

ORDER

1270.1

FREEDOM OF INFORMATION ACT PROGRAM



June 13, 2000

DEPARTMENT OF TRANSPORTATION

FEDERAL AVIATION ADMINISTRATION

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FOREWORD

This order provides for the administration of the Freedom of Information Act (FOIA), 5 U.S.C. 552, within the Federal Aviation Administration (FAA). It states the authorities, requirements, and responsibilities for administering the FOIA.

This order provides direction and guidance for the administration of the FOIA at all levels within the FAA. The heads of offices, services, regions, and centers are required to designate a FOIA Coordinator. Procedures and administrative questions should be referred to the National Freedom of Information Act Staff (ARC-40) in the Office of the Assistant Administrator for Region and Center Operations.

The contents of this order have been prepared on an agencywide basis; therefore, individual organizations may supplement this broad coverage with specific guidelines and instructions specific

to their needs. Supplementation that may have agencywide application should be coordinated with ARC-40.

Signed by:

Jane F. Garvey
Administrator

TABLE OF CONTENTS

CHAPTER 1. GENERAL

1. Purpose
2. Distribution
3. Cancellation
4. Background
5. Explanation of Changes
6. Related Publications
7. Definitions
8. Forms
9. Reports
10. Supplements
11. Authority to Issue Changes to this Order
- 12.-19. Reserved

CHAPTER 2. RESPONSIBILITIES AND DELEGATIONS OF AUTHORITY

20. Responsibilities
21. Delegations of Authority
- 22.-29. Reserved

CHAPTER 3. DISCLOSURE AND ACCESS TO FAA RECORDS

30. FOIA Request Requirements

31. Guidelines for Scoping the Request

32. Time Limits

33. Search

34. FAA FOIA Release Policy and Duty to Segregate

35. Application of Exemptions

36. Discretionary Disclosure

37. FOIA and Privacy Act Interface

38.-39. Reserved

CHAPTER 4. FEES AND FEE WAIVERS

40. General Statement

41. Category of Requester

42. Services For Which Fees Are Charged

43. Aggregation

44. Delinquent Fee Payment

45. Fee Levels/Requester Notification

46. Fee Waiver/Fee Reduction

47. Fee Payment

48.-49. Reserved

CHAPTER 5. DECISION LETTERS

50. Full Disclosure Letter

51. Denial/Partial Denial Letter

52. No Records Determination Letter

53. Documentation

54. Appeals

55.-59. Reserved

CHAPTER 6. REPORTS

60. FOIA Annual Report

61. Overdue Report

62. Status Report

63.-69. Reserved

CHAPTER 7. DOCUMENT INSPECTION FACILITIES

70. Document Inspection Facilities

71. Types of Documents Available

72. FOIA Reading Room

73.-79. Reserved

APPENDIX 1. DOT FINAL RULE, 49 CFR PART 7, PUBLIC AVAILABILITY OF INFORMATION; ELECTRONIC FOIA AMENDMENT

APPENDIX 2. FOIA CHECKLIST/FEE WORKSHEET

CHAPTER 1. GENERAL

1. PURPOSE. This order provides guidance governing processing of requests for agency records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and implements the Department of Transportation (DOT) regulations found in part 7, title 49 of the Code of Federal Regulations (CFR). **Note: For the purposes of this order, FOIA (pronounced "foi-ya") is used throughout as an acronym, rather than an abbreviation.**

2. DISTRIBUTION. This order is being distributed to the branch level in Washington headquarters, regions, and centers and field offices and facilities.

3. CANCELLATION. Order 1200.23, Public Availability of Information, dated November 1, 1977, is canceled.

4. BACKGROUND. The FOIA, enacted in 1966, established a statutory right of access to agency records, unless those records are specifically exempted from disclosure or specifically excluded in the FOIA. In implementing the FOIA, it is the policy of the DOT to make information available to the public to the greatest

extent possible in keeping with the spirit of the statute. Each officer and employee of the Federal Aviation Administration (FAA) is directed to cooperate fully by making records available to the public in a timely manner and to the fullest extent consistent with this policy.

5. EXPLANATION OF CHANGES. This revision:

- a. Changes the title of the order to the Freedom of Information Act Program.
- b. Changes the subject classification series of the order from 1200 to 1270.
- c. Updates the organizational responsibility with the Freedom of Information Act function being transferred from the Office of Public Affairs to the Office of the Assistant Administrator for Region and Center Operations. The National Freedom of Information Act Staff performs the FOIA function.
- d. Incorporates the delegations of authority to release records, to withhold records, and to make "no records" determinations.
- e. Requires identification of the exemption relied on to be placed on any redacted document so the requester is notified of which exemption applies to each redaction.
- f. Adds definitions.
- g. Replaces the former Chapter 3, Release of Information by FAA Employees, with a new Chapter 3, Disclosure and Access to FAA Records, for consistency with internal policies and procedures as well as with Departmental regulations, Executive Orders, Department of Justice policy, and case law.
- h. Adds Chapter 4, Fees and Fee Waivers, to explain the categories of requesters, chargeable services, and fee reductions or waivers.
- i. Adds Chapter 5, Decision Letters, to address preparation of FOIA responses.
- j. Adds Chapter 6, Reports, to address reporting requirements.
- k. Adds Chapter 7, Document Inspection Facilities, to address the document inspection facilities, the type of documents available at these facilities, and the FAA FOIA Reading Room.
- l. Adds DOT final rule, 49 CFR Part 7, Public Availability of Information; Electronic FOIA Amendment, in Appendix 1.
- m. Adds Appendix 2, FOIA Checklist/Fee Worksheet.

6. RELATED PUBLICATIONS. The latest edition of the following publications are

to be used in conjunction with this order in the implementation of the FOIA program:

- a. FAA Order 1280.1, Protecting Privacy of Information About Individuals.
- b. FAA Order 1600.2, Safeguarding Controls and Procedures for Classified National Security Information and Sensitive Unclassified Information.
- c. FAA Order 7210.3, Facility Operation and Administration.
- d. FAA Order 8020.11, Aircraft Accident and Incident Notification, Investigation, and Reporting.
- e. FAA Order 8120.10, Suspected Unapproved Parts Program.
- f. 14 CFR Part 107, Sensitive Security Information.
- g. Finding the DOT Records You Want (Internet address:

<http://www.dot.gov/ost/ogc/subject/consumer/foia/index.html>).

7. DEFINITIONS. These definitions apply to carrying out the intent of the FOIA.

a. Adequate searches are conducted in a manner reasonably calculated to locate responsive documents maintained in a paper or electronic form or format by agency personnel familiar with the subject matter and with the likely location of responsive documents. A search should be conducted in all places where responsive records would likely be found. Electronic searches should be conducted in a manner that would not significantly interfere with the operation of the agency's automated information system.

b. Agency records are existing documents that are:

- (1) Created or obtained by the agency; and
- (2) Under the agency's control at the time of the FOIA request.

c. Program office is any office in headquarters, regions, or centers that has records responsive to the FOIA request.

d. Perfected request is a FOIA request for records which adequately describes the records sought, which has been assigned to and received by the FOIA office of the agency or agency components in possession of the records, and for which there is no remaining question about the payment of applicable fees.

e. Records include any existing writing, drawing, map, recording, tape, film, photograph, or other documentary material used to preserve information by the agency. Records also include existing documentary material stored in an electronic form or format.

f. Use of Shall, Must, Should, and May.

(1) Shall and/or must in the second or third person means that an action is mandatory/required. Shall not or must not means that the action is

prohibited.

(2) Should means that an action is desirable or preferred but not mandatory.

(3) May means an action is permissive.

8. FORMS. FOIA Checklist/Fee Worksheet (FAA Form 1270-1). Paragraph 53b explains the checklist and fee worksheet accompanying each FOIA request. FAA Form 1270-1 is available electronically and is not stocked. Contact your FOIA coordinator or ARC-40 for copies of the form.

9. REPORTS. The following reports are used in conjunction with the FOIA program.

a. FOIA Annual Report. See paragraph 60 for more detail.

b. Overdue Report. See paragraph 61 for more detail.

c. Status Report. See paragraph 62 for more detail.

10. SUPPLEMENTS. Heads of offices, services, regions, and centers are authorized to issue supplements to implement this order. A copy of each supplement should be furnished to the National Freedom of Information Act Staff (ARC-40). Additionally, supplements which may have agencywide application should be coordinated with ARC-40.

11. AUTHORITY TO ISSUE CHANGES TO THIS ORDER. The Assistant Administrator for Region and Center Operations may issue changes to this order. The Administrator reserves the authority to approve changes that establish policy, delegate authority, or assign responsibility.

12.-19. RESERVED.

CHAPTER 2. RESPONSIBILITIES AND DELEGATIONS OF AUTHORITY

20. RESPONSIBILITIES.

a. The National Freedom of Information Act Staff (ARC-40) administers the FOIA program throughout the agency. The staff:

(1) Develops national policies, guidance, and procedures to conduct the FAA FOIA program.

- (2) Provides training to FAA managers, coordinators, and program personnel who respond to FOIA requests.
 - (3) Assigns and tracks FOIA requests received in Washington headquarters.
 - (4) Identifies responsive organizations and, when appropriate, assigns a lead organization to coordinate the process when responding to a FOIA request that crosses organizational lines of business.
 - (5) Monitors and reviews certain responses (i.e., those involving unique or complex issues) to FOIA requests received in the Washington headquarters.
 - (6) Coordinates, monitors, and/or reviews certain responses to FOIA requests received at FAA organizations located outside the Washington headquarters.
 - (7) Determines whether responses to a FOIA request received in headquarters will be consolidated or separate.
 - (8) Documents and analyzes the operation of the FOIA program within the agency.
 - (9) Reviews all partial no record and no record determinations made at the Washington headquarters.
 - (10) Logs and tracks all appeals of initial determination.
 - (11) Gathers all information necessary to process appeals of initial determinations.
 - (12) Processes no records and fee issue appeals.
 - (13) Remands to the service, office, region, or center certain appeals of determinations that are deemed to warrant review and reconsideration by those organizations.
 - (14) Determines whether requests to expedite appeals should be granted.
 - (15) Determines the fee category of a requester for requests received in headquarters when the category is not provided in the FOIA request and more than one program office has responsive records.
- b.** The Assistant Administrator for Region and Center Operations (ARC-1) has been delegated authority to make final agency determinations regarding FOIA appeals, unless ARC-1 made the initial determination, in which case the final agency determination shall be made by the Administrator or an official designated by the Administrator.
- c.** The General Law Branch in the Office of the Chief Counsel (AGC-110) provides legal advice and counsel on issues relating to the FOIA. AGC-110 provides legal

review and concurrence for all partial denials, full denials, partial no records, and no records determinations for headquarters FOIA requests. It also provides legal review and concurrence for all appeal determinations.

d. The regional and center counsels provide legal assistance to division managers, reviewing officials, FOIA coordinators, and other employees and officers within their respective geographic or organizational jurisdictions. They also provide legal review and concurrence for all partial denials, full denials, partial no records, and no records determinations for region and center FOIA requests.

e. The heads of offices and services, regional administrators, and directors of centers are responsible for determining both the releasability of records under their purview and withholding records pursuant to properly applied exemptions or exclusions. In the case of the regions, the regional administrator's authority covers records for all organizations resident in the region including those not under his/her direct operational line of authority (straightline). Additionally, they are responsible for designating a FOIA coordinator who has technical or subject matter knowledge about the organization, and for notifying ARC-40 of that designation. These officials are accountable for ensuring that employees at all levels responsible for FOIA's, including the FOIA coordinator, receive appropriate FOIA training.

f. The responsibilities for the FOIA coordinators may include, but are not limited to:

- (1) Acting as the focal point between their organization and ARC-40.
- (2) Assigning and controlling FOIA requests with appropriate due dates to elements within their organization possessing records responsive to the requests. The FOIA coordinator shall include with each FOIA request a copy of FAA Form 1270-1, FOIA Checklist/Fee Worksheet, to be completed by the person preparing the FOIA response.
- (3) Following up on the status of outstanding FOIA requests.
- (4) Designating the lead organization or element for coordinating and processing FOIA requests when the requested records reside in more than one organizational element and consolidated approval is warranted.
- (5) Advising program offices regarding the FOIA process; e.g., scoping the FOIA requests, establishing search parameters, addressing fees, and assisting in the decision process regarding the applicability of the FOIA to withholding and/or disclosing records.
- (6) Reviewing for accuracy and completeness the FOIA response, checklist, and fee worksheet and coordinating on FOIA responses prior to signature. The FOIA coordinator shall ensure that there is adequate documentation both for materials

released and withheld, and adequate search documentation for no records or partial no record responses.

(7) Providing ARC-40, upon notification of an appeal of a determination, with the withheld materials for denial/partial denial responses or search documentation for "no records" responses within 7 working days.

(8) Compiling and submitting to ARC-40, upon request, the FOIA Annual Report information affecting their organization in accordance with established instructions and deadlines.

(9) Providing copies of no records, denials, and partial denial determination letters to AGC-110 and ARC-40.

(10) Providing copies of news media FOIA requests to the appropriate public affairs office and ARC-40.

g. FOIA respondents are responsible for answering and processing FOIA requests under established FOIA policies, procedures, and timelines. When more than one program office has responsive records, responding organizations are encouraged to coordinate their efforts to ensure consistency in the agency response.

21. DELEGATIONS OF AUTHORITY.

a. Release of FAA Records. Authority to release FAA records requested under the FOIA is vested in the heads of offices and services, regional administrators, and directors of the Mike Monroney Aeronautical Center (AMC) and the William J. Hughes Technical Center (ACT). This authority may only be redelegated to heads of divisions.

b. Denial Authority. Authority to withhold FAA records or portions thereof and to make "no records" determinations is vested in the heads of offices and services, regional administrators, and directors of AMC and ACT. This signature authority may not be delegated.

22.-29. RESERVED.

CHAPTER 3. DISCLOSURE AND ACCESS TO FAA RECORDS

30. FOIA REQUEST REQUIREMENTS.

a. A request for agency records may be made by any person, which encompasses individuals (including foreign citizens), partnerships, corporations, associations, and foreign and domestic governments. "Person" does not, however, include

Federal agencies.

b. A request for agency records shall meet the following provisions:

1. The request must be made in writing.
2. The request should indicate that it is being made under FOIA.
3. The envelope in which the request is mailed should be marked "FOIA."
4. The request should be addressed to the appropriate FOIA office. A current listing of FAA FOIA offices is available on the Internet on the FAA FOIA Home Page, accessible from the FAA Home Page.
5. The request should state the format (e.g., paper, microfiche, computer diskette, etc.) in which the information is sought, if the requester has a preference.
6. Each FOIA request shall specify the fee category of the requester (commercial, media, educational or noncommercial scientific institution, media, or other).
7. Each FOIA request shall state the maximum amount of fees that the requester is willing to pay.
8. Each FOIA request including a fee waiver shall address how the requester believes each of the criteria for fee waiver (see paragraph 46) is met.
9. Each request should describe the particular record to the fullest extent possible. The request should describe the subject matter of the record, and, if known, indicate the date when it was made, the place where it was made, and the person or office that made it.

c. The time for responding to requests shall not begin to run until the FOIA request is perfected. A perfected request is a FOIA request for records which describes the records sought, which has been assigned to and received by the FOIA office of the agency or agency components in possession of the records. In addition, the time for responding to requests shall not begin to run:

- (1) If the requester has not sufficiently identified the fee category applicable to the request;
- (2) If a requester has not stated a willingness to pay fees as high as anticipated by the Department of Transportation (DOT); or
- (3) If a fee waiver request is denied and the requester has not included an alternative statement of willingness to pay fees as high as anticipated by DOT; or
- (4) If a fee waiver request does not address fee waiver criteria.

d. A request provides a right of access only to records existing when the request is made. It does not allow access to records prospectively. A request may not require that new records be created in response to the request.

31. GUIDELINES FOR SCOPING THE REQUEST. A FOIA request should contain a sufficient description of the records being sought to enable an agency employee who is familiar with the subject area to locate the records with a reasonable amount of effort.

- a. **Clarifying the Request.** If the request appears too broad or vague, the program office may contact the requester to clarify the description of the records being sought or to narrow the scope of the request.
- b. **Identifying Responsive Records.** The agency is required to conduct a search reasonably calculated to locate all records responsive to a FOIA request.
- c. **Coordinating with Other Offices with Responsive Records.** When other program offices are believed to have responsive records, the lead program office should contact them to confirm the existence of records, and then notify the appropriate FOIA coordinator. The coordinators may consolidate the responses.

32. TIME LIMITS. A determination is required within 20 working days after a FOIA request is received by the appropriate program office and determined to be a perfected FOIA request. The appropriate FOIA coordinator assigns to each FOIA request a due date that is within the regulatory time limit.

a. Extensions. The program office may extend the initial time limit for an additional 10 working days if there are unusual circumstances. The extension must be by written notice to the person making the request. "Unusual circumstances" means a need to:

- (1) Search for and collect records from field facilities or other establishments that are separate from the office processing the request;
- (2) Examine a voluminous amount of records required by the request; or
- (3) Consult with another agency or DOT component having substantial subject matter interest in the records.

b. Negotiations for Extension of Time. When it appears that the response due date cannot be met, the program office should:

- (1) Contact the requester by telephone, or if no telephone number is available, by letter;
- (2) Explain the reasons for the unusual circumstance; and
- (3) Provide the requester an opportunity to:
 - a. modify the scope of the request so that it may be processed within the initial timeframe; or

b. arrange a new due date for processing the request.

(4) Follow up with a letter confirming the conversation and provide a copy of the letter to the appropriate FOIA coordinator. If the requester refuses to reasonably modify the request or arrange a new due date, the due date for response may not be extended. However, the confirming letter should provide the estimated completion time for response.

c. Expedited Processing. Requests may be expedited at the time of the initial request or at a later time. Requests shall be given expedited treatment only upon a showing by the requester of a compelling need based on imminent threat to life or physical safety to an individual, or when a requester primarily engaged in disseminating information shows an urgency to inform the public of an actual or alleged FAA activity.

(1) A requester who is seeking expedited processing must submit a statement, certified to be true and correct to his or her knowledge and belief, explaining in detail the basis for requesting expedited processing.

(2) Media representatives must also establish a particular urgency to inform the public about the activity involved in the request--beyond the public's right generally to know about government activity.

(3) The program office must decide whether to grant an expedited processing request and notify the requester of that decision within 10 working days of receipt of a request to expedite. If the request to expedite is granted, the request will be processed as soon as practicable. In the event of a denial, the notification should include information indicating that the requester may appeal to the Assistant Administrator for Region and Center Operations within 5 working days of receipt of the letter.

(4) The program office is responsible for making the decision to grant or deny an expedited processing request. For media requests, any decision about expediting a FOIA request should be coordinated with their Office of Public Affairs staff member.

d. Estimating Fees. Fees should be estimated *before* starting to process a request. Any fee issue should be resolved before any substantive work is done on the request. (For additional information, refer to Chapter 4, Fees and Fee Waivers.)

33. SEARCH. The agency has a duty to make a "good faith" effort to identify responsive records.

a. Reasonable Search. An adequate search is conducted in a manner reasonably calculated to locate responsive documents by agency personnel familiar with the subject matter and with the likely location of responsive

documents. The agency has no obligation either to create records or go outside the agency to obtain them. When no responsive records can be located, the program office should document the name of the person(s) who conducted the search, the files that were searched manually or electronically, the reason the files were searched, and the identity of any other offices that might have the requested records.

- b. Official vs. Unofficial Records.** The FOIA makes no distinction between "official" and "unofficial" records. The FOIA applies to "agency records," which means records under the possession and control of the agency at the time of the FOIA request.
- c. FOIA Transfers/Coordination with Other Offices.** A program office responding to a FOIA request should consider whether other offices have documents responsive to the request and, if appropriate, consult with those offices. When requested records are located in another FAA program office or in another DOT modal administration, the program office should notify the FOIA coordinator to ensure all agency records are gathered from the appropriate program office or DOT modal administration with responsibility for the requested records. If a request, or portion thereof, is referred to another program office, the FOIA coordinator shall advise the requester in writing of the forwarding action, indicate a point of contact if possible, and provide ARC-40 an information/courtesy copy, when appropriate, of the forwarding correspondence.

d. Referrals.

(1) When the FAA has possession of responsive records that were created by another Federal agency, the FAA shall refer those records to the originating agency for a release determination. The referral package shall include a copy of the incoming request and the responsive records. The referral letter should request the originating agency to provide the FAA with a copy of its response to the requester. The program office will advise the requester in writing of the referral action, with a point of contact if possible, and provide ARC-40, when appropriate, an information/courtesy copy of the forwarding correspondence.

(2) A request for Federal records that the FAA does not maintain may still require a formal no records response. A respondent may contact the requester by telephone, to advise of the appropriate Federal source for the records, if known, and negotiate withdrawal of the request. If the requester still wants an FAA search for the records, then the respondent is obliged to search the files most likely to have the records and follow procedures for a standard no records response.

e. Consultation. If agency records contain information that may be of substantial concern to another Federal agency, State or local government, or a foreign government, the responding program office shall consult with that organization before any determination is made regarding release. The program office shall maintain documentation of the consultation.

f. Federal Records Center. If a FOIA request is received that involves FAA agency records stored at a Federal Records Center, the program office is obligated to retrieve the records from the Federal Records Center.

g. Archives. Agency records that have been released to the National Archives and Records Administration (NARA) are no longer FAA records.

34. FAA FOIA RELEASE POLICY AND DUTY TO SEGREGATE. Agency records

possessed by the FAA are subject to the Act and must be made available to the public on request, unless specifically exempted or excluded by the FOIA. Reasonably segregable information will be provided from records which contain information that may be withheld. At the request of the FOIA requester and **after review by the program office**, releasable records may be made available for inspection and copying.

35. APPLICATION OF EXEMPTIONS.

a. There are nine exemptions under the FOIA which permit an agency to withhold records. The appropriate program office must review each requested record to determine if the records or any reasonably segregable portion of the records fall within one of the nine exemptions. (See 5 U.S.C. 552 for a complete description of the exemptions.)

(1) Exemption 1: Classified Information. Exemption 1 protects from disclosure national security information concerning the national defense or foreign policy, provided it has been properly classified in accordance with the substantive and procedural requirements of Executive Order 12958, Classified National Security Information.

(2) Exemption 2: Internal Matters. Exemption 2 protects from disclosure records which relate to internal personnel rules and practices of the agency. The Exemption protects internal documents, the disclosure of which would risk circumvention of a statute or agency regulation, or impede the effectiveness of an agency's activities.

(3) Exemption 3: Information Protected by Other Statutes. Exemption 3 incorporates the disclosure prohibitions that are contained in other statutes. A statute must require withholding without permitting any discretion, or establish particular criteria for withholding or refer to particular types of matter to be withheld. (**Note:** Neither the Privacy Act nor the Government in The Sunshine Act qualify as exemption 3 statutes.)

(4) Exemption 4: Business or Trade Information. This Exemption protects trade secrets and commercial or financial information obtained from a person that is privileged or confidential.

(a) A trade secret is a secret, commercially valuable plan, formula, process, or device that is used for making, preparing, compounding, or processing trade commodities and that can be said to be the end product of either innovation or substantial effort. A direct relationship between the trade secret and the productive process is required.

(b) Commercial or financial information obtained from a person that is privileged or confidential. Examples of items regarded as commercial or financial information include: business sales statistics; research data; technical designs; customer and supplier lists; profit and loss data; overhead and operating costs; and information on financial condition.

(c) Submitter Notice: Executive Order 12600, Predisclosure Notification Procedures for Confidential Commercial Information, directs agencies to establish procedures to notify in writing submitters of confidential commercial information whenever an agency "determines that it may be required to disclose" such information under the FOIA. Once submitters are notified in writing, they must be given a reasonable period of time to object to disclosure of any of the requested information. At the same time, the requester is given notification that the submitter is being provided the opportunity to comment. Executive Order 12600 also requires that agencies give careful consideration to the submitters' objections and provide them with a written statement explaining why any such objections are not sustained.

(5) Exemption 5: Privileged Information. Exemption 5 protects inter-agency or intra-agency memoranda or letters which would not be available by law to a party in litigation with the agency. The three most frequently invoked privileges are the deliberative process, the attorney work-product and the attorney-client product.

(a) The purpose of the deliberative process privilege is to prevent injury to the quality of agency decisions. Records qualify for withholding if they meet the following criteria:

1 The records are intra-agency or inter-agency documents, meaning they were generated by the agency or, in limited case, pursuant to agency initiative and are directly tied to the agency's decisionmaking process.

2 The records are predecisional in nature, meaning they precede an identifiable agency decision. Final agency decision or documents implementing a final agency decision are not predecisional.

3 The records, or portions thereof, are deliberative in nature, meaning that they express an advisory opinion, recommendation, or advice on a legal matter, policy matter, or other significant matters under agency consideration. Strictly factual information normally does not qualify for protection because it is not deliberative.

(b) The attorney work-product privilege protects documents and other memoranda

prepared by an attorney in contemplation of litigation.

(c) The attorney-client privilege protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice.

(6) Exemption 6: Personal Privacy. Exemption 6 protects information in personnel, medical, or similar files, the disclosure of which would "constitute a clearly unwarranted invasion of privacy." The threshold requirement is "personnel file, medical file, or similar file," which includes any information that applies to a particular individual. This exemption cannot be invoked to withhold from a requester information pertaining only to the requester. To determine whether release of information constitutes a clearly unwarranted invasion of privacy, the individual privacy interest at stake must be balanced against the public interest in disclosure.

(a) The first step is to determine whether the subject of the information has a privacy interest in the information.

(b) If a privacy interest exists, then, determine whether there is a qualifying "public interest" in disclosure. "Public interest" requires that disclosure would inform the public about how the agency is performing its statutory duties, or "what the government is up to." Once both a privacy interest and a public interest have been identified, the two competing interests must be weighed against one another. In balancing these interests, the "clearly unwarranted" language of Exemption 6 weighs the scale in favor of disclosure. If the public benefit is weaker than the threat to privacy or nonexistent, the information should be withheld.

(7) Exemption 7: Law Enforcement Records. Exemption 7 applies to criminal, civil, and regulatory law enforcement records. Exemption 7 protects records or information compiled for law enforcement purposes, but only to the extent that the release of such law enforcement records or information would cause one of the "harms" specified in Exemption 7's six subparts.

(a) Exemption 7(A)—Authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."

(b) Exemption 7(B)—Protects "records or information compiled for law enforcement purposes, the disclosure of which would deprive a person of a right to a fair trial or an impartial adjudication."

(c) Exemption 7(C)—Provides protection for personal information in law enforcement records, the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.

(d) Exemption 7(D)—Provides protection for "records or information compiled for law enforcement purposes, which could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority, or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

(e) Exemption 7(E)—Affords protection to all law enforcement information which "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."

(f) Exemption 7(F)—Permits the withholding of information necessary to protect the physical safety of any individual when disclosure of information about him/or her could reasonably be expected to endanger his/or her life or physical safety.

(8) Exemption 8: Bank Records. Exemption 8 protects information that is 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.

(9) Exemption 9: Well Information. Exemption 9 protects geological and geophysical information and data, including maps, concerning wells.

b. Amount of Information Deleted. The Electronic Freedom of Information Act Amendments of 1996 added a provision to the FOIA law which stipulates that the volume of denied records be addressed in the response letter. It states in part: "In denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, unless providing such estimate would harm an interest protected by the exemption in subsection (b) pursuant to which the denial is made." 5 U.S.C. § 552 (a)(6)(F).

1. When respondents are denying whole records, they can indicate volume and type of record in the response letter in one of several ways, e.g., "5 draft reports and 1 memorandum under Exemption 5, a record of investigation under Exemption 6," or "223 pages under Exemption 5 and 8 pages under Exemption 6."
2. When respondents are partially denying records, and redactions are made using multiple exemptions, then it needs to be clear to the requester which exemption goes with each redaction. This is best done by noting the exemption number, e.g., "Exemption 6," at the place where the redaction is made. Occasionally, the response letter can

sufficiently indicate the nature of the redactions, e.g., "home addresses and telephone numbers at the top of each form were withheld under Exemption 6, and blocks 18-23 of each form were withheld under Exemption 5."

3. When redactions are made by computer or copier, wherever it is technically feasible, the amount of the information and the applicable exemption should be indicated at the place in the record where the deletion is made.

36. DISCRETIONARY DISCLOSURE. Agency components should consider voluntarily releasing records which otherwise qualify for exemption if disclosure would not cause the agency harm that the relevant FOIA exemption sought to avoid. Discretionary disclosures cannot be made for documents that qualify for withholding under Exemptions 1, 3, 4, and 6 or constitute Privacy Act records.

37. FOIA AND PRIVACY ACT INTERFACE.

a. The Privacy Act is a withholding statute. The Privacy Act applies to a collection of agency records about an individual that is maintained in a system of records and retrieved by the name of the individual or a personal identifier, such as a social security number.

b. The Privacy Act, 5 U.S.C. 552a (49 CFR part 10), with 12 narrow exceptions, generally prohibits an agency from disclosing any record contained in a system of records which is retrieved by an individual's name or other personal identifier without the written consent of that individual.

c. A third party request for information contained in a Privacy Act system of records should be processed under the FOIA procedures. If none of the FOIA exemptions are applicable, the requested information may be released.

d. When an individual submits a FOIA request for his/her own records that are contained solely in a Privacy Act system of records, it may be processed under the Privacy Act. When an individual requests his/her own records under both the FOIA and Privacy Act, the request should be processed under both Acts. The request is processed procedurally (i.e., timelines, fees, appeal process, etc.) under the Act that applies. For the whole request or portion of the request that is processed under the Privacy Act, follow guidance provided in FAA Order 1280.1, Protecting Privacy of Information About Individuals.

38.-39. RESERVED.

CHAPTER 4. FEES AND FEE WAIVERS

40. GENERAL STATEMENT. Assessment of fees is prescribed by regulation and the agency does not have the authority to arbitrarily waive or reduce the fees for

processing a FOIA request unless the *statutory* fee waiver requirements have been met (see 49 CFR § 7.44 (f)).

41. CATEGORY OF REQUESTER. Each FOIA request shall specify the fee category of the requester. There are four categories of requesters: commercial; educational or noncommercial scientific institutions; news media; and all other requesters. In assessing fees, the respondent must determine the category of the requester and the type of services that are rendered to the requester.

a. Commercial Requesters. These requesters seek information for a commercial, trade, or profit interest. Requesters that fall within this category have a use or purpose that furthers their commercial, trade, or profit interests or those of the person on whose behalf the request is being made. The requester shall be assessed all direct costs of searching for responsive records, reviewing for applicability of exemptions, and duplicating the records sought.

b. Educational or Noncommercial Scientific Institution Requesters.

(1) Educational requesters include various categories of schools, as well as institutions of higher learning and vocational education, which operate a program of scholarly research. The requester must show a use or purpose for scholarly research (i.e., schools, institutes of professional education). Students gathering data for research papers do not qualify as educational requesters.

(2) Noncommercial scientific requesters include any institution 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.

(3) Costs to these requesters shall be assessed for duplication only, excluding the first 100 pages of standard agency size (no larger than 8 1/2" x 14") paper copies.

c. Media Requesters. A representative of the news media is a 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. Media may include freelance journalists who can demonstrate a solid basis for expecting the information disclosed to be published by a news organization. Media requests may include information sought for enclosure in soft or hardback books or for distribution to electronic publishing services.

(1) Private libraries or private repositories of government records, or middlemen, such as information vendors or data brokers who request records for use by others, are excluded as media requesters.

(2) Costs shall be assessed for duplication only, excluding the first 100 pages of standard agency size (no larger than 8 1/2" x 14") paper copies.

d. Other Requesters. Requesters who do not fit into any of the categories in paragraph 41b. through 41d. shall be assessed costs for search and duplication, except the first 2 hours of search time and the first 100 pages of standard agency size (no larger than 8 1/2" x 14") paper copies.

42. SERVICES FOR WHICH FEES ARE CHARGED.

a. General. Processing fees are assessed for search, review, and duplication activities associated with a FOIA request. Fees are assessed differently depending on the category of the requester and the intended use of the information sought.

b. Search. Search fees are assessed only for the time it takes to locate responsive records and may be conducted manually or electronically, as the situation warrants. The agency can charge for search time even if it fails to locate any records responsive to the request or even if the records located are subsequently determined to be exempt from disclosure.

(1) Any time spent searching for responsive records that will be examined or inspected in the office by the requester shall be included in the fee charged to the extent allowed by the requester's fee category.

(2) When a search is conducted on a mainframe computer (e.g., automated flight service station (AFSS) or automated radar terminal system (ARTS II/III)), the fee charged to the requester shall combine the cost of operating the computer for the time directly attributable to searching for responsive records with the time expended by the operator/programmer according to their pay range (see paragraph 42d).

(3) The time spent by each individual involved with searching for responsive records shall be documented on the FOIA fee worksheet.

c. Review. Review fees are assessed for the time spent determining whether the requested records are exempt from mandatory disclosure.

(1) Responsive documents should be examined line by line to determine if any portion of any document is permitted to be withheld.

(2) Time spent resolving general legal or policy issues regarding the applicability of particular exemptions shall not be charged as review time to the requester, but may be added as an incremental cost. This time may be accounted for in the FOIA fee worksheet as an incremental cost not charged to the requester.

(3) The time spent by each individual involved with reviewing responsive records shall be documented on the FOIA fee worksheet.

d. Calculating Search Fees and Review Fees. The FAA's search fees and review fees are based on an hourly rate schedule established by DOT. The hourly

rate schedule is updated annually. Hourly rates are grouped into three pay ranges, based on FAA FG Grades or Pay Bands, depending on the responding program office's pay compensation system.

EMPLOYEE PAY RANGES		
Pay Range 1: FG-1 thru FG-8, or Pay Bands A thru F	Pay Range 2: FG-9 thru FG-14, or Pay Bands G thru J	Pay Range 3: FG-15 and above, or Pay Bands K thru L

The following options are provided to calculate the search fees and review fees for employees conducting manual or computer searches and reviewing records.

(1) **The FOIA National Tracking System.** The National Tracking System automatically calculates search fees and review fees if you provide: (1) fee category of requester; (2) pay range of employee(s) doing search and review; and (3) number of hours of search time and review time for each employee. This is the preferred option.

(2) **Manual calculations.** Based on the appropriate employee pay range, use the actual dollar rate provided by DOT, which includes the 16-percent overhead charge. The actual dollar rates are updated annually based on the Washington-Baltimore Federal White-Collar Pay Schedule. The updated actual dollar rates are provided to all FOIA coordinators.

MANUAL CALCULATIONS ONLY	
Employee Pay Range	DOT Actual Dollar Rate Based on Washington-Baltimore Federal White-Collar Pay Schedule (includes 16-percent overhead)
Pay Range 1	Actual DOT Dollar Rate* (GS-5, step 7 plus 16 percent)
Pay Range 2	Actual DOT Dollar Rate* (GS-12, step 7 plus 16 percent)
Pay Range 3	Actual DOT Dollar Rate* (GS-15, step 7 plus 16 percent)

(*CALCULATION: (Actual Dollar Rate) X (no. of hrs. of search time or of review time) = cost of search time or review time.)

e. Duplication.

(1) **Photocopying.** The standard fee for photocopying is \$.10 per page for paper that is no more than 8 1/2" x 14."

(2) **Computer Tapes/Printouts.** The standard fee for computer tapes or printouts is the actual direct cost for duplication (e.g., the cost of the tape).

(3) **Other Methods.** The fee for other methods of duplication, e.g., videos, color copies, is the actual expense incurred.

(4) **Air Traffic Tapes.** The fee for air traffic control tapes (cassette tape format) is \$30 per hour or portion thereof (i.e., one tape with 2 hours of recording = \$60; one tape with 30 minutes of recording = \$30; two tapes with 2 1/2 hours of recording = \$90). The fee for digital audio tape (DAT) format is \$25. In addition, a flat fee of \$30 will be charged for each *different* block of time requested, limited to the daily 24 hour period recorded on the facility's master DAT. For example, although a request for one block of time (0900-0900) is a total of 24 hours, it is spread over a 2-day period. Therefore, such a request would be considered as two separate blocks of time (\$60), plus the DAT format (\$25), for a total fee of \$85.

f. Special Services. The fee for other special services asked for by the requester, such as overnight mail, is the actual cost of the service. The fee for certified true copies is \$4 with a seal and \$2 without a seal.

g. Incremental Costs. Costs to the agency in processing a request that are not borne by the requester are considered incremental costs. These costs include all the search, review, and duplication costs not assessed to the requester. (**Note:** Section D of the FOIA fee worksheet is an optional block to address other incurred costs not charged to the requester, e.g., amount of time spent duplicating records, participating in meetings, or preparing correspondence.)

43. AGGREGATION.

a. Requests that are broken into a series of requests for the purpose of avoiding the assessment of fees, may be aggregated and treated as a single request. Fees may not be aggregated for multiple requests on unrelated subjects from one requester.

b. On rare occasions, a group of requesters may be acting in concert to avoid paying fees. Fees cannot be aggregated for such requests unless a concrete basis exists on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees.

44. DELINQUENT FEE PAYMENT. The agency is not obligated to fulfill additional requests for requesters who have failed to pay prior FOIA fees until the requester

demonstrates that the fee has been paid or to pay the full amount owed. The requester will also be required to make an advance payment of the full amount of the estimated fee before processing of a new request or continuation of a pending request is begun.

45. FEE LEVELS/REQUESTER NOTIFICATION.

a. \$10 or less. Fees that are \$10 or less shall not be assessed. However, these fees shall be noted on the FOIA Checklist/Fee Worksheet and in the National Tracking System under incremental costs. The determination letter should include a statement that there is no charge for the request because the cost to process is under \$10.

b. Over \$10/Under \$25. No written willingness to pay is required in advance. The amount of fees owed will be indicated in the agency's response letter to the requester.

c. \$25 to \$250. The agency must notify the requester, preferably in writing, of estimated fees of \$25 to \$250 and seek assurance that the requester will pay costs. The requester must also be informed of who to contact to reformulate the request in an effort to reduce the cost. Work must proceed on the request concurrent with these actions.

46. FEE WAIVER/FEE REDUCTION. Fees may be waived or reduced if a determination is made that the release of information will benefit the public interest because it is likely to contribute significantly to the public's understanding of the agency's operations or activities and is not primarily in the commercial interest of the requester. The program office will make fee waiver or fee reduction determinations on a case-by-case basis after consideration of all six factors described below.

- a. Whether the subject matter of the requested records concerns the operations of the Federal Government.
- b. Whether the disclosure is likely to contribute to an understanding of the Federal Government operations or activities.
- c. Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons.
- d. Whether the contribution to the public understanding of Federal Government operations or activities will be significant.
- e. Whether the requester has a commercial interest that would be furthered by the requested disclosure.
- f. Whether the magnitude of any identified commercial interest to the requester is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requester.

47. FEE PAYMENT. Requesters may pay by check, draft, or money order, payable

to the DOT/FAA for deposit to the General Fund of the Treasury of the United States. The number assigned to identify the FOIA request should be annotated on the check, draft, or money order.

48.-49. RESERVED.

CHAPTER 5. DECISION LETTERS

50. FULL DISCLOSURE LETTER. A full disclosure letter is issued when no part of a requested record is withheld. Fees assessed in processing the request should be included. When fees are \$10 or less, indicate that there is no charge for the request because the cost to process was under \$10. This letter may be signed by the heads of offices and services, regional administrators, and directors of the AMC or ACT or, if redelegated (as authorized by paragraph 21a), it may be signed by heads of divisions. No legal review is necessary.

51. DENIAL/PARTIAL DENIAL LETTER. A denial or partial denial letter is issued when some or all of a requested record is exempt from disclosure. This letter must state the exemption being invoked, a brief statement explaining the exemption and the reason for its applicability to the specific records being withheld, and a description of the records withheld. The letter must advise requesters of their administrative appeal rights and the name(s) and title(s) of the personnel responsible for making the determination. Also, the letter should include assessment of fees. A denial/partial denial letter must be coordinated, as appropriate, and legal concurrence in the application of exemptions must be obtained. Only the head of the office, service, region, or center has signature authority. In the case of the regions, the regional administrator's signature authority covers all organizations resident in the region including those not under his/her direct operational line of authority (straightline).

52. NO RECORDS DETERMINATION LETTER.

a. A no records determination letter is issued after the agency conducts a reasonable search for responsive records and locates none. The letter must include a brief statement indicating that records could not be located along with an explanation, if appropriate. Also, the letter must advise requesters of their administrative appeal rights and the name(s) and title(s) of the personnel responsible for making the determination. Fees for processing the request should be included in the letter.

b. A no records determination should be coordinated with all offices that have conducted a search for records and determined that none exist. In headquarters, the response letter also must be coordinated with ARC-40 before the package is coordinated with the General Law Branch in the Office of the Chief Counsel. In regions and centers, the letter must be coordinated with the regional or center counsel, as appropriate. Only the

head of the office, service, region, or center has signature authority. In the case of the regions, the regional administrator's signature authority covers all organizations resident in the region including those not under his/her direct operational line of authority (straightline).

53. DOCUMENTATION.

a. General. A FOIA file consists of the request letter, interim correspondence, the agency response letter, copies of all records released or an exact listing of the documents (accounting for all pages), copies of any records partially or completely withheld from disclosure (with redactions and/or withheld pages noted with exemption), a memorandum or note in the Remarks section of the FOIA checklist documenting the agency search for "no records" responses, and the completed and signed FOIA checklist and fee worksheet. In the case of exemption 4, include a copy of the submitter notice, any objections received, the agency assessment of the objections, and any correspondence back to the submitter overruling the objections.

b. FOIA Checklist/Fee Worksheet. FAA Form 1270-1, Freedom of Information Act Checklist/Fee Worksheet, must be completed for each FOIA request made to the agency and maintained with the official file (see appendix 2). FAA Form 1270-1 is not stocked. Contact ARC-40 or your FOIA coordinator for copies.

c. Retention of FOIA Documentation.

(1) Full disclosure. Copies of the initial request, response letter(s), and released records are to be maintained in the FOIA file for 2 years from the date of release.

(2) Denial/partial denials or "no records" determinations. Copies of the request, response letter(s), pertinent correspondence, and withheld records are to be maintained for 6 years, unless appealed. If appealed, they are to be maintained for 6 years after the appeal determination, or 3 years after final adjudication by courts, whichever is later.

d. National Tracking System (NTS). The National Tracking System is a centralized data base wherein FOIA requests will be entered and tracked by headquarters, regional, and center FOIA coordinators. The NTS records shall be retained for 6 years after the date of last entry.

54. APPEALS. The Assistant Administrator for Region and Center Operations is the decision-maker for all administrative appeals. Upon receipt of an appeal, ARC-40 will request copies of the initial FOIA file from the appropriate program office. Determinations of administrative appeals are required to be made within 20

working days.

a. Upholding or Reversing Decision by Disclosure Authority. The Assistant Administrator for Region and Center Operations shall review the initial decision *de novo* and administratively affirm, reverse, or remand the initial determination in whole or in part, as appropriate. Any denial decision at the appeal level must obtain the concurrence of the General Counsel.

b. Remands for Reconsideration. An appeal request, particularly a no records appeal, is remanded for reconsideration when either the requester provides additional information clarifying the request (i.e., suggesting other search parameters), or provides additional explanation that can readily be provided by the program office and/or that may have been overlooked in the first response. In other cases, when the initial determination is reversed and significant review needs to be conducted of the records, the FOIA package will be remanded for reconsideration consistent with the appeal decision. The action office should reconsider the request as if it were a new request, responding directly to the requester. Remanded request responses are subject to appeal, therefore, an appeal paragraph should be provided if the response is a denial, partial denial, or no records determination.

c. Fee waiver determination or fee assessment. The Assistant Administrator for Region and Center Operations shall review and, if appropriate, adjust the determination or assessment. The transmittal letter will reflect the rationale for any adjustment. Copies of the transmittal letter will be sent to the disclosure authority responsible for the original decision, the Office of the Chief Counsel, and the Office of the General Counsel, Office of the Secretary of Transportation, when that office is involved in the review.

55.-59. RESERVED.

CHAPTER 6. REPORTS

60. FOIA ANNUAL REPORT.

a. The FOIA Annual Report is prepared by the Office of Assistant Administrator for Region and Center Operations and submitted to Congress through the Office of the Secretary of Transportation. Under the Electronic FOIA Amendments, effective October 1, 1997, the submission requirement of the report changed from calendar year to fiscal year. Under the amendments, agencies are given 4 months to prepare their annual reports after the conclusion of each fiscal year. Beginning February 1, 1999, each agency will be required to provide its

annual report in an electronic format on the Internet and notify the Department of Justice of its website. The National Tracking System is the source for most of the data for the Annual Report. FOIA coordinators will be asked to provide certain supplementary information.

b. The following elements are required to be in the report:

- (1) The number of requests for records pending before the agency as of the end of the fiscal year.
- (2) The median number of days that such requests had been pending before the agency as of that date. (The median is the middle, not average number. For example, of 3, 5, 7, 9, and 14, the median number is 7).
- (3) The number of requests for records received by the agency.
- (4) The number of requests that the agency processed.
- (5) The median number of days taken by the agency to process different types of requests.
- (6) The number of determinations made by the agency not to comply with requests for records made to the agency.
- (7) The reasons for each such determination.
- (8) A complete list of all statutes that the agency relies upon to authorize the agency to withhold information under Exemption 3.
- (9) A description of whether a court has upheld the decision of the agency to withhold information under each such statute.
- (10) A concise description of the scope of any information withheld under each such statute.
- (11) The number of appeals made by persons under Exemption 6.
- (12) The results of such appeals.
- (13) The reason for the action upon each appeal that results in a denial of information.
- (14) The total amount of fees collected by the agency for

processing requests.

(15) The number of FAA full-time staff devoted to processing requests for records under the Act.

(16) The total amount expended by the FAA to process such requests.

61. OVERDUE REPORT. ARC-40 shall provide a weekly report on overdue FOIA responses to the heads of offices and services.

62. STATUS REPORT. Upon request, ARC-40 and the region or center FOIA coordinators shall provide a status report to agency senior officials on the FOIA requests received within their purview.

63.-69. RESERVED.

CHAPTER 7. DOCUMENT INSPECTION FACILITIES

70. DOCUMENT INSPECTION FACILITIES. Inspection facilities for publicly available records are operated in accordance with 49 CFR 7.10.

71. TYPES OF DOCUMENTS AVAILABLE. The types of records and materials available at document inspection facilities are identified in 49 CFR 7.5.

72. FOIA READING ROOM. The FAA FOIA Reading Room is located in the Washington headquarters. Requesters may view records by appointment with the National Freedom of Information Act Staff. Records available in the reading room, including an index of the records, are found on the Internet on the FAA FOIA Home Page, which is accessible from the [FAA Home Page](#).

73.-79. RESERVED.