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Title 38, Parts 0, 1, 2, 12, 14-16,
18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 101

Covering period of *Federal Register* issues
through September 1, 2011

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GENERAL INSTRUCTIONS

Custom Federal Regulations Service™

Supplemental Materials for *Book A*

Code of Federal Regulations

Title 38, Parts 0, 1, 2, 12, 14-16, 18-20, 25-26, 38-45, 48-49, 74-75

General

Veterans Benefits Administration

Supplement No. 101

5 September 2011

Covering the period of Federal Register issues
through September 1, 2011

When **Book A** was originally prepared, it was current through final regulations published in the *Federal Register* of 21 April 1992. These supplemental materials are designed to keep your regulations up to date. You should file the attached pages immediately, and record the fact that you did so on the *Supplement Filing Record* which begins on page A-8 of Book A, *General*.

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FILING INSTRUCTIONS

**Book A, Supplement No. 101
September 5, 2011**

<i>Remove these old pages</i>	<i>Add these new pages</i>	<i>Section(s) Affected</i>
Do not file this supplement until you confirm that all prior supplements have been filed		
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1.INDEX-5 to 1.INDEX-6	1.INDEX-5 to 1.INDEX-6	Part 1 Index
1.550-1 to <u>1.559-1</u>	1.550-1 to <u>1.562-1</u>	§§1.550 to 1.562
2.6-4 to 2.7-1	2.6-4 to 2.7-1	§2.6
20.705-1 to 20.708-1	20.705-1 to 20.708-1	§20.706
20.App.A-1 to 20.App.A-2	20.App.A-1 to 20.App.A-2	Appendix to Part 20
20.App.A-11 to 20.App.A-12	20.App.A-11 to 20.App.A-12	Appendix to Part 20

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HIGHLIGHTS

Book A, Supplement No. 101 September 5, 2011

Supplement Highlights references: Where substantive changes are made in the text of regulations, the paragraphs of *Highlights* sections are cited at the end of the relevant section of text. Thus, if you are reading §3.263, you will see a note at the end of that section which reads: “Supplement *Highlights* references—6(2).” This means that paragraph 2 of the *Highlights* section in Supplement No. 6 contains information about the changes made in §3.263. By keeping and filing the *Highlights* sections, you will have a reference source explaining all substantive changes in the text of the regulations.

Supplement frequency: This Book A (*General*) was originally supplemented twice a year, in April and October. Beginning 1 August 1995, supplements will be issued *every month* during which a final rule addition or modification is made to the parts of Title 38 covered by this book. Supplements will be numbered consecutively as issued.

Modifications in this supplement include the following:

1. On 19 August 2011, the VA published a final rule, effective 19 September 2011, to amend the regulations governing the submission and processing of requests for information under the Freedom of Information Act (FOIA) in order to implement provisions of the OPEN Government Act of 2007, and to reorganize and clarify existing regulations. Changes:

- Revised §§1.550, 1.552, 1.553, 1.554, 1.555, 1.556 and 1.557;
- Removed §§1.553a and 1.554a;
- Added §§1.551, 1.558, 1.559, 1.560, 1.561 and 1.562; and
- In §2.6, revised paragraph (e)(10) and added paragraph (g)(3).

2. On 23 August 2011, the VA published a final rule, effective that same day, to amend its hearing regulations to clarify that the provisions regarding hearings before the Agency of Original Jurisdiction do not apply to hearings before the Board of Veterans' Appeals. Change:

- Revised §20.706; and
- Revised Appendix A to Part 20.



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Procedures for Disclosure of Records Under the Freedom of Information Act

§1.550 Purpose.

(a) Sections 1.550 through 1.562 contain the rules followed by VA in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. These regulations should be read together with the FOIA, which provides the underlying legal basis for the regulations and other information regarding requests for records in the custody of a Federal agency. The regulations also should be read together with VA's FOIA Reference Guide, available on VA's FOIA home page (see §1.552(a) for the pertinent Internet address) and FOIA fee guidance provided by the Office of Management and Budget (OMB), Uniform Freedom of Information Act Fee Schedule and Guidelines, available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf.

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

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

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

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

[40 FR 12656, Mar. 20, 1975 as amended at 76 FR 51892, Aug. 19, 2011]

Supplement *Highlights* references: 101(1).

§1.551 Definitions.

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

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

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

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

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

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

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

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

Expedited processing means giving a FOIA request priority for processing ahead of other pending requests because VA has determined that the requester has shown an exceptional need or urgency for the records as provided in these regulations.

Fees. For fees and fee-related definitions, see §1.561.

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

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

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

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

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

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

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

VA means the Department of Veterans Affairs.

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

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

[76 FR 51892, Aug. 19, 2011]

Supplement *Highlights* Reference: 101(1).

§1.552 General provisions.

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

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

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

[32 FR 10850, July 25, 1967, as amended at 40 FR 12657, Mar. 20, 1975; 72 FR 65462, Nov. 21, 2007; 76 FR 51893, Aug. 19, 2011]

Supplement *Highlights* references: 80(1), 101(1).

§1.553 Public reading rooms and discretionary disclosures.

(a) VA maintains a public reading room electronically at its FOIA home page on the Internet, which contains the records that the FOIA requires to be regularly made available for public inspection and copying. See §1.552(a) for the pertinent Internet address. Information routinely provided to the public (press releases, for example) may be provided without following these sections. In addition, as a matter of policy, VA may make discretionary releases of records or information exempt from disclosure under the FOIA when permitted to do so in accordance with current law and governmental policy. Each VA component is responsible for determining which of its records are required to be made available and for making its records available electronically.

(b) VA may process, in accordance with the FOIA, records that it makes publicly available. Information in a public reading room record will be redacted, for example, if its release would be a clearly unwarranted invasion of an individual's personal privacy.

(c) Some VA components may also maintain physical public reading rooms. Information regarding these components and their contact information is available on VA's FOIA home page on the Internet. See §1.552(a) for the pertinent Internet address. If the requester does not have access to the Internet and wishes to obtain information regarding publicly available information or components that have a physical reading room, he or she may write VA's Chief FOIA Officer at the following address: Department of Veterans Affairs, FOIA Service (005R1C), 810 Vermont Avenue, NW., Washington, DC 20420.

[53 FR 10377, Mar. 31, 1988, as amended at 71 FR 28586, May 17, 2006; 76 FR 51893, Aug. 19, 2011]

Supplement *Highlights* Reference: 101(1).

§1.554 Requirements for making requests.

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

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

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

(d) *Description of records sought.*

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

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

(3) If the FOIA Officer determines that the request does not reasonably describe the records sought, the FOIA Officer will tell the requester why the request is insufficient. The FOIA Officer will also provide an opportunity to discuss the request by documented telephonic communication or written correspondence in order to modify it to meet the requirements of this section.

(4) The time limit for VA to process the FOIA request will not start until the FOIA Officer determines that the requester has reasonably described the records sought in the FOIA request. If the FOIA Officer seeks additional clarification regarding the request and does not receive the requester's written response within thirty (30) calendar days of the date of its communication with the requester, he or she will conclude that the requester is no longer interested in pursuing the request and will close VA's files on the request.

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

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

[32 FR 10850, July 25, 1967, as amended at 40 FR 12657, Mar. 20, 1975; 42 FR 37976, July 26, 1977; 53 FR 9442, Mar. 23, 1988; 76 FR 51893, Aug. 19, 2011]

Supplement *Highlights* Reference: 101(1).

§1.555 Responsibility for responding to requests.

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

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

(c) *Consultations and referrals.* When a component FOIA Officer determines that the component maintains responsive records that either originated with another component or agency, or which contain information provided by, or of substantial interest to, another component or agency, then the FOIA Officer shall either:

(1) Respond to the request, after consulting with the component or the agency that originated or has a substantial interest in the records involved; or

(2) Refer the responsibility for responding to the request or portion of the request to the component best able to determine whether to disclose the relevant records, or to the agency that created or initially acquired the record as long as that agency is subject to the FOIA. Ordinarily, the component or agency that created or initially acquired the record will be presumed to be best able to make the disclosure assessment. The referring component shall document the referral and maintain a copy of the records that it refers.

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

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

[53 FR 10377, Mar. 31, 1988; 76 FR 51894, Aug. 19, 2011]

Supplement *Highlights Reference:* 101(1).

§1.556 Timing of responses to requests.

(a) *General.* Components ordinarily shall respond to requests according to their order of receipt and within the time frames established under the FOIA. If a request for expedited processing is granted in accordance with paragraph (d) of this section, such request will be processed prior to requests in either of the tracks described in paragraph (b) of this section.

(b) *Multitrack processing.*

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

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

(c) *Unusual circumstances.*

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

(i) The need to search for and collect the requested records from field facilities or other components other than the office processing the request;

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

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

(2) Where the FOIA Officer reasonably believes that certain requests from the same requester, or a group of requesters acting in concert, actually constitute the same request that would otherwise satisfy the unusual circumstances specified in this paragraph, and the requests involve clearly related matters, the FOIA Officer may aggregate those requests. Multiple requests involving unrelated matters will not be aggregated.

(d) *Expedited processing.*

(1) Requests will be processed out of the order in which they were received by the component responsible for processing the FOIA request and given expedited treatment when VA determines that:

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

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

(iii) In the discretion of the FOIA Officer, the request warrants such treatment; or

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

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

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

[40 FR 12658, Mar. 20, 1975, as amended at 61 FR 7216, Feb. 27, 1996; 76 FR 51894, Aug. 19, 2011]

Supplement *Highlights Reference*: 101(1).

§1.557 Responses to requests.

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

(b) *Processing of requests.* Upon receipt of a perfected request by the appropriate component, the FOIA Officer will make a reasonable effort to search for records responsive to the request. The FOIA Officer ordinarily will include as responsive those records in its possession and control as of the date the search for responsive records began. This includes searching for records in electronic form or format, unless to do so would interfere significantly with the agency's automated information systems. If fees for processing the request are due under §1.561, the FOIA Officer shall inform the requester of the amount of the fee as provided in §1.554(e) and §1.561. When a request is granted in part, the FOIA Officer shall mark, redact, or annotate the records to be released to show the amount of information deleted and, where technically feasible, indicate the exemption at the place of redaction unless doing so would harm an interest protected by an applicable exemption. The FOIA Officer will provide the records in the form or format sought by the requester, if readily reproducible in that form or format.

(c) *Time limits for processing requests.* Ordinarily, a component will have twenty (20) business days from the date of VA's receipt of the request to make a determination whether to grant the request in its entirety, grant the request in part, or deny the request in its entirety. If the request must be referred to another component, the response time will begin on the date that the request was received by the appropriate component, but in any event not later than ten (10) business days after the referring office receives the FOIA request.

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

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

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

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

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

[40 FR 12658, Mar. 20, 1975, as amended at 55 FR 21546, May 25, 1990; 76 FR 51895, Aug. 19, 2011]

Supplement *Highlights* Reference: 101(1).

§1.558 Business information.

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

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

(c) *Notices to submitters.*

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

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

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

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

(d) *Opportunity to object to disclosure.* When notification to a submitter is made pursuant to paragraph (c)(1) of this section, the submitter may object to the disclosure of any specified portion(s) of the record(s). The submitter's objection(s) must be in writing, addressed to the FOIA Officer, and must be received by the reasonable date specified in the FOIA Officer's notice in order for VA to consider such objections. If the submitter has any objection to disclosure of the record(s) requested, or any specified portion(s) thereof, the submitter must identify the specific record(s) or portion(s) of records for which objection(s) are made. The objection will specify in detail all grounds for withholding any record(s) or portion(s) of the record(s) upon which disclosure is opposed under any exemption of the FOIA. In particular, if the submitter is asserting that the record is protected under Exemption 4, 5 U.S.C. 552(b)(4), it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. The submitter must explain in detail how and why disclosure of the specified records would likely cause substantial competitive harm in the case of a required submission or state whether the records would customarily be disclosed by the submitter upon a request from the public in the case of a voluntary submission. The submitter's objections must be contained within a single written response; oral responses or subsequent, multiple responses generally will not be considered. If the submitter does not respond to the notice described in paragraph (c)(1) of this section within the specified time limit, the submitter will be considered to have no objection to disclosure of the information.

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

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

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

- (1) The FOIA Officer determines that the information should not be disclosed;
- (2) The information lawfully has been published or has been officially made available to the public; or

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

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

[76 FR 51895, Aug. 19, 2001]

Supplement *Highlights* reference: 101(1)

§1.559 Appeals.

(a) *Informal resolution prior to appeal.* Before filing an appeal, the requester may wish to communicate with the contact person listed in the FOIA response or the component's FOIA Officer to see if the issue can be resolved informally. Informal resolution of the requester's concerns may be appropriate, for example, where additional details may be required for a search for responsive records. Communication with VA at this level does not toll the time limit for filing an administrative appeal.

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

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

(d) *Time limits and content of appeal.* The appeal to the VA OGC (024), or VA Office of Inspector General (50), as appropriate, must be postmarked no later than sixty (60) calendar days after the date of the adverse determination. The appeal must clearly identify the determination being appealed, including any assigned request number. Other information should also be included, such as the name of the FOIA officer, the address of the component, the date of the component's determination, if any, and the precise subject matter of the appeal. If appealing only a portion of the component's determination, the requester must specify which part of the determination he or she is appealing. Copies of the request and VA's response, if any, should be included with the appeal. An appeal is not perfected until VA either receives the information identified above or the appeal is otherwise sufficiently defined. Appeals should be marked "Freedom of Information Act Appeal." The General Counsel, Deputy General Counsel, or Assistant General Counsel with jurisdiction over information disclosure matters (024) will act on behalf of the Secretary on all appeals under this section, except those pertaining to the Office of Inspector General. The designated official in the Office of Inspector General will act on all

appeals pertaining to Office of Inspector General records. A determination by the General Counsel, Deputy General Counsel, or Assistant General Counsel, or designated official within the Office of Inspector General, will be the final VA action.

(e) *Responses to appeals.* The Office of the General Counsel or the Office of Inspector General, as applicable, will provide the requester a decision on the appeal in writing. The decision will include a brief statement of the reasons for the decision, including, if applicable, any FOIA exemptions applied and notice of the right to judicial review of the decision.

(f) *Court review.* Unless the requester has been deemed to have exhausted all administrative remedies, he or she must first appeal the adverse determination in accordance with this section before seeking review by a court.

[76 FR 51895, Aug. 19, 2001]

Supplement *Highlights* reference: 101(1)

§1.560 Maintenance and preservation of records.

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

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

[76 FR 51895, Aug. 19, 2001]

Supplement *Highlights* reference: 101(1)

§1.561 Fees.

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

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

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

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

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

(4) *Duplication* means making a copy of a record necessary to respond to a FOIA request; copies may take the form of paper, microform, audiovisual materials or machine readable-documentation (*e.g.*, magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

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

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

(7) *Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase or subscription or free distribution to the general public. These examples are not all-inclusive. As methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media that otherwise meet the criteria for news media shall be considered to be news-media entities. Freelance journalists may be regarded as working for a news-media entity if they can demonstrate a solid basis for expecting publication through that entity, even though not actually employed by it. A publication contract would be the clearest proof, but the requester's publication history may also be considered. To be in this category, the requester must not be seeking the requested records for a commercial use; a records request supporting the requester's news-dissemination function shall not be considered to be for a commercial use.

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

(9) *Search* means the process of looking for and retrieving records that are responsive to a request, including line-by-line or page-by-page identification of responsive information within records. *Search* also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The component will conduct searches in the most efficient and least expensive manner reasonably possible. The FOIA Officer may charge for time spent searching even if he or she does not locate any responsive record(s) or if any record(s) located is withheld as entirely exempt from disclosure.

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

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

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

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

(4) *All other requesters.* Subject to the limitations in paragraph (e) of this section, a requester who does not fit into any of the categories in this section will be charged fees to recover the full, reasonable direct cost of searching for and reproducing records responsive to a request, except that the first 2 hours of search time and the first 100 pages of reproduction will be furnished without cost.

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

(1) *Search.*

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

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

(2) *Duplication.* When a duplication fee applies, the FOIA Officer will charge a fee of 15 cents per one-sided page for a paper photocopy of a record; no more than one copy will be provided. For other forms of duplication, including electronic copies, the FOIA Officer will charge the direct costs of that duplication.

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

(e) *Limitations on charging fees.*

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

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

(3) No search fee (or duplication fee, when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or a representative of the news media) will be charged in accordance with this section if the agency fails to comply with the time limit under §1.556(a), and if no unusual or exceptional circumstances apply to the processing of the request pursuant to §1.556(c). Duplication and search fees may still be charged to commercial use requesters. Duplication fees may still be charged for “all other” requesters.

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

(i) The first 100 pages of duplication (or the cost equivalent).

(ii) The first 2 hours of search time (or the cost equivalent).

(5) Whenever a total fee calculated under paragraph (d) of this section is less than \$25.00, no fee will be charged.

(6) VA may provide free copies of records or free services in response to an official request from other government agencies and Congressional offices and when a component head or designee determines that doing so will assist in providing medical care to a VA patient or will otherwise assist in the performance of VA's mission.

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

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

(g) *Fee schedule.* If it is determined that a fee will be charged for processing the FOIA request, VA will charge the requester to search for, review, and duplicate the requested records according to his or her fee category (see §1.561(c)) and the following fee schedule. In addition, VA will charge the requester for any special handling or services performed in connection with processing the request and/or appeal. The following fees will be used by VA; these fees apply to services performed in making documents available for public inspection and copying under §1.553 as well. The duplicating fees also are applicable to records provided in response to requests made under the Privacy Act. Fees will not be charged under either the FOIA or the Privacy Act where the total amount of fees for processing the request is \$25.00 or less or where the requester has met the requirements for a statutory fee waiver.

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

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

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

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

Note to paragraph (g)(1):Fees for the current fiscal year are posted on VA's FOIA home page (see §1.552(a) for the pertinent Internet address).

(2) Schedule of fees:

Activity	Fees
(i) Duplication of standard size (8 1/2" x 11"; 8 1/2" x 14"; 11" x 14") paper records	\$0.15 per page.
(ii) Duplication of non-paper items (e.g., x-rays), paper records which are not of a standard size (e.g., architectural drawings/construction plans or EKG tracings), or other items which do not fall under category (1), in paragraph (c)(1) of this section	Direct cost to VA.
(iii) Record search by manual (non-automated) methods	Basic hourly salary rate of the employee(s), plus 16 percent. *Note—If a component uses a single class of personnel for a search, e.g., all clerical or professional, an average rate for the grades of employees involved in the search may be used.
(iv) Record search using automated methods, such as by computer	Direct cost to perform search.
(v) Record review (for Commercial Use Requesters only)	Basic hourly rate of employees performing review to determine whether to release records and to prepare them for release, plus 16 percent.
(vi) Other activities, such as: Attesting under seal or certifying that records are true copies; sending records by special methods; forwarding mail; compiling and providing special reports, drawings, specifications, statistics, lists, abstracts or other extracted information; generating computer output; providing files under court process where the federal government is not a party to, and does not have an interest in, the litigation	Direct cost to VA.

(h) *Notification of fee estimate or other fee issues.*

(1) Threshold for charging fees: VA will not charge the requester if the fee is \$25.00 or less.

(2) When a FOIA Officer determines or estimates that the fees to be charged under this section will amount to more than \$25.00 or the amount set by OMB fee guidelines, whichever is higher, the FOIA Officer will notify the requester in writing of the actual or estimated amount of the fees, and ask the requester to provide written assurance of the payment of all fees or fees up to a designated amount, unless he or she has indicated a willingness to pay fees as high as those anticipated. Any such agreement to pay the fees shall be memorialized in writing. In addition, when the requester does not provide sufficient information upon which VA can identify a fee category (see paragraphs (c)(1) through (4) of this section), or an issue otherwise arises regarding fee assessment, the FOIA Officer may seek clarification from the requester. In either case, the timeline for responding to the request will be tolled and no further work will be done on it until the fee issue has been resolved. If VA does not receive a written response within ten (10) days after contacting the requester regarding a fee issue, it will assume that the requester no longer wishes to pursue the request and will close the file on the request.

(i) *Charges for other services.* Apart from the other provisions of this section, when special service, such as certifying that records are true copies or sending them by other than ordinary mail, is requested, and the FOIA Officer chooses to provide such a service as a matter of administrative discretion, the direct costs of providing the service ordinarily will be charged.

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

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

(l) *Advance payments.*

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

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

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

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

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

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

(n) *Requirements for waiver or reduction of fees.*

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

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

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

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

(3) To determine whether the fee waiver requirement under paragraph (n)(2)(i) of this section is met, the FOIA Officer will consider the following factors:

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

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

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

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

(4) To determine whether the fee waiver requirement under paragraph (n)(2)(ii) of this section is met, the FOIA Officer will consider the following factors:

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

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

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

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

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

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

[76 FR 51895, Aug. 19, 2001]

Supplement *Highlights* reference: 101(1)

§1.562 Other rights and services.

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

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

[76 FR 51895, Aug. 19, 2001]

Supplement *Highlights* reference: 101(1)

make the determination in all instances as to whether the case warrants referral to the Department of Justice. The delegations of authority are applicable to those claims where the Department of Justice determines that action based upon the alleged fraud, false claim, or misrepresentation is not warranted.

(5) Pursuant to the provisions of the Military Personnel and Civilian Employees' Claim Act of 1964, 31 U.S.C. 3721, as amended, the General Counsel, Deputy General Counsel, Assistant General Counsel (Professional Staff Group III), Deputy Assistant General Counsel of said staff group, and Regional Counsel or those authorized to act for them are authorized to settle and pay a claim for not more than \$40,000 made by a civilian officer or employee of the Department of Veterans Affairs for damage to, or loss of, personal property incident to his or her service. (Pub. L. 97-226)

(6) Under the provisions of 38 U.S.C. 7316(e), authority is delegated to the General Counsel, Deputy General Counsel, and the Assistant General Counsel (Professional Staff Group I) to hold harmless or provide liability insurance for any person to whom the immunity provisions of section 7316 apply, for damage for personal injury or death, or for property damage, negligently caused by such person while furnishing medical care or treatment in the exercise of his or her duties in or for the Veterans Health Administration, if such person is assigned to a foreign country, detailed to State or political division thereof, or is acting under any other circumstances which would preclude the remedies of an injured third person against the United States, provided by sections 1346(b) and 2672 of title 28, United States Code, for such damage or injury.

(7) The General Counsel, Deputy General Counsel, and those authorized to act for them, are authorized to conduct investigations, examine witnesses, take affidavits, administer oaths and affirmations, and certify copies of public or private documents on all matters within the jurisdiction of the General Counsel. Pursuant to the provisions of §2.2(c), the General Counsel, Deputy General Counsel, and those authorized to act for them, are authorized to countersign VA Form 4505.

(8) The General Counsel, or the Deputy General Counsel acting as or for the General Counsel, is authorized to designate, in accordance with established standards, those legal opinions of the General Counsel which will be considered precedent opinions involving veterans' benefits under laws administered by the Department of Veterans Affairs. (Authority: 38 U.S.C. 501, 512)

(9) Under the provisions of 38 U.S.C. 1729(c)(1), authority is delegated to the General Counsel, Deputy General Counsel, Assistant General Counsel (Professional Staff Group I), Deputy Assistant General Counsel of said staff group, and Regional Counsel, or those authorized to act for them, to collect in full, compromise, settle, or waive any claim and execute the release thereof; however, claims in excess of \$100,000 may only be compromised, settled, or waived with the prior approval of the General Counsel, Deputy General Counsel, Assistant General Counsel (Professional Staff Group I), or Deputy Assistant General Counsel of said staff group, or those authorized to act for them. (Authority: 38 U.S.C. 501, 512, 1729(c)(1))

(10) Except as prescribed in paragraph (g)(3) of this section, the General Counsel, Deputy General Counsel, and the Assistant General Counsel for Professional Staff Group IV are authorized to make final Departmental decisions on appeals under the Freedom of Information Act, the Privacy Act, and 38 U.S.C. 5701, 5705 and 7332. (Authority 38 U.S.C 512)

(11) All authority delegated in this paragraph to Regional Counsels will be exercised by them under the supervision of and in accordance with instructions issued by the General Counsel.

(f) *National Cemetery Administration.* Under Secretary for Memorial Affairs is delegated authority:

(1) To act on all matters assigned to the National Cemetery Administration by statute (38 U.S.C. chapter 24) and by regulation except where specifically requiring the personal attention or action of the Secretary and to authorize supervisory personnel within the jurisdiction of the Under Secretary for Memorial Affairs to perform such functions as may be assigned.

(2) To designate, as deemed necessary, Superintendents of National Cemeteries as special investigators under 38 U.S.C. 901, however, such law enforcement authority is limited to enforcement of rules and regulations governing conduct on property under the charge and control of the Department of Veterans Affairs, as those rules and regulations apply to the cemetery over which the individual Superintendent exercises control and jurisdiction. Such designation will not authorize the carrying of firearms by any Superintendent.

(3) To accept donations, except offers of land, made in any manner, for the beautification or benefit of national cemeteries.

(4) To name features in national cemeteries, such as, roads, walks, and special structures.

(5) To establish policies and specifications for inscriptions on Government headstones, markers, and private monuments. (Authority: 38 U.S.C. 501(a), 512, 3703(c)(1), 3719(f))

(g) *Inspector General.*

(1) The Secretary delegates to the Inspector General, the authority, as head of the Department of Veterans Affairs, to make written requests under the Privacy Act of 1974, 5 U.S.C. 552a(b)(7), for the transfer of records or copies of records maintained by other agencies which are necessary to carry out an authorized law enforcement activity of the Office of Inspector General. This delegation is made pursuant to 38 U.S.C. 512. The Inspector General may redelegate the foregoing authority within the Office of Inspector General, but the delegation may only be to an official of sufficient rank to ensure that the request for the records has been the subject of a high level evaluation of the need for the information.

(2) The Inspector General delegates the authority under the Inspector General Act of 1978, and redelegates the authority under paragraph (a) of this section, to request Privacy Act

protected records from Federal agencies pursuant to subsection (b)(7) of the Privacy Act to each of the following Office of Inspector General officials:

- (i) Deputy Inspector General,
- (ii) Assistant Inspector General for Investigations,
- (iii) Deputy Assistant Inspector General for Investigations,
- (iv) Chief of Operations, and
- (v) Special Agents in Charge of Field Offices of Investigations.

(3) The Office of Inspector General is authorized to make final decisions on appeals submitted pursuant to the Freedom of Information Act concerning any Office of Inspector General records.

These officials may not redelegate this authority. (Authority: 38 U.S.C. 512)

(h) *Delegations to Office Resolution Management Officials (ORM).*

(1) The Deputy Assistant Secretary for Resolution Management is delegated authority to supervise and control the operation of the administrative EEO Discrimination Complaint Processing System within the Department.

(2) The Deputy Assistant Secretary for Resolution Management, the Chief Operating Officer, and all Regional EEO Officers/Field Managers are delegated authority to make procedural agency decisions to either accept or dismiss, in whole or in part, EEO discrimination complaints based upon race, color, national origin, sex, religion, age, disability, or reprisal filed by employees, former employees, or applicants for employment.

(3) The Deputy Assistant Secretary for Resolution Management, the Chief Operating Officer, and the Chief, Policy and Compliance are delegated authority to make agency decisions on all breach of settlement claims raised by employees, former employees, and applicants for employment.

(4) The Deputy Assistant Secretary for Resolution Management, the Chief Operating Officer, and the Chief, Policy and Compliance are delegated authority to consider and resolve all claims raised by employees, former employees, and applicants for employment that allege dissatisfaction with the processing of a previously filed EEO discrimination complaint.

(5) The Deputy Assistant Secretary for Resolution Management, the Chief Operating Officer, and the Chief, Policy and Compliance are delegated authority to monitor compliance by Department organizational components with orders and decisions of the OEDCA and the EEOC.

(i) *Delegations to officials of the Office of Employment Discrimination Complaint Adjudication (OEDCA).*

(1) The Director and Associate Director, OEDCA, are delegated authority to make procedural decisions to dismiss, in whole or in part, any EEO discrimination complaint filed by

any employee, former employee, or applicant for employment that may be pending before OEDCA, where administrative complaint processing efficiency may be best served by doing so.

(2) The Director and Associate Director, OEDCA, are delegated authority to dismiss, in whole or in part any EEO discrimination complaint based upon race, color, religion, sex, national origin, age, disability, or reprisal filed by any ORM employee, former employee, or applicant for employment.

(3) The Director and Associate Director, OEDCA, are delegated authority to make the agency decision on all breach of settlement claims raised by ORM employees, former employees, and applicants for employment.

(4) The Director and Associate Director, OEDCA, are delegated authority to consider and resolve all claims raised by ORM employees, former employees, and applicants for employment that allege dissatisfaction with the processing of a previously filed EEO discrimination complaint.

(5) The Director and Associate Director, OEDCA, are delegated authority to make procedural agency decisions to either accept or dismiss, in whole or in part, EEO discrimination complaints filed by employees, former employees, or applicants for employment where the ORM must recuse itself from a case due to an actual, apparent, or potential conflict of interest.

(j) *Delegation to the Chairman, Board of Veterans' Appeals.* In cases where OEDCA has recused itself from a case due to an actual, apparent, or potential conflict of interest, the Chairman, Board of Veterans' Appeals, is delegated authority to make procedural agency decisions to dismiss, in whole or in part, EEO discrimination complaints filed by agency employees, former employees, and applicants for employment; to make substantive final agency decisions where complainants do not request an EEOC hearing; to take final agency action following a decision by an EEOC Administrative Judge; and to make final agency decisions ordering appropriate remedies and relief where there is a finding of discrimination.

(k) *Processing complaints involving certain officials.* A complaint alleging that the Secretary or the Deputy Secretary personally made a decision directly related to matters in dispute, or are otherwise personally involved in such matters, will be referred for procedural acceptability review, investigation, and substantive decisionmaking to another Federal agency (e.g., The Department of Justice) pursuant to a cost reimbursement agreement. Referral will not be made when the action complained of relates merely to ministerial involvement in such matters (e.g., ministerial approval of selection recommendations submitted to the Secretary by the Under Secretary for Health, the Under Secretary for Benefits, the Under Secretary for Memorial Affairs, assistant secretaries, or staff office heads).

[25 FR 11095, Nov. 23, 1960, as amended at 58 FR 32442, June 10, 1993; 58 FR 39152, July 22, 1993; 61 FR 7216, Feb. 27, 1996; 61 FR 26107, May 24, 1996; 61 FR 27784, June 3, 1996; 61 FR 56449, Nov. 1, 1996; 63 FR 11122, Mar. 6, 1998; 64 FR 30244, June 7, 1999; 64 FR 47111, Aug. 30, 1999; 66 FR 44053, Aug. 22, 2001; 67 FR 3434, Jan. 24, 2002; 68 FR 25504, May 13, 2003; 69 FR 62203, Oct. 25, 2004; 72 FR 12565, Mar. 16, 2007; 72 FR 27247, May 15, 2007; 72 FR 34395, June 22, 2007; 74 FR 10176, Mar. 10, 2009; 76 FR 51901, Aug. 19, 2011]

Editorial note: For *Federal Register* citations affecting §2.6, see the List of CFR Sections Affected in the *Finding Aids* section of the *Code of Federal Regulations*.

Supplement *Highlights* references: 3(3, 5, 6), 15(2, 5), 18(1), 26(2), 34(2), 36(1), 47(2), 56(1), 66(1), 75(1), 76(1), 77(1), 88(1), 101(1).

§2.7 Delegation of authority to provide relief on account of administrative error.

(a) Section 503(a) of title 38 U.S.C., provides that if the Secretary determines that benefits administered by the Department of Veterans Affairs have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary is authorized to provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom he determines equitably entitled thereto.

(b) Section 503(b) of title 38 U.S.C., provides that if the Secretary determines that any veteran, surviving spouse, child of a veteran, or other person, has suffered loss, as a consequence of reliance upon a determination by the Department of Veterans Affairs of eligibility or entitlement to benefits, without knowledge that it was erroneously made, the Secretary is authorized to provide such relief as the Secretary determines equitable, including the payment of moneys to any person equitably entitled thereto. The Secretary is also required to submit an annual report to the Congress, containing a brief summary of each recommendation for relief and its disposition. Preparation of the report shall be the responsibility of the General Counsel.

(c) The authority to grant the equitable relief, referred to in paragraphs (a) and (b) of this section, has not been delegated and is reserved to the Secretary. Recommendation for the correction of administrative error and for appropriate equitable relief therefrom will be submitted to the Secretary, through the General Counsel. Such recommendation may be initiated by the head of the administration having responsibility for the benefit, or of any concerned staff office, or by the Chairman, Board of Veterans Appeals. When a recommendation for relief under paragraph (a) or (b) of this section is initiated by the head of a staff office, or the Chairman, Board of Veterans Appeals, the views of the head of the administration having responsibility for the benefit will be obtained and transmitted with the recommendation of the initiating office. (Authority: 38 U.S.C. 503, 512)

[37 FR 22864, Oct. 26, 1972, as amended at 49 FR 30693, Aug. 1, 1984; 54 FR 34981, Aug. 23, 1989; 68 FR 25504, May 13, 2003]

§20.705 Rule 705. Where hearings are conducted.

A hearing on appeal before the Board of Veterans' Appeals may be held in one of the following places at the option of the appellant:

(a) In Washington, DC, or

(b) At a Department of Veterans Affairs facility having adequate physical resources and personnel for the support of such hearings. (Authority: 38 U.S.C. 7102, 7105(a), 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 58 FR 27936, May 12, 1993; 61 FR 20451, May 7, 1996]

Supplement *Highlights* references: 3(2), 14(3).

§20.706 Rule 706. Functions of the presiding Member.

The presiding Member is responsible for the conduct of the hearing, in accordance with the provisions of subpart H of this part, administering the oath or affirmation, and ruling on questions of procedure. The presiding Member will assure that the course of the hearing remains relevant to the issue, or issues, on appeal and that there is no cross-examination of the parties or witnesses. The presiding Member will take such steps as may be necessary to maintain good order at hearings and may terminate a hearing or direct that the offending party leave the hearing if an appellant, representative, or witness persists in disruptive behavior. The presiding Member is not bound by the procedures described in § 3.103(c) of this chapter, as those procedures only apply to hearings before the agency of original jurisdiction. (Authority: 38 U.S.C. 7102, 7105(a), 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20451, May 7, 1996; 76 FR 52575, Aug. 23, 2011]

Supplement *Highlights* reference: 101(1).

§20.707 Rule 707. Designation of Member or Members to conduct the hearing.

The Member or panel to whom a proceeding is assigned under §19.3 of this part shall conduct any hearing before the Board in connection with that proceeding. Where a proceeding has been assigned to a panel, the Chairman, or the Chairman's designee, shall designate one of the Members as the presiding Member. The Member or Members who conduct the hearing shall participate in making the final determination of the claim, subject to the exception in §19.11(c) of this part (relating to reconsideration of a decision). (Authority: 38 U.S.C. 7102, 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 61 FR 20451, May 7, 1996]

Supplement *Highlights* reference: 14(3)

§20.708 Rule 708. Prehearing conference.

An appellant's authorized representative may request a prehearing conference with the presiding Member of a hearing to clarify the issues to be considered at a hearing on appeal, obtain rulings on the admissibility of evidence, develop stipulations of fact, establish the length of argument which will be permitted, or take other steps which will make the hearing itself more efficient and productive. With respect to hearings to be held before the Board at Washington, DC, arrangements for a prehearing conference must be made through: Director, Management and Administration (01E), Board of Veterans' Appeals, 810 Vermont Avenue, NW., Washington, DC 20420. Requests for prehearing conferences in cases involving hearings to be held before the Board at Department of Veterans Affairs field facilities must be addressed to the office of the Department of Veterans Affairs official who signed the letter giving notice of the time and place of the hearing. (Authority: 38 U.S.C. 7102, 7105(a), 7107)

[57 FR 4109, Feb. 3, 1992, as amended at 58 FR 27936, May 12, 1993; 61 FR 20452, May 7, 1996; 67 FR 16023, Apr. 4, 2002]

Supplement *Highlights* references: 3(2), 14(3).

Appendix A to Part 20**Cross-References**

Section: 20.100

Cross-reference: 38 CFR 20.306

Title of cross-referenced material or comment: Rule 306. Legal holidays.

Section: 20.200

Cross-reference: 38 CFR 20.201

Title of cross-referenced material or comment: Rule 201. Notice of Disagreement.

Section: 20.200

Cross-reference: 38 CFR 20.202

Title of cross-referenced material or comment: Rule 202. Substantive Appeal.

Section: 20.200

Cross-reference: 38 CFR 20.300-20.306

Title of cross-referenced material or comment: See re filing Notices of Disagreement and Substantive Appeals.

Section: 20.202

Cross-reference: 38 CFR 19.29

Title of cross-referenced material or comment: Statement of the Case.

Section: 20.202

Cross-reference: 38 CFR 19.31

Title of cross-referenced material or comment: Supplemental Statement of the Case.

Section: 20.301

Cross-reference: 38 CFR 20.500

Title of cross-referenced material or comment: Rule 500. Who can file an appeal in simultaneously contested claims.

Section: 20.301

Cross-reference: 38 CFR 20.602

Title of cross-referenced material or comment: Rule 602. Representation by recognized organizations.

Section: 20.301

Cross-reference: 38 CFR 20.603

Title of cross-referenced material or comment: Rule 603. Representation by attorneys-at-law.

Section: 20.301

Cross-reference: 38 CFR 20.604

Title of cross-referenced material or comment: Rule 604. Representation by agents.

Section: 20.301

Cross-reference: 38 CFR 20.605

Title of cross-referenced material or comment: Rule 605. Other persons as representative.

Section: 20.302

Cross-reference: 38 CFR 20.501

Title of cross-referenced material or comment: Rule 501. Time limits for filing Notice of Disagreement, Substantive Appeal, and response to Supplemental Statement of the Case in simultaneously contested claims.

Section: 20.303

Cross-reference: 38 CFR 20.304

Title of cross-referenced material or comment: Rule 304. Filing additional evidence does not extend time limit for appeal.

Section: 20.303

Cross-reference: 38 CFR 20.503

Title of cross-referenced material or comment: Rule 503. Extension of time for filing a Substantive Appeal in simultaneously contested claims.

Section: 20.305

Cross-reference: 38 CFR 20.306

Title of cross-referenced material or comment: Rule 306. Legal holidays.

Section: 20.400

Cross-reference: 38 CFR 19.50-19.53

Title of cross-referenced material or comment: See also re administrative appeals.

Section: 20.401

Cross-reference: 38 CFR 19.50-19.53

Title of cross-referenced material or comment: See also re administrative appeals.

Section: 20.401

Cross-reference: 38 CFR 20.302-20.306

Title of cross-referenced material or comment: See re time limits for perfecting an appeal.

Section: 20.401

Cross-reference: 38 CFR 20.501, 20.503

Title of cross-referenced material or comment: See re time limits for perfecting an appeal in simultaneously contested claims.

Section: 20.1105

Cross-reference: 38 CFR 3.160(e)

Title of cross-referenced material or comment: Reopened claim.

Section: 20.1105

Cross-reference: 38 CFR 20.1304(b)(1)

Title of cross-referenced material or comment: See re request for a personal hearing or submission of additional evidence more than 60 days after a case has been certified to the Board of Veterans' Appeals as possible basis for a reopened claim.

Section: 20.1106

Cross-reference: 38 CFR 3.22(a)(2)

Title of cross-referenced material or comment: See re correction of a rating, after a veteran's death, based on clear and unmistakable error, in cases involving claims for benefits under the provisions of 38 U.S.C. 1318.

Section: 20.1300

Cross-reference: 38 CFR 1.500–1.527

Title of cross-referenced material or comment: See re the release of information from Department of Veterans Affairs claimant records.

Section: 20.1300

Cross-reference: 38 CFR 1.550–1.559

Title of cross-referenced material or comment: See re the release of information from Department of Veterans Affairs records other than claimant records.

Section: 20.1300

Cross-reference: 38 CFR 1.575–1.584

Title of cross-referenced material or comment: See re safeguarding personal information in Department of Veterans Affairs records.

Section: 20.1300

Cross-reference: 38 CFR 20.1301

Title of cross-referenced material or comment: Rule 1301. Disclosure of information.

Section: 20.1301

Cross-reference: 38 CFR 1.577

Title of cross-referenced material or comment: Access to records.

Section: 20.1302

Cross-reference: 38 CFR 20.611

Title of cross-referenced material or comment: Rule 611. Continuation of representation following death of a claimant or appellant.

Section: 20.1304

Cross-reference: 38 CFR 20.700–20.717

Title of cross-referenced material or comment: See also re hearings.

Section: 20.1304

Cross-reference: 38 CFR 3.156

Title of cross-referenced material or comment: New and material evidence.

Section: 20.1304

Cross-reference: 38 CFR 3.160(e)

Title of cross-referenced material or comment: Reopened claim.

Section: 20.1304

Cross-reference: 38 CFR 20.305

Title of cross-referenced material or comment: Rule 305. Computation of time limit for filing.

Section: 20.1304

Cross-reference: 38 CFR 20.306

Title of cross-referenced material or comment: Rule 306. Legal holidays.

[57 FR 4109, Feb. 3, 1992, as amended at 76 FR 52575, Aug. 23, 2011]

End of Part 20

Next Part in this Book A is Part 25