

IOLTA programs, and private foundations;

(5) The reputations of the applicant's principals and key staff;

(6) The applicant's knowledge of the various components of the legal services delivery system in the State and its willingness to coordinate with the various components as appropriate to assure the availability of a full range of legal assistance, including:

(i) its capacity to cooperate with State and local bar associations, private attorneys and pro bono programs to increase the involvement of private attorneys in the delivery of legal assistance and the availability of pro bono legal services to eligible clients; and

(ii) its knowledge of and willingness to cooperate with other legal services providers, community groups, public interest organizations and human services providers in the service area;

(7) The applicant's capacity to develop and increase non-Corporation resources;

(8) The applicant's capacity to ensure continuity in client services and representation of eligible clients with pending matters; and

(9) The applicant does not have known or potential conflicts of interest, institutional or otherwise, with the client community and demonstrates a capacity to protect against such conflicts.

(b) In selecting recipients of awards for grants or contracts under this part, the Corporation shall not grant any preference to current or previous recipients of funds from the Corporation.

§ 1634.10 Transition provisions.

(a) When the competitive bidding process results in the award of a grant or contract to an applicant, other than the current recipient, to serve the area currently served by that recipient, the Corporation—

(1) may provide, if the law permits, continued funding to the current recipient, for a period of time and at a level to be determined by the Corporation after consultation with the recipient, to ensure the prompt and orderly completion of or withdrawal from pending cases or matters or the transfer of such cases or matters to the new recipient or to other appropriate legal service providers in a manner consistent with the rules of ethics or professional responsibility for the jurisdiction in which those services are being provided; and

(2) shall ensure, after consultation with the recipient, the appropriate disposition of real and personal

property purchased by the current recipient in whole or in part with Corporation funds consistent with the Corporation's policies.

(b) Awards of grants or contracts for legal assistance to any applicant that is not a current recipient may, in the Corporation's discretion, provide for incremental increases in funding up to the annualized level of the grant or contract award in order to ensure that the applicant has the capacity to utilize Corporation funds in an effective and economical manner.

§ 1634.11 Replacement of recipient that does not complete grant term.

In the event that a recipient is unable or unwilling to continue to perform the duties required under the terms of its grant or contract, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in that service area. The Corporation shall have discretion to determine how legal assistance is to be provided to the service area, including, but not limited to, enlarging the service area of a neighboring recipient, putting a current recipient on month-to-month funding or entering into a short term, interim grant or contract with another qualified provider for the provision of legal assistance in the service area until the completion of a competitive bidding process within a reasonable period of time.

§ 1634.12 Emergency procedures and waivers.

The President of the Corporation may waive the requirements of §§ 1634.6 and 1634.8(a) (3) and (5) when necessary to comply with requirements imposed by law on the awards of grants and contracts for a particular fiscal year.

Dated: March 26, 1996.
Victor M. Fortuno,
General Counsel.
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45 CFR Part 1635

Timekeeping Requirement

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This rule requires all recipients of Legal Services Corporation ("LSC" or "Corporation") funds to account for the time spent on all cases, matters, and supporting activities by their attorneys and paralegals, whether funded by the Corporation or by other sources.

EFFECTIVE DATE: May 1, 1996.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, Legal Services Corporation, 750 First Street NE., 11th Floor, Washington, D.C. 20002-4250. (202) 336-8800.

SUPPLEMENTARY INFORMATION: On June 25, 1995, in order to improve the accountability of recipients for their funds (both Corporation and all other funds), and in response to concerns expressed by members of Congress in proposed reauthorization legislation, proposed appropriations legislation, and in congressional hearings, the LSC Board of Directors ("Board") adopted a resolution requiring Corporation staff to prepare a regulation specifying a time and recordkeeping system for implementation by LSC recipients. On September 8, 1995, the Board's Operations and Regulations Committee ("Committee") held public hearings on proposed 45 CFR part 1635. After adopting several changes to the proposed rule, the Committee voted to publish the proposed rule in the Federal Register for notice and comment.

The proposed rule was published in the Federal Register on September 21, 1995 (60 FR 48956). Six comments were submitted during the allotted time and three arrived after the deadline, but all nine were fully considered. The Committee met on December 17, 1995, to consider the written and oral comments to the proposed rule. Based on the comments, the Committee revised the proposed rule. On December 18, 1995, the Board voted to adopt the rule as recommended by the Committee and directed publication of the rule in the Federal Register as a final rule.

This rule requires recipients to account for the time spent on all cases, matters, and supporting activities by their attorneys and paralegals. These requirements apply whether the case, matter, or supporting activity is funded by the Corporation or by other sources, as provided in H.R. 2076, the appropriations bill which included funds for LSC for fiscal year ("FY") 1996. (H.R. 2076 was passed by Congress but vetoed by the President; however, the Corporation anticipates passage of legislation containing substantially similar language in the near future.) Such timekeeping is not now required under 45 CFR Part 1630, Costs Standards and Procedures.

Several comments objected to the proposed rule as time-consuming, costly and burdensome. The Corporation is mindful of the costs which this regulation will impose on its recipients. Nevertheless, despite the possibility that implementation of this rule will reduce a recipient's LSC-funded capacity for

client services, the Corporation has concluded that timekeeping by attorneys and paralegals will materially improve recipients' accountability for their funds. Stated simply, the potential benefits of timekeeping to recipients outweigh the costs. These benefits include improved supervisory information, better cost estimation in bidding for other funds, enhanced control of priority implementation by local boards of directors, and more informative reports to the Corporation, other grantors, and the public. Congress has apparently reached a similar conclusion, since a timekeeping requirement is included in § 504(10) of the House bill (H.R. 2076), § 14(a)(10)(A) of the Senate version, and § 504(a)(10)(A) of the House-Senate Conference version.

The remainder of this commentary provides a section-by-section analysis of the rule, discusses the major issues raised by comments, and notes the changes made in the regulation.

Section 1635.1 Purpose

The purpose of this rule is to ensure recipient accountability for the use of funds. Although not included as a stated purpose, the Corporation notes that, as some recipients that currently have timekeeping systems in place have found, timekeeping may be a useful management tool as well.

Section 1635.2 Definitions

This section now defines "case," "matter," and "supporting activity" as the functions of a program for which time records are required to be kept. Several comments criticized the definitions in the proposed rule as vague, confusing or incomplete, and sought more examples for guidance. The definitions have been substantially changed to address these concerns.

Section 504(a)(10)(A) would have required that records of time be maintained on "each case or matter." One comment pointed out that the proposed rule failed to indicate where to record time spent on important elements of program services, such as training, intake, staff development, the preparation of desk manuals, and continuing legal education. This final rule assigns such actions to the term "matter." As a result, the categories now closely parallel the terms used in new accounting standards which every recipient of LSC funding is required to follow. These new standards for the financial statements of not-for-profit organizations such as legal services programs require that annual financial statements report expenses by their functional classifications, divided into

two major classes of expenses for "program services" and "supporting activities." Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 117, ¶ 26 (June 1993) [hereafter referred to as "SFAS 117"]. "Program services" are defined as actions "that result in goods and services being distributed to beneficiaries, customers, or members that fulfill the purposes or mission for which the organization exists." SFAS 117 at ¶ 27. "Supporting activities" are defined as "all activities of a not-for-profit organization other than program services. Generally, they include management and general, fundraising, and membership-development activities." SFAS 117 at ¶ 28. The revised definitions in the regulation adopt the accounting separation of "program services" from "supporting activities."

Within the program services category, separate definitions are provided for a "case" and a "matter." The definition of "matter" includes both direct program services such as community legal education and also the types of actions which must be performed in order to provide direct program services in an effective and efficient manner. Time spent in training, the preparation of desk manuals, and similar undertakings is necessary and reasonable to accomplish a recipient's program service priorities, but it is often not directly allocable to a particular case or matter. Instead, the costs incurred in such uses of time are gathered together in an indirect cost pool and then allocated among the relevant program services and fund sources pursuant to 45 CFR part 1630 and generally accepted accounting principles. The Corporation has attempted to clearly delineate the actions which will fall into each category; however, if in unresolvable doubt as to the category in which a particular action belongs, the recipient should classify that action as a "matter."

Actions that are administrative in nature would be included in the supporting activities category. Actions such as board meetings, staff breaks, general staff meetings, researching and implementing timekeeping systems, and staff evaluations would be included in the supporting activities subcategory of "management and general."

Section 1635.3 Timekeeping Requirement

This section sets out the timekeeping requirement. The rule sets out the minimum requirements for a timekeeping system and is not intended to prevent recipients from implementing

a system designed to collect additional information the recipient will find useful for program purposes.

The timekeeping rule is intended to require all recipients to account for the time spent by their attorneys and paralegals on all cases, matters, and supporting activities, whether the time is funded by the Corporation or by other sources. Such timekeeping records must be created contemporaneously. This means that, in most cases, records should be created no later than the end of the day. The records also must account for time in increments not greater than one-quarter of an hour, comprising all of the efforts of the attorneys and paralegals for which compensation is paid. In response to a question raised in the comments, it is noted that, although the rule contains a not less than one-quarter hour requirement, true blocks of time may be accumulated (for example, where 30 minutes is spent on one activity, the time record may reflect the 30-minute increment). Because the Corporation believes time records will be more useful to the Corporation and to the recipient if certain data are included, the content of the time records has been specified in more detail to ensure that each case has a specific and unique client name or case number, and that time spent by lawyers and paralegals on matters or supporting activities is identified separately from time spent on cases.

In addition, to avoid misunderstanding, the rule now explicitly requires that, for time spent after a time record system is implemented, the system must be able to aggregate, on request, time data in the legal problem categories that the Corporation uses for its Case Service Reports. This will ensure that recipients will be able to demonstrate their time by type of case and will assist them in estimating future resource commitments. Recipients will be able to meet this requirement, for example, by entering the legal problem category on each time record for a case or by aggregating the data of all cases of the same type through coding of each client name or case number.

Because the rule as proposed contained only an effective date and did not address the question of precisely when a timekeeping system must be implemented, the rule has been modified to add a specific time period by which a timekeeping system must be put in place. Recipients must implement a system in accordance with the rule no later than 30 days after the rule's effective date, or within 30 days

of the effective date of a grant or contract, whichever is later.

The timekeeping requirement, with its reference to 45 CFR part 1630, was read by some commentators as creating a new requirement that all cost allocations for part 1630 purposes be calculated directly from time records kept pursuant to this rule. This is not correct. Part 1630 requires that costs be allocated to cost objectives (such as grants, projects, services or other actions) in accordance with the benefits received by those cost objectives. Time records may well provide the basis for allocating costs among cost objectives. Under both part 1630 and generally accepted accounting principles, however, in appropriate situations other bases remain acceptable as well, such as number of cases, number of employees, or total direct costs. A more extended discussion of allocation bases can be found in the Supplementary Information for part 1630 as a final rule, published on August 13, 1986 (51 FR 29078-29079).

Some confusion also arose from the statement in the Supplementary Information to the proposed rule that recipients must account for 100 percent of attorney and paralegal time spent in the course of their employment, even if the time is spent outside normal business hours. The statement that recipients must account for 100 percent of attorney and paralegal time is not intended to suggest that the number of hours attorneys and paralegals work should exceed the number of hours in a normal business day or week. It is assumed that attorneys and paralegals work the number of hours necessary to perform their job duties competently and professionally. Pursuant to the rule, time records are designed to document all (100 percent) the efforts of attorneys and paralegals for which they are compensated by a recipient, regardless of whether such compensated work is performed before, during, or after a recipient's normal business hours. Moreover, since the purpose of the rule is to ensure accountability for the use of recipients' funds, it is not intended to require attorneys and paralegals to account for any time period for which they are not being compensated by a recipient for work performed on behalf of the recipient.

Section 1635.4 Administrative Provisions

The proposed rule included language advising recipients that the records should be maintained in a manner consistent with the attorney-client privilege and all applicable rules of professional responsibility. Since all

actions of recipients must be consistent with the attorney-client privilege and rules of professional responsibility, upon reflection, the Corporation has determined that inclusion of specific language in the rule is not necessary. In implementing the timekeeping requirement, recipients should remain aware of the access provision and mindful of ethical precepts governing client confidentiality.

The House-Senate Conference version of H.R. 2076 directed that time records be accessible to the Corporation (§ 509(d)) and to any Federal department or agency auditing or monitoring the activities of the Corporation or of a recipient and any independent auditors or monitors receiving Federal funds to conduct such auditing or monitoring (§ 504(a)(10)(C)). The Conference version also directed that the Corporation not disclose time records it obtains except to a law enforcement official or to a bar association official conducting a disciplinary investigation (§ 509(e)). One comment suggested that the regulation should contain very similar provisions. Because the final statutory definition of those who will be entitled to access to time records either directly from the recipient or from the Corporation is still uncertain, the regulation simply provides notice that there are organizations and individuals who may have such access under statutes. On the other hand, with regard to release of such time records as the Corporation may obtain, the Board decided that it would adopt the terms of the Conference version of H.R. 2076 and included them in the final rule without waiting for enactment of the final appropriations law.

List of Subjects in 45 CFR Part 1635

Legal services, Reporting and recordkeeping requirements.

For reasons set forth in the preamble, LSC amends 45 CFR chapter XVI by adding part 1635 as follows:

PART 1635—TIMEKEEPING REQUIREMENT

Sec.

- 1635.1 Purpose.
- 1635.2 Definitions.
- 1635.3 Timekeeping Requirement.
- 1635.4 Administrative Provisions.

Authority: 42 U.S.C. §§ 2996e(b)(1)(A), 2996g(a), 2996g(b), 2996g(e).

§ 1635.1 Purpose.

This Part is intended to improve accountability for the use of all funds of a recipient by:

- (a) Assuring that allocations of expenditures of Corporation funds

pursuant to 45 CFR part 1630 are supported by accurate and contemporaneous records of the cases, matters, and supporting activities for which the funds have been expended;

- (b) Enhancing the ability of the recipient to determine the cost of specific functions; and

- (c) Increasing the information available to the Corporation for assuring recipient compliance with Federal law and Corporation rules and regulations.

§ 1635.2 Definitions.

As used in this part—

- (a) A "case" is a form of program service in which an attorney or paralegal of a recipient provides legal services to one or more specific clients, including, without limitation, providing representation in litigation, administrative proceedings, and negotiations, and such actions as advice, providing brief services and transactional assistance, and assistance with individual PAI cases.

- (b) A "matter" is an action which contributes to the overall delivery of program services but does not involve direct legal advice to or legal representation of one or more specific clients. Examples of matters include both direct services, such as community education presentations, operating pro se clinics, providing information about the availability of legal assistance, and developing written materials explaining legal rights and responsibilities; and indirect services, such as training, continuing legal education, general supervision of program services, preparing and disseminating desk manuals, PAI recruitment, intake when no case is undertaken, and tracking substantive law developments.

- (c) A "supporting activity" is any action that is not a case or matter, including management and general, and fundraising.

§ 1635.3 Timekeeping Requirement.

- (a) All expenditures of funds for recipient actions are, by definition, for cases, matters, or supporting activities. The allocation of all expenditures must be carried out in accordance with 45 CFR part 1630.

- (b) Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter, or supporting activity.

- (1) Time records must be created contemporaneously and account for time in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid.

(2) Each record of time spent must contain: for a case, a unique client name or case number; for matters or supporting activities, an identification of the category of action on which the time was spent.

(c) The timekeeping system must be implemented within 30 days of the effective date of this regulation or within 30 days of the effective date of a grant or contract, whichever is later.

(d) The timekeeping system must be able to aggregate time record information from the time of implementation on both closed and pending cases by legal problem type.

§ 1635.4 Administrative Provisions.

Time records required by this section shall be available for examination by auditors and representatives of the Corporation, and by any other person or entity statutorily entitled to access to such records. The Corporation shall not disclose any time record except to a Federal, State or local law enforcement official or to an official of an appropriate bar association for the purpose of enabling such bar association official to conduct an investigation of an alleged violation of the rules of professional conduct.

Dated: March 26, 1996.

Victor M. Fortuno,
General Counsel.

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ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1535 and 1552

[FRL-5448-7]

Acquisition Regulation; Confidential Business Information

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: This document amends the Environmental Protection Agency Acquisition Regulation (EPAAR) (48 CFR Chapter 15) by revising both the prescription for use of solicitation provisions and contract clauses regarding collection, use, access, treatment, and disclosure of confidential business information (CBI), and adding solicitation provisions and contract clauses on CBI.

EFFECTIVE DATE: May 1, 1996.

FOR FURTHER INFORMATION CONTACT: Louise Senzel, Environmental Protection Agency, Office of Acquisition Management (3802F), 401 M Street,

SW., Washington, DC 20460. Telephone: (202) 260-6204.

SUPPLEMENTARY INFORMATION:

A. Background

The proposed rule was published in the Federal Register (60 CFR 64408) on December 15, 1995, providing for a 60-day comment period until February 13, 1996.

Interested persons have been afforded an opportunity to participate in the making of this rule. Due consideration was given to the one comment received. The following is a summary of the comment received and the Agency's disposition of the comment.

Comment. The use by the Environmental Protection Agency and potentially other Federal agencies and contractors of confidential business information (CBI) would not be objectionable as long as proper safeguards are in place to protect CBI from improper release to a company's competitors. The proposed rule appears to provide sufficient safeguards to protect CBI from improper release with the exception of one comment and suggestion.

With respect to Section 1552.235-79, Release of Contractor Confidential Business Information, we suggest that paragraph (c), which states that the "Agency will permit release of CBI under subparagraphs (1), (3), (5), or (9) only pursuant to a confidentiality agreement," be modified to include references to subparagraphs (4) and (6), to the extent that CBI is not otherwise protected by the applicable statute. The rationale for also including subparagraphs (4) and (6) is to obtain the protections afforded by a confidentiality agreement in such situations as contemplated by subparagraphs (4) and (6). An agency's release of CBI only pursuant to a properly executed confidentiality agreement should provide sufficient safeguards to protect CBI in the vast majority of situations.

Response. In practice, the Agency does not release CBI in these situations unless there has been a properly executed confidentiality agreement. The Agency has made the requested change to the proposed rule to ensure that this practice continues and so that contractors are aware that this is a condition of release of CBI to these individuals.

B. Executive Order 12866

This is not a significant regulatory action for the purposes of Executive Order 12866; therefore, no review was required by the Office of Information and Regulatory Affairs.

C. Paperwork Reduction Act

The Paperwork Reduction Act did not apply because this rule does not contain information collection requirements that require the approval of OMB under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.)

D. Regulatory Flexibility Act

The EPA certifies that this rule does not exert a significant economic impact on a substantial number of small entities. The requirements to contractors under the rule impose no reporting, recordkeeping, or any compliance costs.

E. Unfunded Mandates

This rule will not impose unfunded mandates on state or local entities, or others.

The provisions of this regulation are issued under 5 U.S.C. 301; 40 U.S.C. 486(c).

List of Subjects in 48 CFR Parts 1535 and 1552

Government procurement.

Therefore, 48 CFR Chapter 15 is amended as set forth below:

1. The authority citation for Parts 1535 and 1552 continues to read as follows:

Authority: Sec. 205(c), 63 stat. 390, as amended, 40 U.S.C. 486(c).

2. Section 1535.007 is revised to read as follows:

1535.007 Solicitations.

(a) Contracting Officers shall insert the following provisions in all solicitations when the Contracting Officer has determined that EPA may furnish the contractor with confidential business information which EPA has obtained from third parties under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 et seq.).

(1) 48 CFR 1552.235-72, Control and Security of Federal Insecticide, Fungicide, and Rodenticide Act Confidential Business Information; and

(2) 48 CFR 1552.235-73, Access to Federal Insecticide, Fungicide, and Rodenticide Act Confidential Business Information.

(b) Contracting Officers shall insert the following provisions in all solicitations when the Contracting Officer has determined that EPA may furnish the contractor with confidential business information which EPA has obtained from third parties under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.)

(1) 48 CFR 1552.235-74, Control and Security of Toxic Substances Control Act Confidential Business Information, and