

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## NATIONAL CAPITAL PLANNING COMMISSION

### 1 CFR Part 456

#### Freedom of Information Act Regulations

**AGENCY:** National Capital Planning Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The National Capital Planning Commission ("NCPC" or "Commission") proposes to revise the current regulations the NCPC follows for processing Requests for Information Act (FOIA). The revisions reorganize the regulations to focus each section on a discrete topic. The revisions also incorporate new information in response to changes to the FOIA. Finally, the revisions increase the threshold dollar amount that must be reached before the NCPC charges members of the public a processing fee for information.

**DATES:** Submit comments on or before October 18, 2013.

**ADDRESSES:** You may submit comments on the proposed rule by either of the methods listed below.

1. U.S. mail, courier, or hand delivery: General Counsel/Freedom of Information Officer, National Capital Planning Commission, 401 9th Street NW., Suite 500, Washington, DC 20004.

2. Electronically: [FOIAComments@ncpc.gov](mailto:FOIAComments@ncpc.gov).

**FOR FURTHER INFORMATION CONTACT:** Anne R. Schuyler, General Counsel/Chief FOIA Officer, 202-482-7223 or [anne.schuyler@ncpc.gov](mailto:anne.schuyler@ncpc.gov).

#### SUPPLEMENTARY INFORMATION:

#### I. Purpose for Revising the NCPC's Existing Regulations

The NCPC proposes to revise its current FOIA regulations to create an organizational structure that permits easier use by members of the public. To achieve this objective, Sections in the existing regulations that address

multiple aspects of one issue have been broken up, and each Section contained in the revised regulations addresses one discrete topic identified by its subject heading. The NCPC also seeks to update its FOIA regulations to reflect changes in the law that have occurred since the NCPC adopted its original FOIA regulations in 1982 and processed amendments in 1998. With the addition of new Sections in the draft rules, the NCPC's FOIA regulations provide a complete compendium of the rules governing the agency's FOIA activity. Members of the public no longer need to consult multiple sources when preparing a FOIA Request for submission to NCPC.

#### II. Compliance With Laws and Executive Orders

##### 1. Executive Orders 12866 and 13563

By Memorandum dated October 12, 1993 from Sally Katzen, Administrator, Office of Information and Regulatory Affairs (OIRA) to Heads of Executive Departments and Agencies, and Independent Agencies, OMB rendered the NCPC exempt from the requirements of Executive Order 12866 (See, Appendix A of cited Memorandum).

Nonetheless, the NCPC endeavors to adhere to the provisions of the Executive Order. Accordingly, the NCPC, in consultation with OIRA, has determined the proposed rule is not a major rule for purposes of Executive Order 12866. Further, the NCPC developed the proposed rule in a manner consistent with the requirements of Executive Order 13563.

##### 2. Regulatory Flexibility Act

As required by the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), the NCPC certifies that the proposed rule will not have a significant economic effect on a substantial number of small entities.

##### 3. Small Business Regulatory Enforcement Fairness Act

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. It does not have an annual effect on the economy of \$100 million or more; will not cause a major increase in costs for individuals, various levels of governments or various regions; and does not have a significant adverse effect on completion, employment, investment, productivity,

innovation or the competitiveness of U.S. enterprises with foreign enterprises.

##### 4. Unfunded Mandates Reform Act (2 U.S.C. 1531 et seq.)

A statement required by the Unfunded Mandates Reform Act is not required. The proposed rule neither imposes an unfunded mandate of more than \$100 million per year nor imposes a significant or unique effect on State, local or tribal governments or the private sector.

##### 5. Federalism (Executive Order 13132)

In accordance with Executive Order 13132, the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The proposed rule does not substantially and directly affect the relationship between the Federal and state governments.

##### 6. Civil Justice Reform (Executive Order 12988)

The General Counsel of the NCPC has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of Executive Order 12988 secs. 3(a) and 3(b)(2).

##### 7. Paperwork Reduction Act

The proposed rule does not contain information collection requirements, and it does not require a submission to the Office of Management and Budget under the Paperwork Reduction Act.

##### 8. National Environmental Policy Act

The proposed rule is of an administrative nature, and its adoption does not constitute a major federal action significantly affecting the quality of the human environment. The NCPC's adoption of the proposed rule will have minimal or no effect on the environment; impose no significant change to existing environmental conditions; and will have no cumulative environmental impacts.

##### 9. Clarity of the Regulation

Executive Order 12866, Executive Order 12988, and the Presidential Memorandum of June 1, 1998 requires the NCPC to write all rules in plain language. The NCPC maintains the proposed rule meets this requirement. Those individuals reviewing the proposed rule who feel otherwise should submit specific comments to the

addresses noted above recommending revised language for those provision or portions thereof where they feel compliance is lacking.

#### 10. Public Availability of Comments

Be advised that personal information such as name, address, phone number email address, or other identifying personal information contained in a comment may be made publically available. Individuals may ask the NCPC to withhold the personal information in their comment, but there is no guarantee the agency can do so.

#### List of Subjects in 1 CFR Part 456

Freedom of Information.

Dated: August 12, 2013.

Anne R. Schuyler,  
General Counsel.

For the reasons stated in the preamble, the National Capital Planning Commission proposes to revise 1 CFR part 456 to read as follows:

#### PART 456—NATIONAL CAPITAL PLANNING COMMISSION FREEDOM OF INFORMATION ACT

- Sec.
- 456.1 General information.
- 456.2 Organization.
- 456.3 Definitions.
- 456.4 General policy.
- 456.5 Public reading rooms and information routinely available.
- 456.6 FOIA request requirements.
- 456.7 Time-frame for response to FOIA requests.
- 456.8 Multi-track processing.
- 456.9 Expedited processing.
- 456.10 Consultations and referrals.
- 456.11 Classified and controlled unclassified information.
- 456.12 Confidential commercial information.
- 456.13 Appeals.
- 456.14 Fees.

**Authority:** 40 U.S.C. 8701 et seq., as amended and 5 U.S.C. 552, as amended.

##### § 456.1 General information.

This part contains the rules the National Capital Planning Commission (“NCPC” or “Commission”) shall follow in processing Requests for Records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. Privacy Act Requests made by individuals under the Privacy Act, 5 U.S.C. 522a, which are processed in accordance with part 455 of Title 1 of the Code of Federal Regulations, are processed under this part as well. Information routinely provided to the public as part of regular NCPC activity shall be provided to the public without regard to this part.

##### § 456.2 Organization.

(a) The NCPC serves as the planning agency for the Federal Government in the National Capital Region (NCR). The NCR includes the District of Columbia, Montgomery and Prince George’s Counties in Maryland, Arlington, Fairfax, Loudon, and Prince William Counties in Virginia, and all cities in Maryland and Virginia in the aforementioned counties.

(b) Pursuant to the Planning Act, 40 U.S.C. 8701 et seq., the NCPC’s primary mission includes:

(1) Preparation of the Comprehensive Plan for the National Capital: Federal Elements (“Comprehensive Plan”). The Comprehensive Plan sets forth the principles, goals and planning policies that guide federal government growth and development of the NCR. The Comprehensive Plan serves as the foundation for all other plans prepared by the NCPC.

(2) Review of Federal and District of Columbia Agency Plans and Projects.

The Commission reviews, and takes appropriate action on, Federal and District Government agency plans and projects to ensure compliance with, among others, the Comprehensive Plan, principals of good planning and urban design, and federal environmental and historic preservation policies mandated by the National Environmental Policy Act and the National Historic Preservation Act.

(3) Preparation of a Federal Capital Improvement Plan (FCIP). The FCIP is an annual, six-year program of prioritized Federal government capital projects prepared by the NCPC for use by the Office of Management and Budget (“OMB”) in its preparation of the President’s Annual Budget.

(c) The Commission is comprised of five citizen members, three of whom are appointed by the President of the United States, including the Chairman, and two of whom are appointed by the Mayor of the District of Columbia. Ex-officio members of the Commission include:

- (1) The Secretary of Defense;
  - (2) The Administrator of the General Services Administration;
  - (3) The Mayor of the District of Columbia;
  - (4) The Chairman of the Council of the District of Columbia;
  - (5) The Chairman of the Senate Committee of Homeland Security and Governmental Affairs; and
  - (6) The Chairman of the House Committee on Oversight and Government Reform, or their designated alternates.
- (d) A professional staff, headed by an Executive Director, assists the

Commission. The staff is organized functionally as follows:

- (1) Office of the Executive Director;
- (2) Office of the General Counsel;
- (3) Office of the Secretariat;
- (4) Office of Public Engagement;
- (5) Office of Administration;
- (6) Physical Planning Division;
- (7) Policy and Research Division; and
- (8) Urban Design and Plan Review Division.

##### § 456.3 Definitions.

For purposes of this part, the following definitions shall apply:

(a) *Act and FOIA* mean the Freedom of Information Act, 5 U.S.C. 552, as amended.

(b) *Adverse Determination or Determination* shall include a determination to withhold, in whole or in part, Records Requested in a FOIA Request; the failure to respond to all aspects of a Request; the determination to deny a Request for a fee waiver; or the determination to deny a Request for expedited processing. The term shall also encompass a challenge to NCPC’s determination that Records have not been described adequately, that there are no responsive Records or that an adequate Search has been conducted.

(c) *Agency Record or Record* means any documentary material which is either created or obtained by a Federal Agency (“Agency”) in the transaction of Agency business and under Agency control. Agency Records may include without limitation books; papers; maps; charts; plats; plans; architectural drawings; photographs and microfilm; machine readable materials such as magnetic tape and disks; electronic records including email messages; and audiovisual material such as still pictures, and sound and video recordings. This definition generally does not cover records of Agency staff that are created and maintained primarily for a staff member’s convenience and are not subject to Agency creation or retention requirements or distributed to other Agency employees for their official use.

(d) *Confidential Commercial Information* means commercial or financial information obtained by the NCPC from a Submitter that may be protected from disclosure under Exemption 4 of the FOIA. Exemption 4 of the FOIA protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”

(e) *Controlled Unclassified Information* means unclassified information that does not meet the standards for National Security Classification under Executive Order 13536, as amended, but is:

(1) Pertinent to the national interests of the United States or to the important interests of entities outside the Federal Government, and

(2) Under law or policy requires protection from unauthorized disclosure, special handling safeguards, or prescribed limits on exchange or dissemination.

(f) *Commercial Use Request* means a FOIA Request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the Requester or the person on whose behalf the Request is made.

(g) *Direct Costs* means those expenditures that the NCPC incurs in searching for, duplicating, and in the case of commercial Requesters, reviewing 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 the rate to cover benefits) and the cost of operating duplicating machinery. Direct Costs do not include overhead expenses such as costs of space, and heating or lighting the facility in which the Records are stored.

(h) *Duplication* means the process of making a copy of a document necessary to respond to a FOIA Request in a form that is reasonably usable by a Requester. Copies can take the form of, among others, paper copy, audio-visual materials, or machine readable documents (i.e., computer disks).

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

(j) *Expedited Processing* means giving a FOIA Request priority because a Requester has shown a compelling need for the Records.

(k) *FOIA Request or Request* means a written Request made by an entity or member of the public for an Agency Record submitted via the U.S. Postal Service mail or other delivery means to include without limitation electronic-mail (email) or facsimile.

(l) *Freelance Journalist* means a representative of the news media who is

able to demonstrate a solid basis for expecting publication through a news organization, even though not actually employed by that news organization. A publication contract or past evidence of a specific freelance assignment from a news organization may indicate a solid basis for expecting publication.

(m) *Frequently Requested Documents* means documents that have been Requested at least three times under the FOIA. It also includes documents the NCPC anticipates would likely be the subject of multiple Requests.

(n) *Multi-track Processing* means placing simple Requests requiring relatively minimal work and/or review in one processing track, more complex Requests in one or more other tracks, and expedited Requests in a separate track. Requests in each track are processed on a first-in/first-out basis.

(o) *Noncommercial Scientific Institution* means an institution that is not operated for commerce, trade or profit, but is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To be in this category, a Requester must show that the Request is authorized by and is made under the auspices of a qualifying institution and that the Records are not sought for commercial use but are sought to further scientific research.

(p) *Privacy Act Request* means a written (paper copy with an original signature) Request made by an individual for information about him/herself that is contained in a Privacy Act system of records. The Privacy Act applies only to U.S. citizens and aliens lawfully admitted for permanent residence such that only individuals satisfying these criteria may make Privacy Act Requests.

(q) *Reading Room Materials* means Records, paper or electronic, that are required to be made available to the public under 5 U.S.C. 552(a)(2) as well as other Records that the NCPC, at its discretion, makes available to the public for inspection and copying without requiring the filing of a FOIA Request.

(r) *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 events that would be of current interest to the public. News media entities include television or radio stations broadcasting to the public at large; publishers of periodicals that qualify as disseminators of news and make their products available for purchase or subscription by the general

public; and alternative media to include electronic dissemination through telecommunication (internet) services. To be in this category, a Requester must not be seeking the Requested Records for a commercial use.

(s) *Requester* means an entity or member of the public submitting a FOIA Request.

(t) *Review* means the examination of Records located in response to a Commercial Use Request to determine whether any portion of the located Record is eligible to be withheld. It also includes processing any Records for disclosure, i.e., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(u) *Search* means the process of looking for material, by manual or electronic means that is responsive to a Request. The term also includes page-by-page or line-by-line identification of material within documents.

(v) *Submitter* means any person or entity outside the Federal Government from whom the NCPC directly or indirectly obtains commercial or financial information. The term includes, among others, corporations, banks, state and local governments, and agencies of foreign governments who provide information to the NCPC.

(w) *Unusual Circumstances* means, for purposes of § 456.7(b), and only to the extent reasonably necessary to the proper processing of a particular Request:

(1) The need to Search for and collect the Requested Agency Records from establishments that are separate from the Commission's offices;

(2) The need to Search for, collect and appropriately examine and Review a voluminous amount of separate and distinct Agency Records which are demanded in a single Request; or

(3) The need for consultation with another Agency having a substantial interest in the determination of the FOIA Request.

(x) *Workday* means a regular Federal workday. It does not include Saturdays, Sundays, legal public holidays, and days when the federal government is closed for any reason.

#### § 456.4 General policy.

(a) It is the NCPC's general policy to facilitate the broadest possible availability and dissemination of information to the public through use of the NCPC's Web site, [www.NationalCapitalPlanningCommission.gov](http://www.NationalCapitalPlanningCommission.gov), and physical distribution of materials not available electronically. The NCPC staff

shall be available to assist the public in obtaining information formally by using the procedures herein or informally in a manner not inconsistent with the rules set forth in this part. In addition, to the extent permitted by other laws, the NCPC will make available Agency Records of interest to the public that are appropriate for disclosure.

(b) Whenever the waiver of any of the procedures set forth in §§ 456.6 and 456.14 would further the purposes of the FOIA by causing public disclosure of information eligible for disclosure under the Act and the rules contained in this part within the time periods required by the rules contained in this part, the NCPC may waive the procedures set forth in the aforementioned Sections in the context of individual Requests.

#### **§ 456.5 Public reading rooms and information routinely available.**

(a) The NCPC shall maintain an electronic library at [www.NationalCapitalPlanningCommission.gov](http://www.NationalCapitalPlanningCommission.gov) that makes Reading Room Materials capable of production in electronic form available for public inspection and downloading. The NCPC shall also maintain an actual reading room containing Reading Room Materials incapable of production in electronic form at NCPC's offices. The actual reading room shall be available for use on Workdays during the hours of 9:00 a.m. to 4:00 p.m. Requests for appointments to review Reading Room Materials in the actual public reading room should be directed to the NCPC's Information Resources Specialist identified on NCPC's Web site.

(b) The following types of Records shall be available routinely (subject to the fee schedule set forth in § 456.14) without resort to formal FOIA Request procedures unless such Records fall within one of the exemptions listed at 5 U.S.C. 552(b) of the Act:

- (1) Commission agendas;
- (2) Plans and supporting documentation submitted by applicants to the Commission to include environmental and historic preservation reports prepared for a plan or project;
- (3) Executive Director's Recommendations;
- (4) Commission Memoranda of Action;
- (5) Transcripts of Commission Proceedings;
- (6) Federal Elements of the Comprehensive Plan for the National Capital and other plans prepared by the NCPC from time to time;
- (7) Federal Capital Improvements Plan for the National Capital Region

(FCIP) following release of the President's Budget;

(8) Policies adopted by the Commission;

(9) Correspondence between the Commission and the Congress, other federal and local government agencies, and the public; and

(10) Frequently Requested Documents.

#### **§ 456.6 FOIA Request Requirements.**

(a) The NCPC shall designate a Chief Freedom of Information Act Officer who shall be authorized to grant or deny any Request for a Record of the NCPC.

(b) Requests for a Record or Records that is/are not available in the actual or electronic reading rooms shall be directed to the Chief Freedom of Information Officer.

(c) All FOIA Requests shall be made in writing. If sent by U.S. mail, Requests should be sent to NCPC's official business address contained on the NCPC Web site. If sent via email, they should be directed as indicated on the NCPC Web site. To expedite internal handling of FOIA Requests, the words "Freedom of Information Act Request" shall appear prominently on the envelope or the subject line of a Request sent via email or facsimile.

(d) The FOIA Request shall:

- (1) State that the Request is made pursuant to the FOIA;
- (2) Describe the Agency Record(s) Requested in sufficient detail including, without limitation, any specific information known such as date, title or name, author, recipient, or time frame for which you are seeking Records, to enable the NCPC personnel to locate the Requested Agency Records;
- (3) State, pursuant to the fee schedule set forth in § 456.14, a willingness to pay all fees associated with the FOIA Request or the maximum fee Requester is willing to pay to obtain the Requested Records, unless the Requester is seeking a fee waiver or placement in a certain fee category;
- (4) State the desired form or format of disclosure of Agency Records with which the NCPC shall endeavor to comply unless compliance would damage or destroy an original Agency Record or reproduction is costly and/or requires the acquisition of new equipment; and
- (5) Provide a phone number or email address at which the Requester can be reached to facilitate the handling of the Request.

(e) If a FOIA Request is unclear, overly broad, involves an extremely voluminous amount of Records or a burdensome Search, or fails to state a willingness to pay the requisite fees or

the maximum fee which the Requester is willing to pay, the NCPC shall endeavor to contact the Requester to define the subject matter, identify and clarify the Records being sought, narrow the scope of the Request, and obtain assurances regarding payment of fees. The timeframe for a response set forth in § 456.7(a) shall be tolled (stopped temporarily) and the NCPC will not begin processing a Request until the NCPC obtains the information necessary to clarify the Request and/or clarifies issues pertaining to the fee.

#### **§ 456.7 Time-frame for response to FOIA requests.**

(a) The Chief Freedom of Information Act Officer, upon receipt of a FOIA Request made in compliance with these rules, shall determine within 20 Workdays whether to grant or deny the Request. The Freedom of Information Officer shall within 20 Workdays notify the Requester in writing of his/her determination and the reasons therefore and of the right to appeal any Adverse Determination to the head of the NCPC.

(b) In cases involving Unusual Circumstances, the Chief Freedom of Information Act Officer may extend the 20 Workday time limit by written notice to the Requester. The written notice shall set forth the reasons for the extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension of more than 10 Working Days unless the Chief Freedom of Information Act Officer affords the Requester an opportunity to modify his/her Request or arranges an alternative timeframe with the Requester for completion of the NCPC's processing.

#### **§ 456.8 Multi-track processing.**

The NCPC may use multiple tracks for processing FOIA Requests based on the complexity of Requests and those for which expedited processing is Requested. Complexity shall be determined based on the amount of work and/or time needed to process a Request and/or the number of pages of responsive Records. If the NCPC utilizes Multi-track Processing, it shall advise a Requester when a Request is placed in a slower track of the limits associated with a faster track and afford the Requester the opportunity to limit the scope of its Request to qualify for faster processing.

#### **§ 456.9 Expedited processing.**

(a) The NCPC shall provide Expedited Processing of a FOIA Request if the person making the Request demonstrates that the Request involves:

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

(2) An urgency to inform the public about an actual or alleged Federal government activity, if made by a person primarily engaged in disseminating information;

(3) The loss of substantial due process rights; or (4) a matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence. A Request for Expedited Processing may be made at the time of the initial FOIA Request or at a later time.

(b) A Requester seeking Expedited Processing must submit a detailed statement setting forth the basis for the Expedited Processing Request. The Requester must certify in the statement that the need for Expedited Processing is true and correct to the best of his/her knowledge. To qualify for Expedited Processing, a Requester relying upon paragraph (a)(2) of this section must establish:

(1) That he/she is a full time member of the news media or primarily engaged in the occupation of information dissemination, though it need not be his/her sole occupation;

(2) A particular urgency to inform the public about the information sought by the FOIA Request beyond the public's right to know about the government activity generally; and

(3) The information is of the type that has value that will be lost if not disseminated quickly such as a breaking news story. Information of historical interest only or information sought for litigation or commercial activities will not qualify nor would a news media deadline unrelated to breaking news.

(c) Within 10 calendar days of receipt of a Request for expedited processing, the NCPC shall decide whether to grant or deny the Request and notify the Requester of the decision in writing. If a Request for Expedited Processing is granted, the Request shall be given priority and shall be processed in the expedited processing track. If a Request for Expedited Processing is denied, any appeal of that decision shall be acted on expeditiously.

#### **§ 456.10 Consultations and referrals.**

(a) Unless the NCPC determines that it is best able to process a Record in response to a FOIA Request, the NCPC shall either respond to the FOIA Request after consultation with the Agency best able to determine if the Requested Record(s) is/are subject to

disclosure; or refer the responsibility for responding to the FOIA Request to the Agency responsible for originating the Record(s). Generally, the Agency originating a Record will be presumed by the NCPC to be the Agency best qualified to render a decision regarding disclosure or exemption except for Agency Records submitted to the NCPC pursuant to its authority to review Agency plans and/or projects.

(b) Upon referral of a FOIA Request to another Agency, the NCPC shall notify the Requester in writing of the referral and inform the Requester of the name of the Agency to which all or part of the FOIA Request has been referred.

(c) The timeframe for a response to a FOIA Request requiring consultation or referral shall be based on the date the FOIA Request was initially received by the NCPC and not any later date.

#### **§ 456.11 Classified and controlled unclassified information.**

(a) Whenever a Request is made for an Agency Record that has been classified, or may be appropriate for classification, by another Agency under Executive Order 13526, as amended or any other executive order concerning the classification of Records, the NCPC shall refer the responsibility for responding to the FOIA Request regarding that Record to the Agency that either classified the Record, should consider the Record for classification, or has the primary interest in the Record, as appropriate.

(b) Whenever a Request is made for a Record that is designated Controlled Unclassified Information (CUI) by another Agency, the NCPC shall refer the FOIA Request to the Agency that designated the Record CUI. Decisions to disclose or withhold information designated as CUI shall be made based on the applicability of the statutory exemptions contained in the FOIA, not on a CUI marking or designation.

#### **§ 456.12 Confidential Commercial Information.**

(a) Confidential Commercial Information obtained by the NCPC from a Submitter will be disclosed under the FOIA only in accordance with the requirements of this section.

(b) A Submitter of Confidential Commercial Information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA. These designations will expire ten years after the date of the submission unless the Submitter Requests, and provides

justification for, a longer designation period.

(c) Subject to the requirements of paragraphs (d) and (g) of this section, the NCPC shall provide a Submitter with prompt written notice of a FOIA Request or administrative appeal that seeks the Submitter's Confidential Commercial Information. The notice shall give the Submitter an opportunity to object to disclosure of any specified portion of that Information pursuant to paragraph (e) of this section. The notice shall either describe the Confidential Commercial Information Requested or include copies of the Requested Records or portions thereof containing the Confidential Commercial Information. When notice to a large number of Submitters is required, NCPC may provide notification by posting or publishing the notice in a place reasonably likely to accomplish the intent of the notice requirement.

(d) Notice shall be given to a Submitter wherever:

(1) The Confidential Commercial Information has been designated in good faith by the Submitter as Confidential Commercial Information considered protected from disclosure under Exemption 4 of the FOIA; or

(2) The NCPC has reason to believe that the Confidential Commercial Information may be protected from disclosure under Exemption 4 of the FOIA.

(e) The NCPC shall allow a Submitter a reasonable time to respond to the notice described in paragraph (c) of this section and shall specify within the notice the time period for response. If a Submitter has any objection to disclosure, it shall submit a detailed written statement. The statement must specify all grounds for withholding any portion of the Confidential Commercial Information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the Confidential Commercial Information is a trade secret or commercial or financial information that is privileged or confidential. If the Submitter fails to respond to the notice within the specified time, the NCPC shall consider this failure to respond as no objection to disclosure of the Confidential Commercial Information on the part of the Submitter, and NCPC shall proceed to release it. A statement provided by the Submitter that is not received by NCPC until after the NCPC's disclosure decision has been made shall not be considered by the NCPC.

Information provided by a Submitter under this paragraph may itself be subject to disclosure under the FOIA.

(f) The NCPC shall consider a Submitter's objections and specific

grounds for nondisclosure in deciding whether to disclose Confidential Commercial Information. Whenever the NCPC decides to disclose Confidential Commercial Information over the objection of a Submitter, the NCPC shall give the Submitter written notice, which shall include:

(1) A statement of the reason(s) why each of the Submitter's disclosure objections was not sustained;

(2) A description of the Confidential Commercial Information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(g) The notice requirements of paragraphs (d) and (f) of this section shall not apply if:

(1) The NCPC determines that the Confidential Commercial Information is exempt under FOIA;

(2) The Confidential Commercial Information has been published lawfully or has been officially made available to the public;

(3) Disclosure of the Information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or

(4) The designation made by the Submitter under paragraph (b) of this section appears obviously frivolous in which case the NCPC shall, within a reasonable time prior to a specified disclosure date, give the Submitter written notice of any final decision to disclose the Confidential Commercial Information.

(h) Whenever a Requester files a lawsuit seeking to compel the disclosure of Confidential Commercial Information, the NCPC shall promptly notify the Submitter.

(i) Whenever the NCPC provides a Submitter with notice and an opportunity to object to disclosure under paragraph (c) of this section, the NCPC shall also notify the Requester. Whenever the NCPC notifies a Submitter of its intent to disclose Requested Information under paragraph (f) of this section, the NCPC shall also notify the Requester. Whenever a Submitter files a lawsuit seeking to prevent the disclosure of Business Information, the NCPC shall notify the Requester.

#### **§ 456.13 Appeals.**

(a) An appeal of an Adverse Determination shall be made in writing to the Chairman of the Commission ("Chairman"). An appeal may be submitted via US mail or other type of manual delivery service or via email or facsimile within 30 Workdays of the

date of a notice of an Adverse Determination. To facilitate handling of an appeal, the words "Freedom of Information Act Appeal" shall appear prominently on the envelope or the subject line of a Request sent via electronic-mail or facsimile.

(b) An appeal of an Adverse Determination shall include a detailed statement of the legal, factual or other basis for the Requester's objections to an Adverse Determination; a daytime phone number or email address where the Requester can be reached if the NCPC requires additional information or clarification regarding the appeal; copies of the initial Request and the NCPC's written response; and for an Adverse Determination of a Request for Expedited Processing or a fee waiver, a demonstration of compliance with the requirements of §§ 456.9(a) or 456.14(i) respectively.

(c) The Chairman shall respond to an appeal of an Adverse Determination in writing within 20 Workdays of receipt. If the Chairman grants the appeal, the Chairman shall notify the Requester, and the NCPC shall make available copies of the Requested Records promptly thereafter upon receipt of the appropriate fee determined in accordance with § 456.14. If the Chairman denies the appeal in whole or in part, the letter to the Requester shall state the reason(s) for the denial, including the FOIA exemptions(s) applied; a statement that the decision is final; and notification of the Requester's right to seek judicial review of the denial in the District Court of the United States in either the district in which the Requester resides, in which the Requester has his/her principal place of business, or in the District of Columbia.

(d) The NCPC shall not act on an appeal of an Adverse Determination if the underlying FOIA Request becomes the subject of FOIA litigation.

(e) A party seeking court review of an Adverse Determination must first appeal the decision under this section to NCPC.

#### **§ 456.14 Fees.**

(a) In responding to FOIA Requests, the NCPC shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (i) of this section.

(1) Search fees shall be as follows:

(i) Other than Requests made by Educational Institutions, Noncommercial Scientific Institutions, or Representatives of the News Media, Search fees shall be charged for all Requests, subject to the limitations of paragraph (b) of this section. The NCPC may charge for time spent conducting a Search even if it fails to locate any

responsive Records or if the NCPC withholds Records located based on a FOIA exemption.

(ii) For each quarter hour spent by personnel searching for Requested Records, including electronic searches that do not require new programming, the fees will be the calculated based on the average hourly General Schedule (GS) base salary, plus the District of Columbia locality payment, plus 16 percent for benefits, of employees in the following three categories: Staff Assistant (assigned at the GS 9–11 grades with an average salary of \$63,103 per annum); Professional Personnel (assigned at the GS 11–13 grades with an average salary of \$86,775 per annum); and Managerial Staff (assigned at the 14–15 grades with an average salary of \$152,336 per annum). For a Staff Assistant the quarter hour fee to Search for and retrieve a Requested Record, shall be \$9.00. If a Search and retrieval cannot be performed entirely by a Staff Assistant—for example, where the identification of Records within the scope of a Request requires the use of Professional Personnel—the fee shall be \$12.00 for each quarter hour of Search time spent by Professional Personnel. If the time of Managerial Personnel is required, the fee shall be \$18.00 for each quarter hour of time spent by Managerial Personnel.

(iii) For a computer Search of Records, Requesters shall be charged the Direct Costs of creating a computer program, if necessary, and/or conducting the Search, although certain Requesters (as provided in paragraph (b)(1) of this section) will be charged no Search fee and certain other Requesters (as provided in paragraph (b)(3) of this section) will be entitled to the cost equivalent of two hours of manual Search time without charge. These Direct Costs shall include the cost of operating a central processing unit for that portion of operating time that is directly attributable to a Search for responsive Records, and the costs of the operator's salary for the time attributable to the Search.

(2) Duplication fees shall be charged to all Requesters, subject to the limitations of paragraph (b) of this section. For a paper photocopy of a Record (no more than one copy of which shall be supplied), the fee shall be 15 cents per page for single sided copies, 30 cents per page for double sided copies, 90 cents per page for 8½ by 11 color copies, and \$1.50 per page for color copies up to 11 x 17 inches per page. For copies produced by computer, and placed on a disk or provided as a printout, the NCPC shall charge the Direct Costs, including operator time, of

producing the copy. For other forms of Duplication, the NCPC shall charge the Direct Costs of that Duplication.

(3) Review fees shall be charged to Requesters who make a Commercial Use Request. Review fees will be charged only for the NCPC initial Review of a Record to determine whether an exemption applies to a particular Record or portion thereof. No charge will be made for Review at the administrative appeal level for an exemption already applied. However, Records or portions thereof withheld under an exemption that are subsequently determined not applicable upon appeal may be reviewed again to determine whether any other exemption not previously considered applies. If changed circumstances lead NCPC to determine a different exemption applies, the costs of that Review are chargeable. Review fees will be charged at the same rates as those charged for a Search under paragraph (a)(1)(ii) of this section.

(b) The following limitations on fees shall apply:

(1) No Search fee shall be charged for FOIA Requests made by Educational Institutions, Noncommercial Scientific Institutions, or Representatives of the News Media.

(2) No Search or Review fees shall be charged for a quarter-hour period unless more than half of that period is required for Search or Review.

(3) Except for Requesters of a Commercial Use Request, the NCPC shall provide without charge the first two hours of Search (or the cost equivalent) and the first 100 pages of Duplication (or the cost equivalent); and

(4) Except for Requesters of a Commercial Use Request, No fee shall be charged for a Request if the total fee calculated under paragraph (c) of this section equals \$50.00 or less.

(5) The provisions of paragraphs (b)(3) and (4) of this section shall be cumulative. Requesters other than those making a Commercial Use Request shall not be charged a fee unless the total cost of a Search in excess of two hours plus the cost of Duplication in excess of 100 pages totals more than \$25.00.

(c) If the NCPC determines or estimates fees in excess of \$50.00, the NCPC shall notify the Requester of the actual or estimated amount of total fees, unless in its initial Request the Requester has indicated a willingness to pay fees as high as those determined or estimated. If only a portion of the fee can be estimated, the NCPC shall advise the Requester that the estimated fee constitutes only a portion of the total fee. If the NCPC notifies a Requester that actual or estimated fees amount to more

than \$50.00, the Request shall not be considered received for purposes of calculating the timeframe for a response, and no further work shall be undertaken on the Request until the Requester agrees to pay the anticipated total fee. Any such agreement shall be memorialized in writing. A notice under this paragraph shall offer the Requester an opportunity to work with the NCPC to reformulate the Request to meet the Requester's needs at a lower cost.

(d) Apart from other provisions of this section, if the Requester asks for or the NCPC chooses as a matter of administrative discretion to provide a special service—such as certifying that Records are true copies or sending them by other than ordinary mail—the actual costs of special service shall be charged.

(e) The NCPC shall charge interest on any unpaid fee starting on the 31st day following the date of billing the Requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 (Interest and Penalty on Claims) and will accrue from the date of the billing until payment is received by the NCPC. The NCPC shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. No. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(f) Where the NCPC reasonably believes that one or more Requesters are acting in concert to subdivide a Request into a series of Requests to avoid fees, the NCPC may aggregate the Requests and charge accordingly. The NCPC shall presume that multiple Requests of this type made within a 30-day period have been made to avoid fees. Where Requests are separated by a longer period, the NCPC shall aggregate the multiple Requests if a solid basis exists for determining aggregation is warranted under all circumstances involved.

(g) Advance payments shall be treated as follows:

(1) For Requests other than those described in paragraphs (g)(2) and (3) of this section, the NCPC shall not require an advance payment. An advance payment refers to a payment made before work on a Request is begun or continued after being stopped for any reason but does not extend to payment owed for work already completed but not sent to a Requester.

(2) If the NCPC determines or estimates a total fee under this section of more than \$250.00, it shall require an advance payment of all or part of the anticipated fee before beginning to process a Request, unless the Requester provides satisfactory assurance of full

payment or has a history of prompt payment.

(3) If a Requester previously failed to pay a properly charged FOIA fee to the NCPC within 30 days of the date of billing, the NCPC shall require the Requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the NCPC begins to process a new Request or continues processing a pending Request from that Requester.

(4) If the NCPC requires advance payment or payment due under paragraphs (g)(2) or (3) of this section, the Request shall not be considered received and no further work will be undertaken on the Request until the required payment is received.

(h) Where Records responsive to Requests are maintained for distribution by Agencies operating statutorily based fee schedule programs, the NCPC shall inform Requesters of the steps for obtaining Records from those sources so that they may do so most economically.

(i) Requirements for waiver or reduction of fees shall be as follows:

(1) Records responsive to a Request shall be furnished without charge or at a charge reduced below that established under this section if the Requester demonstrates to the NCPC, and the NCPC determines, based on all available information, that:

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

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

(2) To determine whether the fee waiver requirement of paragraph (i)(1)(i) of this section is met, the NCPC shall consider the following factors:

(i) The subject of the Request: Whether the subject of the Requested Records concerns “the operations or activities of the government.” The subject of the Requested Records must concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.

(ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The portions of the Requested Records eligible for disclosure must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those



operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

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

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

(3) To determine whether the fee waiver requirement of paragraph (i)(1)(ii) of this section is met, the NCPC shall consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the Requester has a commercial interest that would be furthered by the Requested disclosure. The NCPC shall consider any commercial interest of the Requester (with reference to the definition of "Commercial Use Request" in § 456.3(f), or of any person on whose behalf the Requester may be acting, that would be furthered by the Requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the Requester is sufficiently large, in comparison with the public interest in disclosure that disclosure is "primarily in the commercial interest of the Requester." A fee waiver or

reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The NCPC ordinarily shall presume that where a news media Requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that Requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the Records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those Records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (i)(2) and (3) of this section, insofar as they apply to each Request. The NCPC shall exercise its discretion to consider the cost-effectiveness of its investment of administrative resources in this decision-making process, however, in deciding to grant waivers or reductions of fees.

(j) All fees shall be paid by personal check, money order or bank draft drawn on a bank of the United States, made payable to the order of the Treasurer of the United States.

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 112

[Docket No. FDA-2011-N-0921]

RIN 0910-AG35

#### Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Rule, Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of Intent.

**SUMMARY:** Under the National Environmental Policy Act of 1969 (NEPA), as implemented by the Council on Environmental Quality (CEQ) regulations, the Food and Drug Administration (FDA) announces its intent to prepare an Environmental Impact Statement (EIS) to evaluate the potential environmental effects of the

proposed rule, Standards for Growing, Harvesting, Packing, and Holding of Produce for Human Consumption. By this notice, FDA is announcing the beginning of the scoping process to solicit public comments and identify issues to be analyzed in an EIS. Information on the proposed rule may be accessed using the docket number found in brackets in the heading of this document.

**DATES:** This notice initiates the public scoping process for the EIS which will close on November 15, 2013. The Agency will consider comments in response to this notice to determine the need for any public scoping meetings prior to the preparation of the Draft EIS. In order to be considered during the preparation of the Draft EIS, all comments must be received prior to the close of the public scoping period. All relevant and substantive comments submitted to Docket No. FDA-2011-N-0921 in response to the proposed rule will be considered as part of the scoping process. FDA will provide additional opportunities for public participation upon publication of the Draft EIS.

**ADDRESSES:** You may submit comments, identified by Docket No. FDA-2011-N-0921 and/or Regulatory Information Number (RIN) 0910-AG35, by any of the following methods.

#### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

#### Written Submissions

Submit written submissions in the following ways:

- *Mail/Hand delivery/Courier (for paper or CD-ROM submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

*Instructions:* All submissions received must include the Agency name and Docket No. FDA-2011-N-0921 and RIN 0910-AG35 for this rulemaking. All comments received may be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.