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| **Title:** | **PROPOSED RULE--Releasing Information; Fees Imposed on Information Requests--12 CFR Part 602** |
| **Date of Issuance:** | **1/5/1990** |
| **Agency:** | **FCA** |
| **Federal Register Cite:** | **55 FR 440** |

FARM CREDIT ADMINISTRATION

12 CFR Part 602

RIN 3052-AA05

Releasing Information; Fees Imposed on Information Requests

**ACTION:** Proposed rule.

**SUMMARY:** The Farm Credit Administration (FCA) issues proposed regulations that would amend 12 CFR Part 602, relating to the availability of records of the FCA. The proposed regulations implement statutory changes made by the Freedom of Information Reform Act of 1986, Pub. L. 99-570, by amending the fee structures and related provisions governing fee charges for document requests. The proposed regulations also implement the provisions of Executive order 12600 by providing predisclosure notification procedures for confidential commercial or financial information.

**DATE:** Written comments are due on or before February 5, 1990.

**ADDRESS:** Submit any comments (in triplicate) in writing to Anne E. Dewey, General Counsel, Farm Credit Administration, McLean, Virginia 22102-5090. Copies of all communications received will be available for examination to interested parties in the Office of General Counsel, Farm Credit Administration.

**FOR FURTHER INFORMATION CONTACT:**

Ronald H. Erickson, Freedom of Information Officer, Office of Congressional and Public Affairs, Farm Credit Administration, McLean, Virginia 22101-5090, (703) 883-4113,

or

Gary L. Norton, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, Virginia 22102-5090, (703) 883-4020, TDD (703) 883-4444.

**SUPPLEMENTARY INFORMATION:** On October 27, 1986, the President signed into law the Freedom of Information Reform Act of 1986, Pub. L. 99-570 (1986 Act). The 1986 Act amended the Freedom of Information Act (FOIA) (5 U.S.C. 552) by establishing a new fee structure governing the fees that can be imposed for providing information and requiring the Office of Management and Budget (OMB) to promulgate guidelines regarding such fee structure. On March 27, 1987, the OMB published the Uniform Freedom of Information Act Fee Schedule and Guidelines 52 FR 10012. These proposed regulations are adopted in accordance with the OMB guidelines. Subject to certain limitations, the new fee structure contained in these proposed regulations enables the FCA to recover the actual costs incurred in releasing information. This fee structure includes new limitations on the amount of fees that can be imposed on certain persons or entities requesting information, depending on how the person or entity is classified under the 1986 Act. In addition, the proposed regulations authorize the FCA to impose fees for reviewing documents for persons or entities requesting information for commercial purposes. In accordance with the 1986 Act, and the OMB guidelines, the proposed regulations revise the criteria used in determining whether to waive or reduce the fees imposed under the FOIA.

The 1986 Act also amended the scope of FOIA exemption (b)(7) which relates to records compiled for law enforcement purposes. The proposed regulations implement that amendment by revising the exemption contained in § 602.250(a)(7).

On June 23, 1987, the President issued Executive order 12600, Predisclosure Notification Procedure for Confidential Commercial Information (Order). The Order requires each agency to adopt procedures to notify parties that have submitted confidential commercial or financial information to the agency when those records are requested by other parties under the FOIA. Following the issuance of the Order, the FCA implemented procedures to ensure that when the FCA receives a FOIA request for records that might be exempt from disclosure under exemption (b)(4), the person that submitted such records is given an opportunity to comment on the possible release of such records. The proposed regulations would formalize those procedures and fully implement the Order by establishing regulatory provisions for the notification of submitters of records that contain confidential commercial information when those records are requested under the FOIA. The notification is required if the FCA determines, after reviewing the request, the responsive records, and any appeal by the requester, that the FCA may be required to disclose the records.

The proposed regulations also make technical changes which reflect a reorganization of the FCA which redesignated the Office of Administration as the Office of Resources Management.

**List of Subjects in 12 CFR Part 602**

Courts, Freedom of information, Government employees.

For the reasons stated in the preamble, part 602 of chapter VI, title 12 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 602 -- RELEASING INFORMATION**

1. The authority citation for part 602 is revised to read as follows and all other authority citations throughout part 602 are removed:

**Authority:** Secs. 5.9, 5.17; 12 U.S.C. 2243, 2252; 5 U.S.C. 552, E.O. 12600, 52 FR 23781, 3 CFR 1987, p. 235.

**Subpart B -- Availability of Records of the Farm Credit Administration**

2. Section 602.250 is amended by revising paragraph (a)(7) to read as follows:

**§ 602.250 Official records of the Farm Credit Administration.**

(a) \* \* \*

(7) Records or information 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 or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence 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;

\* \* \* \* \*

**§ 602.260 [Amended]**

3. Section 602.260 is amended by removing the words ", other than records identified in § 602.265(a) of this part which are available in a public reference facility in the offices of the Farm Credit Administration," from the first sentence.

**§ 602.261 [Amended]**

4. Section 602.261 is amended by removing the words "Office of Administration" and adding in their place, "Office of Resources Management" each place they appear in paragraphs (b), (c) and (d).

5. Section 602.262 is added to read as follows:

**§ 602.262 Business information.**

(a) Business information provided to the Farm Credit Administration by a business submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section. The requirements of this section shall not apply if:

(1) The Farm Credit Administration determines that the information should not be disclosed;

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

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552).

(b) For the purpose of this section, the following definitions shall apply.

(1) "Business information" means trade secrets or other commercial or financial information.

(2) "Business submitter" means any person or entity which provides business information to the government.

(3) "Freedom of Information Officer" means the Freedom of Information Officer, Office of Congressional and Public Affairs.

(4) "Requester" means the person or entity making the Freedom of Information Act request.

(c)(1) The Freedom of Information Officer shall provide a business submitter with prompt written notice of a request encompassing its business information whenever required under paragraph (d) of this section. Such notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

(2) Whenever the Freedom of Information Officer provides a business submitter with the notice set forth in paragraph (c)(1) of this section, the Freedom of Information Officer shall notify the requester that the request includes information that may arguably be exempt from disclosure under 5 U.S.C. 552(b)(4) and that the person or entity who submitted the information to the Farm Credit Administration has been given the opportunity to comment on the proposed disclosure of information.

(d)(1) For business information submitted to the Farm Credit Administration prior to January 1, 1988, the Farm Credit Administration shall provide a business submitter with notice of a request whenever:

(i) The information is less than 10 years old and the information is subject to prior express commitment of confidentiality given by the Farm Credit Administration to the business submitter; or

(ii) The Farm Credit Administration has reason to believe that disclosure of the information may result in commercial or financial injury to the business submitter.

(2) For business information submitter to the Farm Credit Administration on or after January 1, 1988, the Farm Credit Administration shall provide a business submitter with notice of a request whenever:

(i) The business submitter has in good faith designated the information as commercially or financially sensitive information; or

(ii) The Farm Credit Administration has reason to believe that the disclosure of the information may result in commercial or financial injury to the business submitter.

(3) Notice of a request for business information falling within paragraph (d)(2)(i) of this section shall be required for a period of not more than 10 years after the date of submission unless the business submitter requests and provides acceptable justification for a specific notice of greater duration.

(4) Whenever possible, the business submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the business submitter that the information in question is in fact a trade secret or commercial or financial information that is privileged or confidential.

(e) Through the notice described in paragraph (c) of this section, the Farm Credit Administration shall afford a business submitter a reasonable period within which it can provide the Farm Credit Administration with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act and, in the case of the exemption provided by 5 U.S.C. 552(b)(4), shall demonstrate why the information is contended to be a trade secret or commercial or financial information that is privileged or confidential. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under the Freedom of Information Act.

(f)(1) Farm Credit Administration shall consider carefully a business submitter's objections and specific grounds for nondisclosure prior to determining whether to disclosure business information. Whenever the Farm Credit Administration decides to disclose business information over the objection of a business submitter, the Freedom of Information Officer shall forward to the business submitter a written notice which shall include:

(i) A statement of the reasons for which the business submitter's disclosure objections were not sustained;

(ii) A description of the business information to be disclosed; and

(iii) A specified disclosure date.

(2) The notice of intent to disclose required by this paragraph shall be sent, as circumstances permit, within a reasonable number of days prior to the specified date upon which disclosure is intended.

(3) The Freedom of Information Officer shall send a copy of such disclosure notice to the requester at the same time the notice is sent to the business submitter.

(g) Whenever a requester brings suit seeking to compel disclosure of business information covered by paragraph (d) of this section, the Farm Credit Administration shall promptly notify the business submitter of such action.

**Subpart D -- [Redesignated from Subpart C]**

6. Subpart C, consisting of § § 602.280 through 602.289, is redesignated as new Subpart D.

**§ 602.265 [Removed]**

7. Section 602.265 is removed.

8. A new subpart C, consisting of § § 602.265 through 602.272, is added to read as follows:

**Subpart C -- Fees for Provisions of Information**

Sec.

602.265 Definitions.

602.266 Categories of requesters -- fees.

602.267 Fees to be charged.

602.268 Waiver or reduction of fees.

602.269 Advance payments -- notice.

602.270 Interest.

602.271 Charges for unsuccessful searches or reviews

602.272 Aggregating requests.

**Subpart C -- Fees for Provisions of Information**

**§ 602.265 Definitions.**

For the purpose of this subpart, the following definitions shall apply:

(a) The term "commercial use request" means a request for information that is from or on behalf of an individual or entity seeking information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or on whose behalf the request is being made. To determine whether a request is properly classified as a commercial use request, the Farm Credit Administration shall determine the purpose for which the documents requested will be used. If the Farm Credit Administration has reasonable cause to doubt the purpose, specified in the request, for which a requester will use the records sought, or where the purpose is not clear from the request itself, the Farm Credit Administration shall seek additional clarification before assigning the request to a specified category.

(b) The term "direct costs" means those expenditures the Farm Credit Administration actually incurs in searching for and reproducing documents to respond to a request for information. In the case of a commercial use request, the term also means those expenditures the Farm Credit Administration actually incurs in reviewing documents to respond to the request. The direct cost shall include the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating reproduction equipment. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(c) The term "educational institution" means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, and an institution of vocational education that operates a program or programs of scholarly research.

(d) The term "noncommercial scientific institution" refers to an institution that is not operated on a commercial, trade or profit basis 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.

(e) The term "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. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. The examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunication services), such alternative media would be included in this category. "Freelance" journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization even though they are not actually employed by the organization. A publication contract would be the clearest proof that a journalist is working for a news organization, but the Farm Credit Administration may look to a requester's past publication record to determine whether a journalist is working for a news organization.

(f) The terms"reproduce" and "reproduction" mean the process of making a copy of a document necessary to respond to a request for information. Such copies take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided shall be in a form that is reasonably usable by requesters.

(g) The term "review" means the process of examining documents located in response to a request for information to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure (e.g., doing all that is necessary to prepare the documents for release). The term "review" does not include the time spent resolving general legal or policy issues regarding the application of exemptions. The Farm Credit Administration shall only charge fees for reviewing documents in response to a commercial use request.

(h) The term "search" includes all time spent looking for material that is responsive to a request for information, including page-by-page or line-by-line identification of material within documents. Searching for material shall be done in the most efficient and least expensive manner so as to minimize the costs of the Farm Credit Administration and the requester. For example, a line-by-line search for responsive material should not be performed when merely reproducing an entire document would be the less expensive and the faster method of complying with a request for information. Searches may be done manually or by computer using existing programming. A "search" for material that is responsive to a request should be distinguished from a "review" of material to determine whether the material is exempt from disclosure.

**§ 602.266 Categories of requesters -- fees.**

There are four categories of requesters: commercial use requesters; educational and noncommercial scientific institutions; representatives of the news media; and all other requesters.

(a) The Farm Credit Administration shall charge fees for records requested by or on behalf of educational institutions and noncommercial scientific institutions in an amount which equals the cost of reproducing the documents responsive to the request, excluding the costs of reproducing the first 100 pages. For a request to be included in this category, requesters must show that the request being made is authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a noncommercial scientific institution).

(b) The Farm Credit Administration shall charge fees for records requested by representatives of the news media in an amount which equals the cost of reproducing the documents responsive to the request, excluding the costs of reproducing the first 100 pages. For a request to be included in this category, the requester must qualify as a representative of the news media and the request must not be made for a commercial use. A request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for a commercial use.

(c) The Farm Credit Administration shall charge fees for records requested by persons or entities making a commercial use request in an amount that equals the full direct costs for searching for, reviewing for release, and reproducing the records sought. Commercial use requesters are not entitled to 2 hours of free search time nor 100 free pages of reproduction of documents. In accordance with § 602.271, commercial use requesters may be charged the costs of searching for and reviewing records even if there is ultimately no disclosure of records.

(d) The Farm Credit Administration shall charge fees for records requested by persons or entities that are not classified in any of the categories listed in paragraph (a), (b) or (c) of this section in an amount that equals the full reasonable direct cost of searching for and reproducing records that are responsive to the request, excluding the first 2 hours of search time and the cost of reproducing the first 100 pages of records. In accordance with § 602.271 requesters in this category may be charged the cost of searching for records even if there is ultimately no disclosure of records, excluding the first 2 hours of search time.

(e) For purposes of the exceptions contained in this section on assessment of fees, the word "pages" refers to paper copies of "8 1/2 x 11" or "11 x 14." Thus, requesters are not entitled to 100 microfiche or 100 computer disks, for example. A microfiche containing the equivalent of 100 pages or a computer disk containing the equivalent of 100 pages of computer printout meet the terms of the exception.

(f) For purposes of paragraph (d) of this section, the term "search time" has as its basis, manual search. To apply this term to searches made by computer, the Farm Credit Administration will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of 2 hours of the salary of the person performing the search, i.e., the operator, the Farm Credit Administration will begin assessing charges for computer search.

**§ 602.267 Fees to be charged.**

(a) Generally, the fees charged for requests for records shall cover the full allowable direct costs of searching for, reproducing and reviewing documents that are responsive to a request for information.

(b) Manual searches for records will be charged at the salary rate(s) (i.e., basic pay plus 16 percent) of the employee(s) making the search.

(c) Computer searches for records will be charged at the actual direct cost of providing the service. This will include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for records and the operator/programmer salary apportionable to the search. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon the prevailing levels of costs to the Farm Credit Administration for the type and amount of such supplies of materials that are used. Nothing in this paragraph shall be construed to entitle any person or entity, as of right, to any services in connection with computerized records, other than services to which such person or entity may be entitled under the provisions of this subpart of part 602.

(d) Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review; i.e., the review undertaken the first time the Farm Credit Administration analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review is assessable.

(e) Records will be reproduced at a rate of $.15 per page. For copies prepared by computer, such as tapes or printouts, the requester shall be charged the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction, the actual direct costs of producing the document(s) shall be charged.

(f) The Farm Credit Administration will recover the full costs of providing services such as those enumerated below when it elects to provide them: (1) Certifying that records are true copies. (2) Sending records by special methods such as express mail.

(g) Remittances shall be in the form either of personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Farm Credit Administration.

(h) A receipt for fees paid will be given upon request.

**§ 602.268 Waiver or reduction of fees.**

(a) The Farm Credit Administration may grant a waiver or reduction of fees if the Farm Credit Administration determines that the disclosure of the 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 the disclosure of the information is not primarily in the commercial interest of the requester.

(b) The Farm Credit Administration will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. The elements to be considered in determining the "cost of collecting a fee" are the administrative costs of receiving and recording a requester's remittance, and processing the fee.

**§ 602.269 Advance payments -- notice.**

(a) Where it is anticipated that the fees chargeable will amount to more than $25.00 and the requester has not indicated in advance a willingness to pay fees as high as are anticipated, the requester shall be promptly notified of the amount of the anticipated fee or such portion thereof that can be readily estimated.

(b) If the anticipated fees exceed $250.00 and if the requester has a history of promptly paying fees charged in connection with information requests, the Farm Credit Administration may obtain satisfactory assurances that the requester will fully pay the fees anticipated.

(c) If the anticipated fees exceed $250.00 and if the requester has no history of paying fees charged in connection with information requests, the Farm Credit Administration may require an advance payment of fees in an amount up to the full amount anticipated.

(d) If the requester has previously failed to pay a fee charged within 30 days of the date of a billing for fees charged in connection with information requests, the Farm Credit Administration may require the requester to pay the fees owed, plus interest, or demonstrate that the full amount owed has been paid, and require the requester to make an advance payment of the full amount of the fees anticipated before processing a new request or a pending request from that requester.

(e) The notice of the amount of an anticipated fee or a request for an advance deposit shall include an offer to the requester to confer with identified Farm Credit Administration personnel to attempt to reformulate the request in a manner which will meet the needs of the requester at a lower cost.

**§ 602.270 Interest.**

The Farm Credit Administration may begin charging interest on unpaid fees, starting on the 31st day following the day on which the bill for such fees was sent. Interest will not accrue if payment of the fees has been received by the Farm Credit Administration, even if said payment has not been processed. Interest will accrue at the rate prescribed in section 3717 of title 31, United States Code, and will accrue from the day on which the bill for such fees was sent.

**§ 602.271 Charges for unsuccessful searches or reviews.**

The Farm Credit Administration may assess charges for time spent searching for records on behalf of requesters in the categories provided for in § 602.266(c), and (d), even if there are no records that are responsive to the request or there is ultimately no disclosure of records. The Farm Credit Administration may assess charges for time spent reviewing records for requesters in the category provided for in § 602.266(c) even if the records located are determined to be exempt from disclosure.

**§ 602.272 Aggregating requests.**

A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Farm Credit Administration reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Farm Credit Administration may aggregate any such requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

Dated: January 2, 1990.

**Jeffrey P. Katz,**

*Acting Secretary, Farm Credit Administration Board.*

[FR Doc. 90-291 Filed 1-4-90; 8:45 am]

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