

duplication of records in response to FOIA requests. These rules also include a revision of the FOIA fee reduction and waiver standard drawn directly from the language of the Reform Act, along with procedures for implementing that standard.

Further information on these revisions is provided in the supplementary information which follows.

EFFECTIVE DATE: November 20, 1987.
FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street NW., Washington, DC 20463, (202) 376-5690 or Toll Free (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Freedom of Information Reform Act of 1986 (FOIRA) requires each agency to promulgate regulations, pursuant to notice and receipt of public comments, specifying the schedule of fees applicable to the processing of Freedom of Information Act (FOIA) requests and establishing procedures and guidelines for determining when such fees should be waived or reduced. The FOIRA also requires the Office of Management and Budget (OMB) to promulgate guidelines containing a uniform schedule of fees applicable to all agencies. OMB's guidelines were published on March 27, 1987 (52 FR 10012). The Federal Election Commission Interim Rule, published for comment on June 24, 1987 (52 FR 23636), conforms to the OMB guidelines.

The Commission received three comments on the interim rules. Having considered these comments, the Commission is now publishing the final rules together with a statement explaining their basis and purpose in accordance with the Administrative Procedure Act, 5 U.S.C. 553(c).

Statement of Basis and Purpose

Basis and Purpose of the Public Records and Freedom of Information Act Regulations, 11 CFR Parts 4 and 5

Part 4—Freedom of Information Act

The rules implementing the Freedom of Information Act have been revised and expanded as a result of the Freedom of Information Reform Act of 1986 (Pub. L. 99-570). Several new definitions and modifications have been made to broaden the scope of the FOIA and establish uniformity with the fee provisions set by the Office of Management and Budget.

The comments received were taken into consideration in developing the final rule. These comments primarily addressed definitions of terms contained in the proposed fee schedule regarding the different categories of requestors. In particular, the commenters objected to

the definitions of "freelance journalist," "representative of the news media" and "commercial use." However, the Commission's definitions of these terms conform to OMB guidelines and are consistent with the statute and legislative history.

Section 4.1 Definitions. This section adds seven new definitions, paragraphs (g) through (n). These amendments are intended to clarify the expanded provisions of the statute. Three of these definitions were addressed by the comments.

Concerning "commercial use," (11 CFR 4.1(k)) the commenters focus on statements in the legislative history which seem to indicate that it is the requestor rather than the nature of the request which is controlling. Specifically, one commenter proposed a definition of "commercial use" requestor that would distinguish between private, profit-making and non-profit entities, allowing at a minimum that requests from public interest groups, labor unions, libraries and the news media not be treated as commercial requests. This interpretation is contrary to legislative intent. Congress did not intend that organizations seeking to establish private repositories of public records would qualify for waivers. See 123 Cong. Rec. S 14038 (daily ed. Sept. 27, 1985) (statement of Sen. Hatch). Furthermore, the statute does not refer to commercial users, but instead plainly states "commercial use." Therefore, the Commission regulations implement the statute.

With regard to "representative of the news media" (11 CFR 4.1(n)), the comments received suggest that the Commission liberalize its definition beyond the guidelines set forth by OMB. One commenter stated that the Commission's definition is counter to the legislative history and allows the Commission to judge what is current before acting on a request. The commenter suggested that "representative of the news media" be broadened to include any person or organization which publishes or disseminates information to the public. The Commission has retained the word "news" in the definition because it is based on the statutory phrase "news media." The other commenters interpret the Commission definition as inconsistent with Congressional intent due to the use of the terms "current events" or information of "current interest to the public." The Commission concludes however, that the plain meaning of the word "news" entails currency of events and that its interpretation is consistent with the

FEDERAL ELECTION COMMISSION

11 CFR Parts 4 and 5

[Notice 1987-12]

Public Records and Freedom of Information Act

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: The Federal Election Commission has revised its regulations implementing the Freedom of Information Reform Act, Pub. L. No. 99-570, and guidelines established by the Office of Management and Budget (OMB), 52 FR 10012 (March 27, 1987). The revisions are based on the Commission's experience in working with the Freedom of Information Act (FOIA) and on public comments received in response to the Notice of Interim Rulemaking published by the Commission.

The revisions incorporate the recent changes to the FOIA regarding among other things, establishment of fees to be charged for search, review and

statute and OMB guidelines. As a result no change has been made to this definition. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category.

Concerning "freelance journalist" (11 CFR 4.1(a)) one commenter suggested the Commission delete its definition of freelance journalist from the rules as it did not properly describe the work of a freelance journalist and discriminated against first-time freelancers. The Commission's intent was not to limit qualification under this definition to any one particular form of proof or discriminate against legitimate freelancers. Rather, its intent was to incorporate legitimate freelance journalists into the definition, but not anyone merely declaring himself or herself to be a freelance journalist. Accordingly, in addition to the standard set forth by Representative English in his comments in which he describes freelance writers as those "who can demonstrate that their work is likely to be published . . ." 132 Cong. Rec. H 9464 (Oct. 8, 1986), the Commission has adopted other indicia of qualification consistent with another commenter's suggestion. Among these qualifications would be a contract or past publication record. The Commission considers this definition practical and has made no change in the final rule.

In addition to the above concerns expressed in all three comments one set of comments suggested among other things, that the OMB guidelines are in certain instances not supported by, or are contrary to, the legislative intent of the FOIRA. Specifically, this commenter suggested that the phrase "educational institution" (See 11 CFR 4.1(1)) is self defining. The commenter recommended that the Commission borrow from the Tax Code's section 501(c)(3) grant of tax deductible status to determine what constitutes an "educational institution." To adopt such a proposal would be contrary to the congressional intent of the FOIRA and OMB guidelines. The Tax Code merely provides that "corporations, any community chest, fund, or foundation, organized and operated exclusively for . . . educational purposes . . . qualify for exemption from taxation. 26 U.S.C. 501(c)(3). The legislative history of the FOIRA makes it plain that mere non-profit status does not entitle a person or organization to qualify for a limitation of fees as an educational institution. 132 Cong. Rec. S14040 (Sept. 27, 1986.)

Accordingly, the Commission rejects this suggestion.

Section 4.5 Categories of exemptions. This section revises the introductory text in paragraphs (a) and (a)(1) and redesignates paragraphs (b) through (d) as paragraphs (c) through (e). The purpose of this change is to reflect the extensive revisions in the FOIRA exempting information from disclosure under the FOIA, and establishing three special exclusions for specific types of law enforcement records.

Section 4.7 Requests for records. This section is amended to reflect circumstances that might warrant an extension of time for fulfilling a request due to the addition of regulations concerning advance payments at § 4.9(f).

Section 4.9 Fees. This section has received extensive revisions in order to make the FOIA fees charged by government agencies more uniform. Accordingly, the Commission has revised and amended Section 4.9 to conform with government wide standards.

One commenter argued that there is no basis in the FOIRA or its legislative history for construing the automatic waiver of fees for the first two hours of search time to mean something less than that for computer searches. 11 CFR 4.9(a)(2). Congress made it clear that each agency must develop regulations based on OMB's guidelines for a uniform schedule of fees. The Commission's regulations are in conformance with OMB's guidelines on this section, and therefore considered both appropriate and consistent with the requirements of the FOIRA.

This commenter along with another commenter also suggested that the Commission reject the Department of Justice fee waiver policy and adopt simpler less restrictive fee waiver regulations. 11 CFR 4.9(b). The Commission has not utilized the six factors outlined by the Justice Department in its 1983 memorandum but has developed its own standard without guidance from the Department of Justice. Furthermore, one comment received suggests that in light of the Paperwork Reduction Act the Commission should reassess its fee waiver regulations because they seek information from requestors. However, 2 U.S.C. 438(c) exempts the Commission from the Paperwork Reduction Act.

In response to actual Commission practices relating to requests for special mailing services, the Commission has revised the portion of § 4.9(c)(4) dealing with "other charges." The interim rule

appeared to indicate that the Commission would initially pay for such services and bill the requestor. In fact, the Commission's practice is to have requestors pay these costs directly to the company providing the expedited delivery or mailing service. The final rule reflects this practice and explains how it will operate.

Another commenter suggested that the Commission adopt the language in the OMB guidelines relating to "aggregating requests" (11 CFR 4.9(e)) and "advance payments." (11 CFR 4.9(f)). The commenter asserted that § 4.9(e) fails to note the "presumptions against aggregation when the requests have been made more than 30 days apart and does not state that aggregation of multiple requests on unrelated subjects from one requester are prohibited." The Commission has clearly stated that it will consider the time frame involved, as well as the subject matter of the requests, and may find that requests made more than 30 days apart should be aggregated. The Commission, while setting guidelines for determining when requests should be aggregated, also believes each case should be considered on its own merits. The commenter also recommends adopting a clear presumption against advance payments. The Commission's regulations set forth two criteria to be considered when making a determination whether or not to require advance payment. The first criterion is when the Commission estimates or determines that allowable charges that a requestor may be required to pay are likely to exceed \$250. The second criterion is when a requestor has previously failed to pay a fee in a timely fashion. Moreover, the Commission regulations, while not a verbatim statement of the OMB guidelines, closely conform to the standard established by OMB and are consistent with the statute. As a result it is unnecessary to adopt the commenter's proposals.

Part 5—Access to Public Disclosure Division Documents

Section 5.6(a)(1) Fees. This section is amended to reflect the increase in the direct costs of microfilm and personnel to the Commission. The changes in the Public Disclosure fee schedule for these items are made to keep them consistent with the revised FOIA fee schedule.