“subchanneling” or “superchanneling”). Comment is sought regarding the technical, procedural and economic effects of implementing the proposed rule changes.

DATES: Comments must be filed on or before December 9, 1997, and reply comments on or before January 8, 1998. Written comments by the public on the Initial Regulatory Flexibility Analysis are due December 9, 1997.

ADDRESSES: Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Michael J. Jacobs, (202) 418–7066 or Dave Roberts, (202) 418–1600, Video Services Division, Mass Media Bureau.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rulemaking*, MM Docket No. 97–217, adopted October 7, 1997, and released October 10, 1997. The full text of this *NPRM* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, N.W., Washington, D.C. 20036.

Synopsis of Notice of Proposed Rulemaking on MDS and ITFS Two-Way Transmissions

1. This *NPRM* was issued in response to a petition for rulemaking filed by a group of 111 educators and participants in the wireless cable industry (collectively, “Petitioners”), comprised of MDS and ITFS licensees, wireless cable operators, equipment manufacturers, and industry consultants and associations. In this proceeding, Petitioners are asking that we implement a series of technical rule changes that would give MDS and ITFS licensees the needed flexibility to fully exploit digital technology in delivering two-way communications services. Currently, MDS and ITFS licensees are authorized to use digital technology in order to increase the number of usable one-way channels available to them, leased ITFS frequencies and MDS channels may be used for asymmetrical high speed digital data applications so long as such usage complies with the Commission's technical rules and its declaratory ruling on the use of digital modulation by MDS and ITFS stations (“*Digital Declaratory Ruling*,” 11 FCC Rcd 18839 (1996)), and MDS licensees have been permitted to provide two-way service on a limited basis. While 125 kHz response channels are currently allocated for use in association with most MDS and ITFS stations, Petitioners anticipate that many MDS and ITFS licensees and wireless cable operators engaging in two-way transmissions will require more capacity for return paths than is available through such 125 kHz channels. Moreover, because these 125 kHz response channels must be individually licensed under the