

MILLENNIUM CHALLENGE CORPORATION

22 CFR PART 1304

Regulations Implementing the Freedom of Information Act

PART 1304 -- FREEDOM OF INFORMATION ACT PROCEDURES

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AUTHORITY: 5 U.S.C. 552, as amended.

*§1304.1 General Provisions.*

This part contains the regulations the Millennium Challenge Corporation (MCC) follows in implementing the Freedom of Information Act (FOIA) (5 U.S.C. 552) as amended. These regulations provide procedures by which you may obtain access to records compiled, created, and maintained by MCC, along with the procedures that MCC must follow in response to such requests for records. These regulations should be read together with the FOIA, which provides additional information about access to records maintained by MCC.

*§1304.2 Definitions.*

(a) *Agency* has the meaning set forth in 5 U.S.C. 552(f)(1).

(b) *Commercial use requester* means a requester seeking information for a use or purpose that furthers the commercial, trade, or profit interests of himself or the person on whose behalf the request is made, which can include furthering those interests through

litigation. In determining whether a request properly belongs in this category, the FOIA Officer shall determine the use to which the requester will put the documents requested. Where the FOIA Officer has reasonable cause to doubt the use to which the requester will put the records sought, or where that use is not clear from the request itself, the FOIA Officer shall contact the requester for additional clarification before assigning the request to a specific category.

(c) *Confidential commercial information* means records provided to the government by a submitter that arguably contains material exempt from disclosure under Exemption 4 of the FOIA, because disclosure could reasonably be expected to cause substantial competitive harm.

(d) *Direct costs* mean those expenditures by MCC actually incurred in searching for and duplicating records in response to the FOIA request. These costs include the salary of the employee(s) performing the work (basic rate of pay plus a percentage of that rate to cover benefits) and the cost of operating duplicating machinery. Direct costs do not include overhead expenses, such as the cost of space, heating, or lighting of the facility in which the records are stored.

(e) *Duplication* means the process of making a copy of a record in order to respond to a FOIA request, including paper copies, microfilm, audio-video materials, and computer diskettes or other electronic copies.

(f) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institute of undergraduate higher education, an institute of graduate higher education, an institute of professional education, or an institute of vocational education which operates a program of scholarly research. To qualify for 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 not sought for a commercial use, but are sought to further scholarly research.

(g) *FOIA* means the Freedom of Information Act, as amended (5 U.S.C. 552).

(h) *FOIA Officer* means the MCC employee who is authorized to make determinations as provided in this part. The mailing address for the FOIA Officer is: Millennium Challenge Corporation, Attn: FOIA Officer, 875 Fifteenth Street NW, Washington, DC 20005.

(i) *Non-commercial scientific institution* refers to an institution that is not operated on a “commercial” basis as that term is used in paragraph (a) of this section, and which 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 qualify for 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 not sought for a commercial use, but are sought to further scholarly research.

(j) *Record* means information or documentary material MCC maintains in any form or format, including an electronic form or format, which MCC:

(1) Made or received under federal law or in connection with the transaction of public business;

(2) Preserved or determined is appropriate for preservation as evidence of MCC operations or activities or because of the value the information it contains; and

(3) Controls at the time it receives a request.

(k) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term “news” means information that is about current events or that would be of current interest to the public. For a “freelance journalist” to be regarded as working for a news organization, the requester must demonstrate a solid basis for expecting publication through that organization, such as a publication contract. Absent such showing, the requester may provide documentation establishing the requester’s past publication record. To qualify for this category, the requester must not be seeking the requested records for a commercial use. However, a request for records supporting a news-dissemination function shall not be considered to be for a commercial use.

(l) *Requester* means any person, including an individual, corporation, firm, organization, or other entity, who makes a request to MCC under FOIA for records.

(m) *Review* means the process of examining a record to determine whether all or part of the record may be withheld, and includes redacting or otherwise processing the record for disclosure to a requester. It does not include time spent:

(1) Resolving legal or policy issues regarding the application of exemptions to a record; or

(2) At the administrative appeal level, unless MCC determines that the exemption under which it withheld records does not apply and the records are reviewed again to determine whether a different exemption may apply.

(n) *Search* means the time spent locating records responsive to a request, manually or by electronic means, including page-by-page or line-by-line identification of responsive material within a record.

(o) *Submitter* means any person or entity which provides information directly or indirectly to MCC. The term includes, but is not limited to, corporations, state governments and foreign governments.

(p) *Working day* means a Federal workday that does not include Saturdays, Sundays, or Federal holidays.

§1304.3 *Records available to the public.*

(a) *General.* (1) It is the policy of MCC to respond promptly to all FOIA requests.

(2) MCC may disclose records that were previously published or disclosed or are customarily furnished to the public in the course of the performance of official duties without complying with this part. These records include, but are not limited to, the annual report that MCC submits to Congress pursuant to section 613(a) of the Millennium Challenge Act of 2003 (22 U.S.C. 7701), press releases, MCC forms, and materials published in the FEDERAL REGISTER. MCC should first determine whether the information requested is already available on its Web site, which contains information readily accessible to the public. In such an event, MCC will contact the requesting party, either orally or in writing, to advise the individual of the availability of the information on the public Web site. MCC should document this request and the manner in which it handled the file. Where MCC makes the determination that the information requested is not already publicly accessible, MCC should adhere to the procedures outlined in this part for processing a FOIA request and any administrative appeals received.

(b) *Public Reading room.* (1) Records that are required to be maintained by MCC shall be available for public inspection and copying at 875 Fifteenth Street NW,

Washington, DC 20005. Reading room records created on or after November 1, 1996 shall be made available electronically via the Web site at <http://www.mcc.gov>.

(2) MCC shall assess fees for searching, reviewing, or duplicating reading room records in accordance with §1304.9.

*§ 1304.4 Requests for records.*

(a) *Request requirements.* Requests for access to, or copies of, MCC records shall be in writing and addressed to the FOIA Officer. Each request shall include the following:

(1) A description of the requested record that provides sufficient detail to enable MCC to locate the record with a reasonable amount of effort;

(2) The requestor's full name, mailing address, and a telephone number where the requester can be reached during normal business hours;

(3) A statement that the request is made pursuant to FOIA; and

(4) At the discretion of the requestor, a dollar limit on the fees MCC may incur to respond to the request for records. MCC shall not exceed such limit.

(b) *Incomplete Requests.* If a request does not meet all of the requirements of paragraph (a) of this section, the FOIA Officer may advise the requester that additional information is needed. If the requester submits a corrected request, the FOIA Officer shall treat the corrected request as a new request.

*§ 1304.5 Responsibility for responding to requests.*

(a) *General.* In determining which records are responsive to a request, MCC ordinarily will include only records in its possession as of the date it begins its search for

records. If any other date is used, the FOIA Officer shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The FOIA Officer shall make initial determinations either to grant or deny in whole or in part a request for records. When the FOIA Officer denies the request in whole or in part, the FOIA Officer shall notify the requester of the denial, the grounds for the denial, and the procedures for appeal of the denial under §1304.8.

(c) *Consultations and referrals.* When a requested record has been created by another Federal Government agency, that record shall be referred to the originating agency for direct response to the requester. The requester shall be informed of the referral. As this is not a denial of a FOIA request, no appeal rights are afforded to the requester. When a requested record is identified as containing information originating with another Federal Government agency, the record shall be referred to the originating agency for review and recommendation on disclosure.

(d) *Timing and deadlines.* (1) The FOIA Officer ordinarily shall respond to requests according to their order of receipt.

(2) The FOIA Officer may use multi-track processing in responding to requests. This process entails separating simple requesters that require rather limited review from more lengthy and complex requests. Requests in each track are then processed according to paragraph (d)(1) of this section in their respective track.

(3) The FOIA Officer may provide requesters in the slower track an opportunity to limit the scope of their requests in order to decrease the processing time required. The

FOIA Officer may provide such an opportunity by contacting the requester by letter or telephone.

(4) The FOIA Officer shall make an initial determination regarding access to the requested information and notify the requester within twenty (20) working days after receipt of the request. This 20 day period may be extended if unusual circumstances arise. If an extension is necessary, the FOIA Officer shall promptly notify the requester of the extension, briefly providing the reasons for the extension, the date by which a determination is expected, and providing the requester with the opportunity to modify the request so that the FOIA Officer may process it in accordance with the 20 day period.

Unusual circumstances warranting extension are:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a lengthy amount of records which are demanded in a single request; or

(iii) The need for consultation with another agency having a substantial interest in the determination of the request, which consultation shall be conducted with all practicable speed.

(iv) If the FOIA Officer has a reasonable basis to conclude that a requester or group of requesters has divided a request into a series of requests on a single subject or related subject to avoid fees, the requests may be aggregated and fees charged accordingly. Multiple requests involving unrelated matters will not be aggregated.



(6) If no initial determination has been made at the end of the 20 day period provided for in paragraph (d)(4) of this section, including any extension, the requester may appeal the action to the FOIA Appeals Officer.

(e) *Expedited processing of request.* The FOIA Officer must determine whether to grant a request for expedited processing within 10 calendar days of its receipt. Requests will receive expedited processing if one of the following listed compelling reasons is met:

(1) The requester can establish that failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) The requester is primarily engaged in disseminating information and can demonstrate that an urgency to inform the public concerning actual or alleged Federal Government activity exists.

(f) *Providing responsive records.* The FOIA Officer shall provide one copy of a record to a requester in any form or format requested if the record is readily reproducible by MCC in that form or format by regular U.S. mail to the address indicated in the request, unless other arrangements are made. At the option of the requester and upon the requester's agreement to pay fees in accordance with §1304.9, the FOIA Officer shall provide copies by facsimile transmission or other express delivery methods.

§ 1304.6 *Records not disclosed.*

(a) *Records exempt from disclosure.* Except as otherwise provided in this part, MCC shall not disclose records that are:

(1) Specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order.

(2) Related solely to the MCC's internal personnel rules and practices.

(3) Specifically exempted from disclosure by a statute other than FOIA if such statute requires the record to be withheld from the public in such a manner as to leave no discretion on the issue, establishes particular criteria for withholding, or refers to particular types of records to be withheld.

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(5) Inter- or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with MCC.

(6) Personnel, medical, or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority, any private institution, or a Bank, which furnished information on a confidential basis, and, in the case of a record

compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security investigation, information furnished by a confidential source

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) *Reasonably segregable portions.* (1) MCC shall provide a requester with any reasonably segregable portion of a record after deleting the portions that are exempt from disclosure under paragraph (a) of this section.

(2) MCC shall make a reasonable effort to estimate the volume of removed information and provide that information to the requester unless providing the estimate would harm an interest protected by the exemption under which the removal is made.

(3) MCC shall indicate the estimated volume of removed information on the released portion of the record unless providing the estimate would harm an interest

protected by the exemption under which the removal is made. If technically feasible, MCC shall make the indication at the place in the record where the removal is made.

(c) *Public interest.* MCC may disclose records it has authority to withhold under paragraph (a) of this section upon a determination that disclosure would be in the public interest.

§ 1304.7 *Confidential commercial information.*

(a) *Notice to submitters.* The FOIA Officer shall, to the extent permitted by law, provide a submitter who provides confidential commercial information to the FOIA Officer, with prompt notice of a FOIA request or administrative appeal encompassing the confidential commercial information if the Commission may be required to disclose the information under the FOIA. Such notice shall either describe the exact nature of the information requested or provide copies of the records or portions thereof containing the confidential commercial information. The FOIA Officer shall also notify the requester that notice and an opportunity to object has been given to the submitter.

(b) *Where notice is required.* Notice shall be given to a submitter when:

(1) The information has been designated by the submitter as confidential commercial information protected from disclosure. Submitters of confidential commercial information shall use good faith efforts to designate either at the time of submission or a reasonable time thereafter, those portions of their submissions they deem protected from disclosure under Exemption 4 of the FOIA because disclosure could reasonably be expected to cause substantial competitive harm. Such designation shall be deemed to have expired ten years after the date of submission, unless the requester provides reasonable justification for a designation period of greater duration; or

(2) The FOIA Officer has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(c) *Opportunity to object to disclosure.* The FOIA Officer shall afford a submitter a reasonable period of time to provide the FOIA Officer with a detailed written statement of any objection to disclosure. The statement shall specify all grounds for withholding any of the information under any exemption of the FOIA, and if Exemption 4 applies, shall demonstrate the reasons the submitter believes the information to be confidential commercial information that is exempt from disclosure. Whenever possible, the submitter's claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the submitter. In the event a submitter fails to respond to the notice in the time specified, the submitter will be considered to have no objection to the disclosure of the information. Information provided by the submitter that is received after the disclosure decision has been made will not be considered. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(d) *Notice of intent to disclose.* The FOIA Officer shall carefully consider a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose the information requested. Whenever the FOIA Officer determines that disclosure is appropriate, the FOIA Officer shall, within a reasonable number of days prior to disclosure, provide the submitter with written notice of the intent to disclose which shall include a statement of the reasons for which the submitter's objections were overruled, a description of the information to be disclosed, and a specific disclosure date.

The FOIA Officer shall also notify the requester that the requested records will be made available.

(e) *Notice of lawsuit.* If the requester files a lawsuit seeking to compel disclosure of confidential commercial information, the FOIA Officer shall promptly notify the submitter of this action. If a submitter files a lawsuit seeking to prevent disclosure of confidential commercial information, the FOIA Officer shall notify the requester.

(f) *Exceptions to the notice requirements under this section.* The notice requirements under paragraphs (a) and (b) of this section shall not apply if:

(1) The FOIA Officer determines that the information should not be disclosed pursuant to Exemption 4 and/or any other exemption of the FOIA;

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

(3) Disclosure of the information is required by law (other than the FOIA);

(4) The information requested is not designated by the submitter as exempt from disclosure in accordance with this part, when the submitter had the opportunity to do so at the time of submission of the information or within a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(5) The designation made by the submitter in accordance with this part appears obviously frivolous. When the FOIA Officer determines that a submitter was frivolous in designating information as confidential, the FOIA Officer must provide the submitter with written notice of any final administrative disclosure date, but no opportunity to object to disclosure will be offered.

§ 1304.8 *Appeals.*

(a) *Right of appeal.* The requester has the right to appeal to the FOIA Appeals Officer any adverse determination.

(b) *Notice of appeal.* (1) *Timing for appeal.* An appeal must be received no later than thirty (30) working days after notification of denial of access to records or after the time limit for response by the FOIA Officer has expired. Prior to submitting an appeal any outstanding fees related to FOIA requests must be paid in full.

(2) *Method of appeal.* An appeal shall be initiated by filing a written notice of appeal. The notice shall be accompanied by copies of the original request and initial denial of access to records. To expedite the appellate process and give the requester an opportunity to present his or her arguments, the notice should contain a brief statement of the reasons why the requester believes the initial denial of access to records to have been in error. The appeal shall be addressed to the Millennium Challenge Corporation, Attn: FOIA Appeals Officer, 875 Fifteenth Street NW, Washington, DC 20005.

(c) *Final agency determinations.* The FOIA Appeals Officer shall issue a final written determination, stating the basis for his or her decision, within twenty (20) working days after receipt of a notice of appeal. If the determination is to provide access to the requested records, the FOIA Officer shall make those records immediately available to the requester. If the determination upholds the denial of access to the requested records, the FOIA Appeals Officer shall notify the requester of the determination.

§ 1304.9 *Fees.*

(a) *General.* Fees pursuant to the FOIA shall be assessed according to the schedule contained in paragraph (b) of this section for services rendered by MCC in response to requests for records under this part. MCC's fee practices are governed by the FOIA and by the Office of Management and Budget's Uniform Freedom of Information Act Fee Schedule and Guidelines. All fees shall be charged to the requester, except where the charging of fees is limited under paragraph (d) of this section or whether a waiver or reduction of fees is granted under paragraph (c) of this section. Payment of fees should be in U.S. Dollars in the form of either a check or bank draft drawn on a bank in the United States or a money order. Payment should be made payable to the Treasury of the United States and mailed to the Millennium Challenge Corporation, 875 Fifteenth Street NW, Washington, DC 20005.

(b) *Charges for responding to FOIA requests.* The following fees shall be assessed in responding to requests for records submitted under this part, unless a waiver or reduction of fees has been granted pursuant to paragraph (c) of this section:

(1) *Duplications.* The FOIA Officer shall charge \$0.20 per page for copies of documents up to 8½ x 14. For copies prepared by computer, the FOIA Officer will charge actual costs of production of the computer printouts, including operator time. For other methods of reproduction, the FOIA Officer shall charge the actual costs of producing the documents.

(2) *Searches.* (i) *Manual searches.* Search fees will be assessed at the rate of \$25.30 per hour. Charges for search time less than a full hour will be in increments of quarter hours.



(ii) *Computer searches.* The FOIA Officer will charge the actual direct costs of conducting computer searches. These direct costs shall include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for requested records, as well as the costs of operator/programmer salary apportionable to the search. MCC is not required to alter or develop programming to conduct searches.

(3) *Review fees.* Review fees shall be assessed only with respect to those requesters who seek records for a commercial use under paragraph (d)(1) of this section. Review fees shall be assessed at the rate of \$43.63 per hour. Review fees shall be assessed only for the initial record review, for example, review undertaken when the FOIA Officer analyzes the applicability of a particular exemption to a particular record or portion thereof at the initial request level. No charge shall be assessed at the administrative appeal level of an exemption already applied.

(c) *Statutory Waiver.* Documents shall be furnished without charge or at a charge below that listed in paragraph (b) of this section where it is determined, based upon information provided by a requester or otherwise made known to the FOIA Officer, that disclosure of the requested information is in the public interest. Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations and is not primarily for commercial purposes. Requests for a waiver or reduction of fees shall be considered on a case by case basis. In order to determine whether the fee waiver requirement is met, the FOIA Officer shall consider the following six factors:

(1) The subject of the request. Whether the subject of the requested records concerns the operations or activities of the government;

(2) The informative value of the information to be disclosed. Whether disclosure is likely to contribute to an understanding of government operations or activities;

(3) The contribution to an understanding of the subject by the general public likely to result from disclosure. Whether disclosure of the requested information will contribute to public understanding;

(4) The significance of the contribution to public understanding. Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(5) The existence and magnitude of commercial interest. Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(6) The primary interest in disclosure. Whether the magnitude of the 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.

(d) *Types of requesters.* 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. These terms are defined in § 1304.2. The following specific levels of fees are prescribed for each of these categories:

(1) *Commercial use requesters.* The FOIA Officer shall charge commercial use requesters the full direct costs of searching for, reviewing, and duplicating requested records.

(2) *Educational and non-commercial scientific institution requesters.* The FOIA Officer shall charge educational and non-commercial scientific institution requesters for document duplication only, except that the first 100 pages of paper copies shall be provided without charge.

(3) *News media requesters.* The FOIA Officer shall charge news media requesters for document duplication costs only, except that the first 100 pages of paper copies shall be provided without charge.

(4) *All other requesters.* The FOIA Officer shall charge requesters who do not fall into any of the categories in paragraphs (d)(1) through (3) of this section fees which recover the full reasonable direct costs incurred for searching for and reproducing records if that total cost exceeds \$14.99, except that the first 100 pages of duplication and the first two hours of manual search time shall not be charged.

(e) *Charges for unsuccessful searches.* If the requester has been notified of the estimated cost of the search time and has been advised specifically that the requested records may not exist or may be withheld as exempt, fees may be charged.

(f) *Nonpayment of fees.* The FOIA Officer may assess interest charges on an unpaid bill, accrued under previous FOIA request(s), starting the thirty-first (31<sup>st</sup>) day following the day on which the bill was sent to the requester. Interest will be at the rate prescribed in 31 U.S.C. §3717. MCC will require the requester to pay the full amount owed plus any applicable interest as provided above, and to make an advance payment of

the full amount of the remaining estimated fee before MCC will begin to process a new request or continue processing a then-pending request from the requester. The administrative response time limits prescribed in subsection (a)(6) of the FOIA will begin only after MCC has received fee payments described in this section.

(g) *Aggregating requests.* The requester or a group of requesters may not submit multiple requests at the same time, each seeking portions of a document or documents solely in order to avoid payment of fees. When the FOIA Officer reasonably believes that a requester is attempting to divide a request into a series of requests to evade an assessment of fees, the FOIA Officer may aggregate such request and charge accordingly.

(h) *Advance payment of fees.* Fees may be paid upon provision of the requested records, except that payment will be required prior to that time if the requester has previously failed to pay fees or if the FOIA Officer determines the total fee will exceed \$250.00. When payment is required in advance of the processing of a request, the time limits prescribed in § 1304.5 shall not be deemed to begin until the FOIA Officer has received payment of the assessed fee. Where it is anticipated that the cost of providing the requested record will exceed \$25.00 but fall below \$250.00 after the free duplication and search time has been calculated, MCC may, in its discretion may require either:

- (1) An advance deposit of the entire estimated charges; or
- (2) Written confirmation of the requester's willingness to pay such charges.