

§ 1518.4

and approved by the Director or the Project Officer.

(8) The Director may transfer Management Fund resources for any study or project to other federal accounts or other OEQ subaccounts provided that the transfer:

(i) Is approved in writing by the source agency that provided the portion of the funds being transferred;

(ii) Promotes the statutory mission of OEQ; and

(iii) Is justified by the Director as being in the best interests of the government.

(9) Financial transactions shall be classified under each Management

40 CFR Ch. V (7-1-18 Edition)

Funds subaccount in sufficient detail to satisfy management planning, control requirements and financial audit requirements.

(10) All fund expenditures must comport with the purposes of the Management Fund and follow CEQ approval procedures. Any fund expenditures pursuant to interagency agreement for the provision of administrative services shall comport with the CEQ approval procedures specified in the interagency agreement.

PARTS 1519-1599 [RESERVED]

CHAPTER VI—CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

<i>Part</i>		<i>Page</i>
1600	Organization and functions of the Chemical Safety and Hazard Investigation Board	515
1601	Procedures for disclosure of records under the Freedom of Information Act	516
1602	Protection of privacy and access to individual records under the Privacy Act of 1974	532
1603	Rules implementing the Government in the Sunshine Act	536
1610	Administrative investigations	541
1611	Testimony by employees in legal proceedings	543
1612	Production of records in legal proceedings	546
1613–1619	[Reserved]	
1620	Administrative claims arising under the Federal Tort Claims Act	547
1621–1699	[Reserved]	

PART 1600—ORGANIZATION AND FUNCTIONS OF THE CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

- Sec.
1600.1 Purpose.
1600.2 Organization.
1600.3 Functions.
1600.4 Operation.
1600.5 Quorum and voting requirements.
1600.6 Office location.

AUTHORITY: 5 U.S.C. 301, 552(a)(1); 42 U.S.C. 7412(r)(6)(N).

SOURCE: 68 FR 65403, Nov. 20, 2003, unless otherwise noted.

§ 1600.1 Purpose.

This part describes the organization, functions, and operation of the Chemical Safety and Hazard Investigation Board (CSB). The CSB is an independent agency of the United States created by the Clean Air Act Amendments of 1990 [Pub. L. 101-549, 104 Stat. 2399, codified at 42 U.S.C. 7412(r)(6) *et seq.*]. Information about the CSB is available from its Web site, <http://www.csb.gov>.

§ 1600.2 Organization.

(a) The CSB's Board consists of five Members appointed by the President with the advice and consent of the Senate. The President designates one of the Members as Chairperson with the advice and consent of the Senate. The Members exercise various functions, powers, and duties set forth in the Clean Air Act Amendments of 1990 (42 U.S.C. 7412(r)(6) *et seq.*).

(b) The CSB's staff is comprised of the following administrative units:

- (1) The Office of the Chief Operating Officer;
- (2) The Office of Investigations and Safety Programs;
- (3) The Office of the General Counsel;
- (4) The Office of Financial Operations;
- (5) The Office of Management Operations; and
- (6) The Office of Equal Employment Opportunity.

§ 1600.3 Functions.

(a) The CSB investigates chemical accidents and hazards, recommending actions to protect workers, the public,

and the environment. The CSB is responsible for the investigation and determination of the facts, conditions, and circumstances and the cause or probable cause or causes of any accidental release resulting in a fatality, serious injury, or substantial property damages.

(b) The CSB makes safety recommendations to Federal, State, and local agencies, including the Environmental Protection Agency and the Occupational Safety and Health Administration and private organizations to reduce the likelihood of recurrences of chemical incidents. It initiates and conducts safety studies and special investigations on matters pertaining to chemical safety.

(c) The CSB issues reports pursuant to its duties to determine the cause or probable cause or causes of chemical incidents and to report the facts, conditions, and circumstances relating to such incidents; and issues and makes available to the public safety recommendations, safety studies, and reports of special investigations.

§ 1600.4 Operation.

In exercising its functions, duties, and responsibilities, the CSB utilizes:

(a) The CSB's staff, consisting of specialized offices performing investigative, administrative, legal, and financial work for the Board.

(b) Rules published in the FEDERAL REGISTER and codified in this title of the Code of Federal Regulations.

(c) Meetings of the Board Members conducted pursuant to the Government in the Sunshine Act and part 1603 of this title (CSB Rules Implementing the Government in the Sunshine Act) or voting by notation as provided in § 1600.5(b).

(d) Public hearings in connection with incident or hazard investigations.

§ 1600.5 Quorum and voting requirements.

(a) *Quorum requirements.* A quorum of the Board for the transaction of business shall consist of three Members; provided, however, that if the number of Board Members in office is fewer than three, a quorum shall consist of the number of Members in Office; and provided further that on any matter of

§ 1600.6

40 CFR Ch. VI (7–1–18 Edition)

business as to which the number of Members in office, minus the number of Members who have disqualified themselves from consideration of such matter is two, two Members shall constitute a quorum for purposes of such matter. Once a quorum is constituted, a simple majority of voting Members is required to approve an item of the Board’s business. A tie vote results in no action.

(b) *Voting.* The Board votes on items of business in meetings conducted pursuant to the Government in the Sunshine Act. Alternatively, whenever a Member of the Board is of the opinion that joint deliberation among the members of the Board upon any matter at a meeting is unnecessary in light of the nature of the matter, impracticable, or would impede the orderly disposition of agency business, such matter may be disposed of by employing notation voting procedures. A written notation of the vote of each participating Board member shall be recorded by the General Counsel who shall retain it in the records of the Board. If a Board member votes to calendar a notation item, the Board must consider the calendared notation item at a public meeting of the Board within 90 days of the date on which the item is calendared. A notation vote to schedule a public meeting may not be calendared. The Chairperson shall add any calendared notation item to the agenda for the next CSB public meeting if one is to occur within 90 days or to schedule a special meeting to consider any calendared notation item no later than 90 days from the calendar action.

(c) *Public meetings and agendas.* The Chairperson, or in the absence of a chairperson, a member designated by the Board, shall schedule a minimum of four public meetings per year in Washington, DC, to take place during the months of October, January, April, and July.

(1) *Agenda.* The Chairperson, or in the absence of a chairperson, a member designated by the Board, shall be responsible for preparation of a final meeting agenda. The final agenda may not differ in substance from the items published in the Sunshine Act notice for that meeting. Any member may

submit agenda items related to CSB business for consideration at any public meeting, and the Chairperson shall include such items on the agenda. At a minimum, each quarterly meeting shall include the following agenda items:

(i) Consideration and vote on any notation items calendared since the date of the last public meeting;

(ii) A review by the Board of the schedule for completion of all open investigations, studies, and other important work of the Board; and

(iii) A review and discussion by the Board of the progress in meeting the CSB’s Annual Action Plan.

(2) *Publication of agenda information.* The Chairperson shall be responsible for posting information related to any agenda item that is appropriate for public release on the CSB Web site no less than two days prior to a public meeting.

[68 FR 65403, Nov. 20, 2003, as amended at 80 FR 46824, Aug. 6, 2015]

§ 1600.6 Office location.

The principal offices of the Chemical Safety and Hazard Investigation Board are located at 2175 K Street NW, Washington, DC 20037.

PART 1601—PROCEDURES FOR DISCLOSURE OF RECORDS UNDER THE FREEDOM OF INFORMATION ACT

Subpart A—Purpose, Scope, and Applicability

Sec.

1601.1 Purpose and scope.

1601.2 Applicability.

Subpart B—Procedures for Requesting and Disclosing Records

1601.10 Proactive disclosures.

1601.11 Requirements for making requests.

1601.12 Responsibility for responding to requests.

1601.13 Timing of responses to requests.

1601.14 Responses to requests.

1601.15 Special procedures for confidential commercial information.

Subpart C—Appeals

1601.20 Processing of appeals.

Subpart D—Administration

- 1601.30 Protection of records.
 1601.31 Preservation of records pertaining to requests under this part.
 1601.32 Other rights and services.

Subpart E—Fees

- 1601.40 Procedures for fees.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 82 FR 45502, Sept. 29, 2017, unless otherwise noted.

Subpart A—Purpose, Scope, and Applicability**§ 1601.1 Purpose and scope.**

(a) *In general.* This part contains the Chemical Safety and Hazard Investigation Board (“CSB” or “agency”) regulations implementing the Freedom of Information Act (“FOIA”), 5 U.S.C. 552. These regulations provide the procedures by which members of the public may obtain access to records compiled, created, and maintained by the CSB, along with the CSB procedures for responding to such requests. The rules in this subpart are to be read in conjunction with the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the White House Office of Management and Budget (OMB Guidelines).

(b) Definitions.

(1) *Chairperson* means the Chairperson of the CSB.

(2) *Chief FOIA Officer* means the person designated by Chairperson who has overall responsibility for the CSB’s compliance with the FOIA.

(3) *FOIA Officer* means a person designated by the Chief FOIA Officer to process requests for the CSB documents under the FOIA.

(4) *Record* means information regardless of its physical form or characteristics including information created, stored, and retrievable by electronic means that is created or obtained by the CSB and under the control of the CSB at the time of the request, including information maintained for the CSB by an entity under Government contract for records management purposes. *Record* includes any writing, drawing, map, recording, tape, film, photo, or other documentary material by which information is preserved.

(5) *Requester* means any person, including an individual, Indian tribe, partnership, corporation, association, or public or private organization other than a Federal agency that requests access to records in the possession of the CSB pursuant to 5 U.S.C. 552.

§ 1601.2 Applicability.

(a) *In general.* The FOIA and the regulations in this part apply to all CSB documents and information. However, if another law sets specific procedures for disclosure that supersede the FOIA, then CSB must process a request in accordance with the procedures that apply to those specific documents. If a request is received for disclosure of a document to the public that is not required to be released under the provisions of law other than the FOIA, then the CSB must consider the request under the FOIA and the regulations in this part. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with CSB’s Privacy Act regulations (part 1602 of this chapter), as well as under this subpart.

(b) *Disclosure of requested records.* The CSB will only withhold information under the FOIA if the agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. The FOIA Officer will make requested records available to the public to the greatest extent possible in keeping with the FOIA, except for the following types of records, which are exempt from the disclosure requirements:

(1) Records specifically authorized under criteria established by an Executive Order (E.O.) to be kept secret in the interest of national defense or foreign policy and which are, in fact, properly classified pursuant to such E.O.;

(2) Records related solely to the internal personnel rules and practices of the CSB;

(3) Records specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)) provided that such statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue or that the statute establishes particular

§ 1601.10

40 CFR Ch. VI (7–1–18 Edition)

criteria for withholding information or refers to particular types of matters to be withheld; and if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to 5 U.S.C. 552(b)(3);

(4) Records containing trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Interagency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the CSB, provided that the deliberative process privilege shall not apply to records created twenty-five (25) years or more before the date on which the records were requested;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(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.

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

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

(c) *Disclosure of segregable nonexempt material.* The CSB will consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible. If a requested record contains exempted material along with nonexempted material, all reasonably segregable nonexempt material must be disclosed.

(d) *Records available through routine distribution procedures.* If the record requested includes material published and offered for sale, *e.g.*, by the Superintendent of Documents of the Government Printing Office, or by an authorized private distributor, then the CSB will refer the requester to those sources. Nevertheless, if the requester is not satisfied with the alternative sources, then the CSB will process the request under its usual FOIA procedures, noting that the CSB will likely withhold copyrighted records under Exemption 4.

Subpart B—Procedures for Requesting and Disclosing Records

§ 1601.10 Proactive disclosures.

(a) *In general.* Records that the FOIA requires the CSB to make available for public inspection in an electronic format may be accessed through the CSB's Web site (which can be found at <http://www.csb.gov/disclaimers/legal-affairs-foia/>). The CSB is responsible for determining which of its records must be made publicly available, for identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The CSB must ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. The CSB has a FOIA

Contact and FOIA Public Liaison who can assist individuals in locating records particular to the CSB. The most up to date contact information for the CSB's FOIA Contact and the CSB's FOIA Public Liaison is available at <http://www.foia.gov/report-makerequest.html>.

(b) *Definitions.*

(1) *Disclose or disclosure* means making records available for examination or copying, or furnishing a copy of non-exempt responsive records.

(2) *FOIA Contact* means the name, address and phone number at the CSB where a requester can make a FOIA request.

(3) *FOIA Public Liaison* means the official who supervises the FOIA Requester Service Center.

§ 1601.11 Requirements for making requests.

(a) *General information.* (1) To make a request for records, a requester should write directly to the FOIA office of the agency that maintains the records sought. A request will receive the quickest possible response if the request is addressed to the FOIA office of the agency that maintains the records sought. If the CSB is the agency that maintains the records sought, then the contact information for the CSB's FOIA office is listed at <http://www.foia.gov/report-makerequest.html>, and any additional requirements for submitting a request can be found herein. Additionally, requesters who have questions or concerns about making a request, and those who have made a request who have questions or concerns, may discuss their request(s) with the CSB's FOIA Contact or FOIA Public Liaison.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements described in this section. Requesters must provide either a notarized statement or a statement signed under penalty of perjury stating that the requester is the person they claim to be. This certification is required in order to protect the requester's privacy and to ensure that private information about the requester is not disclosed inappropriately to another individual.

(3) Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). As an exercise of administrative discretion, the CSB can require a requester to supply additional information, if necessary, in order to verify that a particular individual has consented to disclosure.

(b) *Addressing requests.* (1) All requests for records to the CSB must be made in writing.

(2) *For hard copy requests:* The envelope and the request both should be clearly marked "FOIA Request" and addressed to: Chief FOIA Officer—FOIA Request, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

(3) *For electronic requests:* The subject line of the request should be marked "FOIA Request" and the request may be submitted by email to foia@csb.gov.

(4) A request that is improperly addressed will be deemed to have been received by the CSB on the date that it is actually received by the CSB, or would have been received with the exercise of due diligence, by the FOIA Officer.

(c) *Description of records sought.* (1) Requesters must describe the records sought in sufficient detail to enable the CSB's personnel to locate them with a reasonable amount of effort.

(2) To the extent possible, requesters should include specific information that may help the CSB identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the CSB's FOIA Contact or FOIA Public Liaison to discuss the

§ 1601.12

records they seek and to receive assistance in describing the records.

(3) If, after receiving a request, the CSB determines that the request does not reasonably describe the records sought, then the CSB must inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the CSB's FOIA Contact or with the CSB's FOIA Public Liaison. If a request does not reasonably describe the records sought, the CSB's response to the request may be delayed.

(d) *Form of records.* Requests may specify the preferred form or format (including electronic formats) for the records that the requester seeks. The CSB must accommodate requests if the record is readily reproducible in that form or format. If a person seeks information from the CSB in a format that does not currently exist, then the CSB must make reasonable efforts to provide the information in the format requested. The CSB will not create a new record of information to satisfy a request.

(e) *Contact information.* Requesters must provide their first and last name along with their contact information, such as their phone number, email address, and/or mailing address, to assist the CSB in communicating with them and providing released records.

(f) *Agreement to pay fees.* The CSB considers a FOIA request an agreement by the requester to pay all applicable fees charged unless the requester seeks a waiver of fees. The CSB ordinarily will confirm this agreement in an acknowledgement letter. The CSB will not charge any fee if the total cost of the response is less than \$25.00. See § 1601.40 [discussing fees in more detail]. If the fee will be greater than \$25.00, then the CSB must contact the requester to discuss how the requester wants to proceed.

(g) *Types of records not available.* The FOIA does not require the CSB to:

(1) Compile or create records solely for the purpose of satisfying a request for records;

(2) Provide records not yet in existence, even if such records may be ex-

40 CFR Ch. VI (7-1-18 Edition)

pected to come into existence at some future time; or

(3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requester that the requested records have been destroyed or otherwise disposed of.

§ 1601.12 Responsibility for responding to requests.

(a) *In general.* The agency that first receives a request for a record and maintains that record is the agency responsible for responding to the request. In determining which records are responsive to a request, the CSB ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the CSB must inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to grant or deny requests.* The Chief FOIA Officer or a designee is authorized to grant or to deny any initial request for records that are maintained by the CSB and to determine any appropriate fees.

(c) *Consultation, referral, and coordination.* When reviewing records, the CSB must determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the CSB must proceed in one of the following ways:

(1) *Consultation.* When records originated with the CSB, but contain within them information of interest to another agency or other Federal Government office, the CSB should consult with that other entity prior to making a release determination.

(2) *Referral.* (i) When the CSB believes that a different agency or component of a different agency is best able to determine whether to disclose the record, the CSB should refer the responsibility for responding to the request regarding that record to that agency or component. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the CSB and the originating agency jointly agree that the CSB is in the best position to

respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the CSB refers any part of the responsibility for responding to a request to another agency, it must document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if an agency locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the CSB must coordinate with the originating agency to seek its views on whether the record can be disclosed. The release determination for the record that is the subject of the coordination will then be conveyed to the requester by the CSB.

(d) *Classified information.* Upon receipt of any request involving classified information, the CSB must determine whether the information is currently and properly classified in accordance with applicable classification rules. Whenever a request involves a record containing information that has been classified or may be appropriate

for classification by another agency under any applicable E.O. concerning the classification of records, the CSB must refer the responsibility for responding to the request regarding that information to the agency that classified the information, or to the agency that should consider the information for classification. Whenever the CSB's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), the CSB must refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the CSB must be handled according to the date that the first agency received the perfected FOIA request.

(f) *Agreements regarding consultations and referrals.* The CSB may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

(g) *No responsive record.* If no records are responsive to the request, the FOIA Officer will so notify the requester in writing.

§ 1601.13 Timing of responses to requests.

(a) *In general.* The CSB ordinarily will respond to requests according to their order of receipt.

(b) *Definitions.*

(1) *Working day* means a Federal workday; Saturdays, Sundays, and Federal holidays are excluded in computing the response time for processing FOIA requests.

(2) [Reserved]

(c) *Multitrack processing.* The CSB has a specific track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (f) of this section. In addition, the CSB uses two standard processing tracks- one for simple requests and a separate track for complex requests. The CSB will assign requests to the simple or complex track based on the estimated amount of work or time needed to process the request. Among the factors the CSB may consider are

the number of records requested, the number of pages involved in processing the request and the need for consultations or referrals. The CSB must advise each requester of the track into which their request falls and, when appropriate, will offer a requester an opportunity to narrow or modify their request so that it can be placed in the simple processing track.

(d) *Unusual circumstances.* Whenever the CSB cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the CSB extends the time limit on that basis, the CSB must, before expiration of the twenty (20) day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the CSB estimates processing of the request will be completed. Where the extension exceeds ten (10) working days, the CSB must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The CSB must make available its designated FOIA Contact or its FOIA Public Liaison for this purpose. A list of agency FOIA Public Liaisons is available at <http://www.foia.gov/report-makerequest.html>. The CSB must also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(e) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, the CSB may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester, or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The CSB must not aggregate multiple requests that involve unrelated matters.

(f) *Expedited processing.* (1) The CSB must process requests and appeals on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exists possible questions about the government’s integrity that affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (f)(1)(i) through (iv) of this section must be submitted to the CSB. When making a request for expedited processing of an administrative appeal, the request must be submitted to the CSB’s FOIA Appeals Officer in accordance with § 1601.20.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (f)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester’s sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public’s right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an “urgency to inform” the public on the topic. As a matter of administrative discretion, the CSB may waive the formal certification requirement.

(4) The CSB must notify the requester within ten (10) calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, then the request must be given priority, placed in the processing track for expedited requests, and must be processed as soon as practicable. If a request for expedited processing is denied, then the

CSB must act on any appeal of that decision expeditiously.

§ 1601.14 Responses to requests.

(a) *In general.* The CSB, to the extent practicable, will communicate electronically with requesters having access to the Internet, such as by email or web portal.

(b) *Acknowledgments of requests.* The CSB must acknowledge the request in writing and assign it an individualized tracking number if it will take longer than ten (10) working days to process. The CSB must include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Estimated dates of completion and interim responses.* Upon request, the CSB must provide an estimated date by which the CSB expects to provide a response to the requester. If a request involves a voluminous amount of material, or searches in multiple locations, the CSB may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once the CSB determines it will grant a request in full or in part, it must notify the requester in writing. The notice must describe the manner in which the record or records will be disclosed, whether by providing a copy of the record or records with the response, or providing them at a later date, or by making a copy of the record available to the requester for inspection at a reasonable time and place. The procedure for such an inspection must not unreasonably disrupt the operation of the CSB. The CSB must also inform the requester of any fees charged under §1601.40 and must disclose the requested records to the requester promptly upon payment of any applicable fees. The CSB must inform the requester of the availability of its FOIA Public Liaison to offer assistance.

(e) *Adverse determinations of requests.* If the CSB makes an adverse determination denying a request in any respect, it must notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part;

the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial must be signed by the Chairperson or the FOIA Officer and must include:

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

(2) A brief statement of the reasons for the denial, including any FOIA exemption(s) applied by the CSB in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption; and

(4) A statement that the denial may be appealed under §1601.20, and a description of the appeal requirements.

(5) A statement notifying the requester of the assistance available from the CSB's FOIA Public Liaison and the dispute resolution services offered by the OGIS.

(g) *Markings on released documents.* Records disclosed in part must be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted must also be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event that the CSB identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the CSB must confer with Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

§ 1601.15

40 CFR Ch. VI (7-1-18 Edition)

(2) When invoking an exclusion, the CSB must maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§ 1601.15 Special procedures for confidential commercial information.

(a) *In general.* Confidential commercial information provided to the CSB by a submitter must not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the CSB from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, Indian tribal governments but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(c) *Designation of confidential commercial information.* A submitter of confidential commercial information must make good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). These designations expire ten (10) years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(d) *When notice to submitters is required.* (1) The CSB must promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the CSB determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The CSB has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined

whether the information is protected from disclosure.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the CSB may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(e) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The CSB determines that the information is exempt under the FOIA, and therefore will not be disclosed;

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

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of E.O. 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such case, the CSB must give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(f) *Opportunity to object to disclosure.* (1) The CSB must specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide the CSB a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. 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. Information provided by a submitter pursuant to this paragraph may

itself be subject to disclosure under the FOIA.

(3) A submitter who fails to respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. The CSB is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(g) *Analysis of objections.* The CSB must consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(h) *Notice of intent to disclose.* Whenever the CSB decides to disclose information over the objection of a submitter, the CSB must provide the submitter written notice, which must include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the CSB intends to release them; and

(3) A specified disclosure date, which must be a reasonable time after the notice.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the CSB must promptly notify the submitter.

(j) *Requester notification.* The CSB must notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure because the request includes information that may arguably be exempt from disclosure under Exemption 4 of the FOIA; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

Subpart C—Appeals

§ 1601.20 Processing of appeals.

(a) *Right of appeal.* If a request has been denied in whole or in part, the requester may appeal the denial to the CSB's FOIA Appeals Officer.

(b) *Definitions.*

(1) *FOIA Appeal* means an independent review of an adverse determination initial determination made in response to a FOIA request.

(2) *FOIA Appeals Officer* means the person designated by the Chairperson to process and to decide a FOIA appeal.

(c) *Requirements for making an appeal.* (1) A requester may appeal any adverse determinations to the FOIA Appeals Officer. Examples of adverse determinations are provided in § 1601.14(e).

(2) The requester must make the appeal in writing. Requesters can submit appeals by mail or email in accordance with the following requirements herein, which are also listed on the CSB's Web site. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal" or "FOIA Appeal."

(i) For hard copy requests: The envelope and the request both should be addressed to: FOIA Appeals Officer—FOIA Appeal, Chemical Safety and Hazard Investigation Board, 1750 Pennsylvania Ave. NW., Suite 910, Washington, DC 20006.

(ii) For electronic requests: The appeal should be addressed to the FOIA Appeals Officer and may be submitted by email to foiaappeals@csb.gov.

(3) To be considered timely, an appeal must be postmarked, or in the case of electronic submissions, transmitted, within ninety (90) calendar days after the date of the adverse determination that is the subject of the appeal. For purposes of apply the ninety (90) calendar day deadline, the CSB will treat an appeal that is improperly addressed as being received on the date on the date that it is actually received by the CSB, or would have been received with the exercise of due diligence, by the FOIA Appeals Officer.

(4) The appeal should clearly identify the adverse determination that is being appealed and the assigned request number.

(5) An appeal should also include a copy of the initial request, a copy of the letter denying the request in whole or in part, and a statement of the circumstances, reasons, or arguments advanced in support of disclosure of the requested record.

§ 1601.30

(d) *Adjudication of appeals.* (1) The CSB FOIA Appeals Officer or designee will act on behalf of the CSB's Chief FOIA Officer on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the FOIA Appeals Officer must take appropriate action to ensure compliance with applicable classification rules.

(e) *Decisions on appeals.* The CSB must provide its decision on an appeal in writing. The disposition of an appeal will be in writing and will constitute the final action of the CSB on a request. A decision that upholds the CSB's determination in whole or in part will contain a statement that identifies the reasons for the affirmation, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will also inform the requester of the mediation services offered by the OGIS of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the CSB's decision is remanded or modified on appeal, the CSB must notify the requester of that determination in writing. The CSB must then further process the request in accordance with that appeal determination and will respond directly to the requester.

(f) *Engaging in dispute resolution services provided by OGIS.* Dispute resolution is a voluntary process. If the CSB agrees to participate in the dispute resolution services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(g) *When appeal is required.* Before seeking review by a court of the CSB's adverse determination, a requester generally must first submit a timely administrative appeal.

Subpart D—Administration

§ 1601.30 Protection of records.

(a) *In general.* (1) Except as authorized by this part or as otherwise necessary in performing official duties, CSB employees must not disclose or

40 CFR Ch. VI (7–1–18 Edition)

permit disclosure of any document or information in the possession of the CSB that is confidential or otherwise of a nonpublic nature, including that regarding the CSB, the Environmental Protection Agency or the Occupational Safety and Health Administration.

(2) No person may, without permission, remove from the place where it is made available any record made available to him for inspection or copying. Stealing, altering, mutilating, obliterating, or destroying a Federal record, in whole or in part, is a violation of Federal law.

(b) [Reserved]

§ 1601.31 Preservation of records pertaining to requests under this part.

The CSB must preserve all correspondence pertaining to the requests that it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code and the General Records Schedule 4.2 of the National Archives and Records Administration. The CSB must not dispose of or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

§ 1601.32 Other rights and services.

Nothing in this subpart will 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.

Subpart E—Fees

§ 1601.40 Procedures for fees.

(a) *In general.* The CSB must charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: Commercial use requesters, non-commercial scientific or educational institutions or news media requesters, and all other requesters. Different fees are assessed depending on the category. Requesters may seek a fee waiver. The CSB must consider requests for fee waivers in accordance with the requirements in paragraph (k) of this section. To resolve any fee

issues that arise under this section, the CSB may contact a requester for additional information. The CSB must ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The CSB ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States, or by another method as determined by the CSB.

(b) *Definitions.*

(1) *Commercial use request* is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The CSB's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The CSB must notify requesters of their placement in this category.

(2) *Direct costs* are those expenses that the CSB incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.*, the basic rate of pay for the employee, plus sixteen percent (16%) of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others. The copies provided must be in a form that is reasonably usable by requesters.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester's role at the educational institution. The CSB may seek verification from the requester that the request is in furtherance of schol-

arly research and the CSB must advise requesters of their placement in this category.

(i) *Example 1.* A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

(ii) *Example 2.* A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

(iii) *Example 3.* A student who makes a request in furtherance of the student's coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) *Noncommercial scientific institution* is an institution that is not operated on a "commercial" basis, as defined in paragraph (b)(1) 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. A requester in this category 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 for a commercial use. The CSB must advise requesters of their placement in this category.

(6) *Representative of the news media* is 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. Accordingly, the term includes 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 that broadcast news to the public at large, and publishers of periodicals that disseminate news and

make their products available through a variety of means to the general public, including news organizations that make their products available for purchase by or subscription by or free distribution to the general public, including those solely on the Internet. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A request for records supporting the news-dissemination function of the requester will not be considered to be for a commercial use. *Freelance* journalists who demonstrate a solid basis for expecting publication through a news media entity will be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the CSB can also consider a requester's past publication record in making this determination. The CSB will advise requesters of their placement in this category.

(7) *Review* is the examination of a record located in response to a FOIA request in order to determine whether any portion of it is exempt from disclosure under one or more of the FOIA exemptions. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under §1601.15, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the CSB will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the CSB should not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The CSB must charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The CSB may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be charged as follows: \$6.00 for clerical personnel; \$11.00 for professional personnel; and \$15.00 for managerial personnel.

(iii) The CSB must charge the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. The CSB must notify the requester of the costs associated with creating such a program, and the requester must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by the CSB at a Federal records center operated by the National Archives and Records Administration (NARA), the CSB must charge additional costs in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication.* The CSB will charge duplication fees to all requesters, subject to the restrictions of paragraph (d) of this section. The CSB must honor a requester's preference for receiving a record in a particular form or format where the CSB can readily reproduce it in the form or format requested. Where photocopies are supplied, the CSB must provide one copy per request at the

cost of \$0.17 per page. For copies of records produced on tapes, disks, or other media, the CSB must charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester must also pay the direct costs associated with scanning those materials. For other forms of duplication, the CSB must charge the direct costs.

(3) *Review.* The CSB must charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.*, the review conducted by the CSB to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the CSB's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees.* (1) When the CSB determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, it will not charge search fees.

(2)(i) If the CSB fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii)-(iv).

(ii) If the CSB has determined that unusual circumstances as defined by the FOIA apply and the CSB provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit must be excused for an additional ten (10) days.

(iii) If the CSB has determined that unusual circumstances as defined by the FOIA apply, and more than 5,000

pages are necessary to respond to the request, the CSB may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees, if the following steps are taken. The CSB must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the CSB must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the CSB may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

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

(4) Except for requesters seeking records for a commercial use, the CSB must provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than \$25.00.

(e) *Notice of anticipated fees in excess of \$25.00.* (1) When the CSB determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, the CSB must notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the CSB must advise the requester accordingly. If the request is for non-commercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge

and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If the CSB notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a non-commercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The CSB is not required to accept payments in installments. Requesters must respond to their fee estimate within thirty (30) working days, or the CSB will assume that the requester is no longer interested in their FOIA request(s), and the case will be administratively closed.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the CSB estimates that the total fee will exceed that amount, the CSB will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The CSB will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The CSB must make available its FOIA Public Liaison or another FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the CSB chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such serv-

ices include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The CSB may charge interest on any unpaid bill starting on the thirty-first (31) 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 from the billing date until payment is received by the CSB. The CSB must 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.

(h) *Aggregating requests.* When the CSB reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the CSB may aggregate those requests and charge accordingly. The CSB may presume that multiple requests of this type made within a thirty (30) day period have been made in order to avoid fees. For requests separated by a longer period, the CSB must aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters cannot be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, the CSB must not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.*, payment before copies are sent to a requester) is not an advance payment.

(2) When the CSB determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The CSB may elect to process the request prior to collecting fees when it receives

a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to the CSB within thirty (30) calendar days of the billing date, the CSB may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the CSB may require that the requester make an advance payment of the full amount of any anticipated fee before the CSB begins to process a new request or continues to process a pending request or any pending appeal. Where the CSB has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the CSB requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within thirty (30) calendar days after the date of the CSB's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires the CSB to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the CSB must inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how 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 is not primarily in the commercial interest of the requester.

(2) The CSB must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that 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 is not primarily in the commercial interest of the requester. In deciding whether this standard is satisfied the CSB must consider the factors described in paragraphs (k)(2)(i) through (iii) of this section:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) 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. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The CSB will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the CSB must consider the following criteria:

(A) The CSB must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters must be

given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the CSB must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) are satisfied and any commercial interest is not the primary interest furthered by the request. The CSB ordinarily will presume that when a news media requester has satisfied the factors in paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the 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.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver must be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the CSB and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

PART 1602—PROTECTION OF PRIVACY AND ACCESS TO INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF 1974

Sec.

- 1602.1 General provisions.
- 1602.2 Requests for access to records.
- 1602.3 Responsibility for responding to requests for access to records.
- 1602.4 Responses to requests for access to records.
- 1602.5 Appeals from denials of requests for access to records.
- 1602.6 Requests for amendment or correction of records.
- 1602.7 Requests for accountings of record disclosures.

1602.8 Preservation of records.

1602.9 Fees.

1602.10 Notice of court-ordered and emergency disclosures.

AUTHORITY: 5 U.S.C. 552a, 553; 42 U.S.C. 7412 *et seq.*

SOURCE: 66 FR 17080, Mar. 29, 2001, unless otherwise noted.

§ 1602.1 General provisions.

(a) *Purpose and scope.* This part contains the rules that the Chemical Safety and Hazard Investigation Board (“CSB” or “Board”) follows under the Privacy Act of 1974, 5 U.S.C. 552a. These rules should be read together with the Privacy Act, which provides additional information about records maintained on individuals. The rules in this part apply to all records in systems of records maintained by the CSB that are retrieved by an individual’s name or personal identifier. They describe the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those records by the CSB. In addition, the CSB processes all Privacy Act requests for access to records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, following the rules contained in part 1601 of this chapter, which gives requests the benefit of both statutes.

(b) *Definitions.* As used in this part:

Requester means an individual who makes a request for access, a request for amendment or correction, or a request for an accounting under the Privacy Act.

Request for access to a record means a request made as described in subsection (d)(1) of the Privacy Act, 5 U.S.C. 552a.

Request for amendment or correction of a record means a request made as described in subsection (d)(2) of the Privacy Act, 5 U.S.C. 552a.

Request for an accounting means a request made as described in subsection (c)(3) of the Privacy Act, 5 U.S.C. 552a.

§ 1602.2 Requests for access to records.

(a) *How made and addressed.* You may make a request for access to a CSB record about yourself by appearing in person or by writing to the CSB. Your

request should be sent or delivered to the CSB's General Counsel, at 2175 K Street, NW., 4th Floor, Washington, DC 20037. For the quickest possible handling, you should mark both your request letter and the envelope "Privacy Act Request."

(b) *Description of records sought.* You must describe the records that you want in enough detail to enable CSB personnel to locate the system of records containing them with a reasonable amount of effort. Whenever possible, your request should describe the records sought, the time periods in which you believe they were compiled, and the name or identifying number of each system of records in which you believe they are kept. The CSB publishes notices in the FEDERAL REGISTER that describe its systems of records. A description of the CSB's systems of records also may be found as part of the "Privacy Act Compilation" published by the National Archives and Records Administration's Office of the Federal Register. This compilation is available in most large reference and university libraries. This compilation also can be accessed electronically at the Government Printing Office's World Wide Web site (which can be found at http://www.access.gpo.gov/su_docs).

(c) *Agreement to pay fees.* If you make a Privacy Act request for access to records, it shall be considered an agreement by you to pay all applicable fees charged under §1602.9 up to \$25.00. The CSB ordinarily will confirm this agreement in an acknowledgment letter. When making a request, you may specify a willingness to pay a greater or lesser amount.

(d) *Verification of identity.* When you make a request for access to records about yourself, you must verify your identity. You must state your full name, current address, and date and place of birth. You must sign your request and your signature must either be notarized or submitted by you under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. In order to help the identification and location of requested records, you may also, at your option, include your social security number.

(e) *Verification of guardianship.* When making a request as the parent or guardian of a minor or as the guardian of someone determined by a court to be incompetent, for access to records about that individual, you must establish:

(1) The identity of the individual who is the subject of the record, by stating the name, current address, date and place of birth, and, at your option, the social security number of the individual;

(2) Your own identity, as required in paragraph (d) of this section;

(3) That you are the parent or guardian of that individual, which you may prove by providing a copy of the individual's birth certificate showing your parentage or by providing a court order establishing your guardianship; and

(4) That you are acting on behalf of that individual in making the request.

§ 1602.3 Responsibility for responding to requests for access to records.

(a) *In general.* In determining which records are responsive to a request, the CSB ordinarily will include only those records in its possession as of the date the CSB begins its search for them. If any other date is used, the CSB will inform the requester of that date.

(b) *Authority to grant or deny requests.* The CSB's General Counsel, or his/her designee, is authorized to grant or deny any request for access to a record of the CSB.

(c) *Consultations and referrals.* When the CSB receives a request for access to a record in its possession, it will determine whether another agency of the Federal Government is better able to determine whether the record is exempt from access under the Privacy Act. If the CSB determines that it is best able to process the record in response to the request, then it will do so. If the CSB determines that it is not best able to process the record, then it will either:

(1) Respond to the request regarding that record, after consulting with the agency best able to determine whether the record is exempt from access and with any other agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that

record to another agency that originated the record (but only if that agency is subject to the Privacy Act). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether it is exempt from access.

(d) *Notice of referral.* Whenever the CSB refers all or any part of the responsibility for responding to your request to another agency, it ordinarily will notify you of the referral and inform you of the name of each agency to which the request has been referred and of the part of the request that has been referred.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals shall be handled according to the date the Privacy Act access request was initially received by the CSB, not any later date.

§ 1602.4 Responses to requests for access to records.

(a) *Acknowledgments of requests.* On receipt of your request, the CSB ordinarily will send an acknowledgment letter, which shall confirm your agreement to pay fees under §1602.2(c) and may provide an assigned request number for further reference.

(b) *Grants of requests for access.* Once the CSB makes a determination to grant your request for access in whole or in part, it will notify you in writing. The CSB will inform you in the notice of any fee charged under §1602.9 and will disclose records to you promptly on payment of any applicable fee. If your request is made in person, the CSB may disclose records to you directly, in a manner not unreasonably disruptive of its operations, on payment of any applicable fee and with a written record made of the grant of the request. If you are accompanied by another person when you make a request in person, you shall be required to authorize in writing any discussion of the records in the presence of the other person.

(c) *Adverse determinations of requests for access.* If the CSB makes an adverse determination denying your request for access in any respect, it will notify you of that determination in writing. Adverse determinations, or denials of requests, consist of: a determination to

withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that what has been requested is not a record subject to the Privacy Act; a determination on any disputed fee matter; and a denial of a request for expedited treatment. The notification letter shall be signed by the General Counsel, or his/her designee, and shall include:

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

(2) A brief statement of the reason(s) for the denial, including any Privacy Act exemption(s) applied by the CSB in denying the request; and

(3) A statement that the denial may be appealed under §1602.5(a) and a description of the requirements of §1602.5(a).

§ 1602.5 Appeals from denials of requests for access to records.

(a) *Appeals.* If you are dissatisfied with the CSB's response to your request for access to records, you may appeal an adverse determination denying your request in any respect to the Privacy Act Appeals Officer of the CSB, 2175 K Street, NW., Suite 400, Washington, DC 20037. You must make your appeal in writing, and it must be received within 60 days of the date of the letter denying your request. Your appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the determination (including the assigned request number, if any) that you are appealing. For the quickest possible handling, you should mark both your appeal letter and the envelope "Privacy Act Appeal."

(b) *Responses to appeals.* The decision on your appeal will be made in writing. A decision affirming an adverse determination in whole or in part will include a brief statement of the reason(s) for the affirmance, including any Privacy Act exemption applied, and will inform you of the Privacy Act provisions for court review of the decision. If the adverse determination is reversed or modified on appeal in whole or in part, you will be notified in a written decision and your request will be reprocessed in accordance with that appeal decision.

(c) *When appeal is required.* If you wish to seek review by a court of any adverse determination or denial of a request, you must first appeal it under this section.

§1602.6 Requests for amendment or correction of records.

(a) *How made and addressed.* You may make a request for amendment or correction of a CSB record about yourself by following the procedures in §1602.2. Your request should identify each particular record in question, state the amendment or correction that you want, and state why you believe that the record is not accurate, relevant, timely, or complete. You may submit any documentation that you think would be helpful.

(b) *CSB responses.* Within ten working days of receiving your request for amendment or correction of records, the CSB will send you a written acknowledgment of its receipt of your request, and it will promptly notify you whether your request is granted or denied. If the CSB grants your request in whole or in part, it will describe the amendment or correction made and advise you of your right to obtain a copy of the corrected or amended record. If the CSB denies your request in whole or in part, it will send you a letter stating:

- (1) The reason(s) for the denial; and
- (2) The procedure for appeal of the denial under paragraph (c) of this section, including the name and business address of the official who will act on your appeal.

(c) *Appeals.* You may appeal a denial of a request for amendment or correction in the same manner as a denial of a request for access to records (see §1602.5), and the same procedures will be followed. If your appeal is denied, you will be advised of your right to file a Statement of Disagreement as described in paragraph (d) of this section and of your right under the Privacy Act for court review of the decision.

(d) *Statements of Disagreement.* If your appeal under this section is denied in whole or in part, you have the right to file a Statement of Disagreement that states your reason(s) for disagreeing with the CSB's denial of your request for amendment or correction. State-

ments of Disagreement must be concise, must clearly identify each part of any record that is disputed, and should be no longer than one typed page for each fact disputed. Your Statement of Disagreement must be sent to the CSB, which will place it in the system of records in which the disputed record is maintained and will mark the disputed record to indicate that a Statement of Disagreement has been filed and where in the system of records it may be found.

(e) *Notification of amendment/correction or disagreement.* Within 30 working days of the amendment or correction of a record, the CSB shall notify all persons, organizations, or agencies to which it previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended or corrected. If an individual has filed a Statement of Disagreement, the CSB will attach a copy of it to the disputed record whenever the record is disclosed and may also attach a concise statement of its reason(s) for denying the request to amend or correct the record.

§ 1602.7 Requests for an accounting of record disclosures.

(a) *How made and addressed.* Except where accountings of disclosures are not required to be kept (as stated in paragraph (b) of this section), you may make a request for an accounting of any disclosure that has been made by the CSB to another person, organization, or agency of any record about you. This accounting contains the date, nature, and purpose of each disclosure, as well as the name and address of the person, organization, or agency to which the disclosure was made. Your request for an accounting should identify each particular record in question and should be made by writing to the CSB, following the procedures in §1602.2.

(b) *Where accountings are not required.* The CSB is not required to provide accountings to you where they relate to disclosures for which accountings are not required to be kept—in other words, disclosures that are made to employees within the agency and disclosures that are made under the FOIA.

§ 1602.8

(c) *Appeals.* You may appeal a denial of a request for an accounting to the CSB Appeals Officer in the same manner as a denial of a request for access to records (see §1602.5) and the same procedures will be followed.

§ 1602.8 Preservation of records.

The CSB will preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized by Title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the Privacy Act.

§ 1602.9 Fees.

The CSB will charge fees for duplication of records under the Privacy Act in the same way in which it charges duplication fees under the FOIA (see part 1601, subpart D of this chapter). No search or review fee will be charged for any record.

§ 1602.10 Notice of court-ordered and emergency disclosures.

(a) *Court-ordered disclosures.* When a record pertaining to an individual is required to be disclosed by a court order, the CSB will make reasonable efforts to provide notice of this to the individual. Notice will be given within a reasonable time after the CSB's receipt of the order—except that in a case in which the order is not a matter of public record, the notice will be given only after the order becomes public. This notice will be mailed to the individual's last known address and will contain a copy of the order and a description of the information disclosed.

(b) *Emergency disclosures.* Upon disclosing a record pertaining to an individual made under compelling circumstances affecting health or safety, the CSB will notify that individual of the disclosure. This notice will be mailed to the individual's last known address and will state the nature of the information disclosed; the person, organization, or agency to which it was disclosed; the date of disclosure; and

40 CFR Ch. VI (7–1–18 Edition)

the compelling circumstances justifying the disclosure.

PART 1603—RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT

Sec.

1603.1 Applicability.

1603.2 Policy.

1603.3 Definitions.

1603.4 Open meetings requirement.

1603.5 Assurance of compliance.

1603.6 Business requiring a meeting.

1603.7 Grounds on which meetings may be closed or information may be withheld.

1603.8 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

1603.9 Procedures for public announcement of meetings.

1603.10 Changes following public announcement.

1603.11 Transcripts, recordings, or minutes of closed meetings.

1603.12 Availability of transcripts, recordings, and minutes, and applicable fees.

1603.13 Report to Congress.

1603.14 Severability.

AUTHORITY: 5 U.S.C. 552b; 42 U.S.C. 7412(r)(6)(N).

SOURCE: 67 FR 35445, May 20, 2002, unless otherwise noted.

§ 1603.1 Applicability.

(a) This part implements the provisions of the Government in the Sunshine Act, 5 U.S.C. 552b. These procedures apply to meetings, as defined herein, of the Members of the Chemical Safety and Hazard Investigation Board (“CSB” or “Board”).

(b) This part does not affect the procedures by which CSB records are made available to the public, which continue to be governed by part 1601 of this chapter pursuant to the Freedom of Information Act, 5 U.S.C. 552, except that the exemptions set forth in §1603.7 shall govern in the case of any requests made for the transcripts, recordings, and minutes described in § 1603.11.

§ 1603.2 Policy.

It is the policy of the CSB to provide the public with the fullest practicable information regarding the decision-making processes of the Board, while protecting the rights of individuals and the ability of the Board to discharge

Chem. Safety and Hazard Invest. Board

§ 1603.5

its statutory functions and responsibilities. The public is invited to attend but not to participate in open meetings. For any open meeting, the Board, by majority vote, may decide to allow for a public comment period immediately following the close of that meeting.

§ 1603.3 Definitions.

As used in this part:

(a) *Days* means calendar days, except where noted otherwise.

(b) *General Counsel* means the Board's principal legal officer, or a CSB attorney serving as Acting General Counsel.

(c) *Meeting* means the deliberations of at least a quorum of Members where such deliberations determine or result in the joint conduct or disposition of official CSB business, and includes conference telephone calls or other exchanges otherwise coming within the definition. A meeting does not include:

(1) Notation voting or similar consideration of business, whether by circulation of material to the Members individually in writing or by a polling of the Members individually by telephone.

(2) Action by at least a quorum of Members to:

(i) Open or to close a meeting or to release or to withhold information pursuant to §1603.7;

(ii) Set an agenda for a proposed meeting(s);

(iii) Call a meeting on less than seven days' notice as permitted by §1603.9(b); or

(iv) Change the subject matter or the determination to open or to close a publicly announced meeting under §1603.10(b).

(3) A session attended by at least a quorum of Members for the purpose of having the Board's staff or expert consultants to the Board brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official CSB business on such matters.

(4) A session attended by at least a quorum of Members for the purpose of having the Environmental Protection

Agency or Occupational Safety and Health Administration (including contractors of those agencies) or other persons or organizations brief or otherwise provide information to the Board concerning any matters within the purview of the Board under its authorizing statute, provided that the Board does not engage in deliberations that determine or result in the joint conduct or disposition of official CSB business on such matters.

(5) A gathering of Members for the purpose of holding informal preliminary discussions or exchange of views which do not effectively predetermine official action.

(d) *Member* means an individual duly appointed and confirmed to the collegial body known as the Board.

(e) *Reporter* means a CSB employee designated by the General Counsel, under §1603.5(c), to attend and prepare a written summary of all briefings described in paragraphs (c)(3) and (c)(4) of this section and all informal preliminary discussions described in paragraph (c)(5) of this section.

(f) *Sunshine Act* means the Government in the Sunshine Act, 5 U.S.C. 552b.

§ 1603.4 Open meetings requirement.

Any meetings of the Board, as defined in §1603.3, shall be conducted in accordance with this part. Except as provided in §1603.7, the Board's meetings, or portions thereof, shall be open to public observation.

§ 1603.5 Assurance of compliance.

(a) The General Counsel or another attorney designated by the General Counsel will attend and monitor all briefings described in §1603.3(c)(3) and (c)(4) and all informal preliminary discussions described in §1603.3(c)(5), to assure that those gatherings do not proceed to the point of becoming deliberations and meetings for Sunshine Act purposes.

(b) The General Counsel or the designated attorney will inform the Board Members if developing discussions at a briefing or gathering should be deferred until a notice of an open or closed meeting can be published in the

§ 1603.6

40 CFR Ch. VI (7-1-18 Edition)

FEDERAL REGISTER, and a meeting conducted pursuant to the Sunshine Act and this part.

(c) For each briefing described in §1603.3(c)(3) or (c)(4) and each informal preliminary discussion described in §1603.3(c)(5), the General Counsel is hereby authorized to designate a CSB employee, other than the attorney referred to in paragraph (a) of this section, to serve as a reporter. An employee may be designated as reporter for a single briefing or informal discussion or for a series of briefings or discussions. The reporter shall attend and prepare a written summary of each briefing(s) or informal discussion(s) for which he/she has been designated. The reporter must prepare the summary of a particular briefing or informal discussion within five business days after the date of that briefing or discussion. The reporter must then submit the summary to the General Counsel or the designated attorney who attended the briefing or informal discussion that is the subject of the summary for review and approval as a fair and accurate summary of that briefing or discussion. The written summaries of briefings and informal discussions shall be maintained in the Office of General Counsel.

§ 1603.6 Business requiring a meeting.

The Board may, by majority vote of its Members, determine that particular items or classes of Board business cannot be accomplished by notation voting, but must instead be decided by a recorded vote at a meeting, as defined in §1603.3(c).

§ 1603.7 Grounds on which meetings may be closed or information may be withheld.

Except in a case where the Board finds that the public interest requires otherwise, a meeting may be closed and information pertinent to such meeting otherwise required by §§1603.8, 1603.9, and 1603.10 to be disclosed to the public may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:

(a) Disclose matters that are:

(1) Specifically authorized under criteria established by an Executive Order

to be kept secret in the interests of national defense or foreign policy; and

(2) In fact, properly classified pursuant to such Executive Order. In making the determination that this exemption applies, the Board shall rely upon the classification assigned to a document by the Environmental Protection Agency, Occupational Safety and Health Administration, or other originating agency;

(b) Relate solely to the internal personnel rules and practices of the CSB;

(c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552), provided that such statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(1) Interfere with enforcement proceedings;

(2) Deprive a person of a right to a fair trial or an impartial adjudication;

(3) Constitute an unwarranted invasion of personal privacy;

(4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(5) Disclose investigative techniques and procedures; or

Chem. Safety and Hazard Invest. Board

§ 1603.9

(6) Endanger the life or physical safety of law enforcement personnel;

(h) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the CSB, except that this paragraph shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action or is required by law to make such disclosure on its own initiative prior to taking final action on such proposal;

(i) Specifically concern the Board's issuance of a subpoena, or the CSB's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the CSB of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing; or

(j) Disclose other information for which the Government in the Sunshine Act provides an exemption to the open meeting requirements of that Act.

§ 1603.8 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

(a) A meeting shall not be closed, or information pertaining thereto withheld, unless a majority of all Members votes to take such action. A majority of the Board may act by taking a single vote with respect to any action under § 1603.7. A single vote is permitted with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular subject matters and is scheduled to be held no more than thirty days after the initial meeting in such series. Each Member's vote under this paragraph shall be recorded and proxies are not permitted.

(b) Any person whose interest may be directly affected if a portion of a meeting is open may request the Board to close that portion on any of the grounds referred to in § 1603.7(e)

through (g). Requests, with reasons in support thereof, should be submitted in writing, no later than two days before the meeting in question, to the General Counsel, Chemical Safety and Hazard Investigation Board, 2175 K Street, NW., Suite 400, Washington, DC 20037. In motion of any Member, the Board shall determine by recorded vote whether to grant the request.

(c) Within one working day of any vote taken pursuant to this section, the CSB shall make available a written copy of such vote reflecting the vote of each Member on the question and, if a portion of a meeting is to be closed to the public, a full written explanation of its action closing the meeting and a list of all persons expected to attend and their affiliation.

(d) Before every closed meeting, the General Counsel of the CSB shall publicly certify that, in his/her opinion, the meeting may be closed to the public and shall state each relevant exemption provision. If the General Counsel invokes the exemption for classified or sensitive unclassified information under § 1603.7(a), he/she shall rely upon the classification or designation assigned to the document containing such information by the Environmental Protection Agency, Occupational Safety and Health Administration, or other originating agency. A copy of such certification, together with a statement setting forth the time and place of the meeting and the persons present, shall be retained by the Board as part of the transcript, recording, or minutes required by § 1603.11.

§ 1603.9 Procedures for public announcement of meetings.

(a) For each meeting, the CSB shall make public announcement, at least one week before the meeting, of:

- (1) The time of the meeting;
- (2) The place of the meeting;
- (3) The subject matter of the meeting;
- (4) Whether the meeting is to be open or closed; and
- (5) The name and business telephone number of the official designated by the CSB to respond to requests for information about the meeting.

§ 1603.10

(b) The one week advance notice required by paragraph (a) of this section may be reduced only if:

(1) A majority of all Members determines by recorded vote that CSB business requires that such meeting be scheduled in less than seven days; and

(2) The public announcement required by paragraph (a) of this section is made at the earliest practicable time.

(c) Immediately following each public announcement required by this section, or by §1603.10, the CSB shall submit a notice of public announcement for publication in the FEDERAL REGISTER.

§ 1603.10 Changes following public announcement.

(a) The time or place of a meeting may be changed following the public announcement only if the CSB publicly announces such change at the earliest practicable time. Members need not approve such change.

(b) A meeting may be cancelled, or the subject matter of a meeting or the determination of the Board to open or to close a meeting, or a portion thereof, to the public may be changed following public announcement only if:

(1) A majority of all Members determines by recorded vote that CSB business so requires and that no earlier announcement of the cancellation or change was possible; and

(2) The CSB publicly announces such cancellation or change and the vote of each Member thereon at the earliest practicable time.

(c) The deletion of any subject matter announced for a meeting is not a change requiring the approval of the Board under paragraph (b) of this section.

§ 1603.11 Transcripts, recordings, or minutes of closed meetings.

(a) Along with the General Counsel's certification referred to in §1603.8(d), the CSB shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or a portion thereof, closed to the public. The CSB may maintain a set of minutes in lieu of such transcript or recording for meetings closed pursuant to §1603.7(i). Such

40 CFR Ch. VI (7-1-18 Edition)

minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote. All documents considered in connection with any actions shall be identified in such minutes.

(b) The CSB shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or a portion thereof, closed to the public for at least two years after such meeting, or until one year after the conclusion of any CSB proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

§ 1603.12 Availability of transcripts, recordings, and minutes, and applicable fees.

The CSB shall make promptly available to the public the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at a meeting, except for such item, or items, of discussion or testimony as determined by the CSB to contain matters which may be withheld under the exemptive provisions of §1603.7. Copies of the non-exempt portions of the transcript or minutes, or transcription of such recordings disclosing the identity of each speaker, shall be furnished to any person at the actual cost of transcription or duplication. Requests for transcripts, recordings, or minutes shall be made in writing to the General Counsel of the CSB, 2175 K Street, NW., Suite 400, Washington, DC 20037.

§ 1603.13 Report to Congress.

The CSB General Counsel shall annually report to the Congress regarding the Board's compliance with the Government in the Sunshine Act, including a tabulation of the total number of open meetings, the total number of closed meetings, the reasons for closing such meetings and a description of any litigation brought against the Board pursuant to the Government in the

Sunshine Act, including any cost assessed against the Board in such litigation (whether or not paid by the Board).

§ 1603.14 Severability.

If any provision of this part or the application of such provision to any person or circumstances, is held invalid, the remainder of this part or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

PART 1610—ADMINISTRATIVE INVESTIGATIONS

Sec.

1610.1 Representation of witnesses in investigations.

1610.2 Repeated attorney misconduct, sanctions, hearings.

1610.3 Sequestration of witnesses and exclusion of Counsel.

1610.4 Deposition Transcripts.

AUTHORITY: 42 U.S.C. 7412(r)(6)(C)(i), 7412(r)(6)(L), 7412(r)(6)(N).

Section 1610.4 also issued under 5 U.S.C. 555.

SOURCE: 66 FR 1050, Jan. 5, 2001, unless otherwise noted.

§ 1610.1 Representation of witnesses in investigations.

(a) *Witnesses who are compelled to appear.* Witnesses who are compelled to appear for a deposition (i.e., by subpoena) are entitled to be accompanied, represented, and advised by an attorney as follows:

(1) Counsel for a witness may advise the witness with respect to any question asked where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence. For these allowable objections, the witness or counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. If the witness refuses to answer a question, then counsel may briefly state on the record that counsel has advised the witness not to answer the question and the legal grounds for such refusal. The

witness and his or her counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.

(2) Any objections made will be treated as continuing objections and preserved throughout the further course of the deposition without the necessity for repeating them as to any similar line of inquiry. Cumulative objections are unnecessary. Repetition of the grounds for any objection will not be allowed.

(3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (a)(1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record.

(4) Following completion of the examination of a witness, counsel for the witness may on the record request the person conducting the deposition to permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the person conducting the deposition.

(5) The person conducting the deposition shall take all necessary action to regulate the course of the deposition, to avoid delay, and to prevent or restrain disorderly, dilatory, obstructive, or contemptuous conduct, or contemptuous language. Such person shall, for reasons stated on the record, immediately report to the Board any instances where an attorney has allegedly refused to comply with his or her directions, or has allegedly engaged in disorderly, dilatory, obstructive, or contemptuous conduct, or contemptuous language in the course of the deposition. The Board may thereupon take such further action, if any, as the circumstances warrant, including exclusion of that attorney from further participation in the particular investigation.

(b) *Voluntary interviews.* Witnesses appearing voluntarily do not have a right to have an attorney present during questioning. The Investigator-in-Charge (IIC), in consultation with the General Counsel, may permit a witness to be accompanied by an attorney or non-attorney representative. If so accompanied, the role of the attorney or non-attorney representative is limited

§ 1610.2

to raising objections to questions that are outside the scope of the investigation and to advising the witness with respect to any legal privilege such as, for example, under the Fifth Amendment to the U. S. Constitution. Attorney and non-attorney representatives may not represent more than one witness in each investigation in this fashion, absent the consent of the IIC and the General Counsel.

§ 1610.2 Repeated attorney misconduct, sanctions, hearings.

(a) If an attorney who has been sanctioned by the Board for disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of a deposition under §1610.1(a)(5) is sanctioned again by the Board in a subsequent deposition or investigation, the Board, after offering the attorney an opportunity to be heard, may reprimand, censure the attorney, or suspend the attorney from further practice before the Board for such period of time as the Board deems advisable.

(b) A reprimand or a censure shall be ordered with grounds stated on the record of the proceeding. A suspension shall be in writing, shall state the grounds on which it is based, and shall advise the person suspended of the right to appeal.

(c) An attorney suspended pursuant to this section may within ten (10) days after issuance of the order file an appeal with the Board. The appeal shall be in writing and state concisely, with supporting argument, why the appellant believes the order was erroneous, either as a matter of fact or law. If necessary for a full and fair consideration of the facts, the Board as a whole may conduct further evidentiary hearings, or may refer the matter to another presiding officer for development of a record. Such presiding officer may be an attorney who is a Member of the Board or is employed in the Office of General Counsel, or an administrative law judge detailed from another agency pursuant to 5 U.S.C. 3344. If the Board refers the matter to a presiding officer, unless the Board provides specific directions to the presiding officer, that officer shall determine the procedure to be followed and who shall present

40 CFR Ch. VI (7-1-18 Edition)

evidence, subject to applicable provisions of law. Such hearing shall commence as soon as possible. If no appeal is taken of a suspension, or, if the suspension is upheld at the conclusion of the appeal, the presiding officer, or the Board, as appropriate, shall notify the state bar(s) to which the attorney is admitted. Such notification shall include copies of the order of suspension, and, if an appeal was taken, briefs of the parties, and the decision of the Board.

[66 FR 17363, Mar. 30, 2001]

§ 1610.3 Sequestration of witnesses and exclusion of Counsel.

(a) All witnesses compelled by subpoena to submit to CSB depositions shall be sequestered unless the official conducting the depositions permits otherwise.

(b) Any witness compelled by subpoena to appear at a deposition during a CSB investigation may be accompanied, represented, and advised by an attorney in good standing of his or her choice, pursuant to §1610.1. However, when the CSB official conducting the investigation determines, after consultation with the Office of General Counsel, that the CSB has concrete evidence that the presence of an attorney representing multiple interests would obstruct and impede the investigation or inspection, the CSB official may prohibit that counsel from being present during the deposition.

(c) The deposing official is to provide a witness whose counsel has been excluded under paragraph (b) of this section, and the witness' counsel, a written statement of the reasons supporting the decision to exclude. This statement, which must be provided no later than five working days after exclusion, must explain the basis for the counsel's exclusion. This statement must also advise the witness of the witness' right to appeal the exclusion decision and obtain an automatic stay of the effectiveness of the subpoena by filing a motion to quash the subpoena with the Board within five days of receipt of this written statement.

(d) Within five days after receipt of the written notification required in paragraph (c) of this section, a witness whose counsel has been excluded may

appeal the exclusion decision by filing a motion to quash the subpoena with the Board. The filing of the motion to quash will stay the effectiveness of the subpoena pending the Board's decision on the motion.

(e) If a witness' counsel is excluded under paragraph (b) of this section, the deposition may, at the witness' request, either proceed without counsel or be delayed for a reasonable period of time to permit the retention of new counsel. The deposition may also be rescheduled to a subsequent date established by the CSB, although the deposition shall not be rescheduled by the CSB to a date that precedes the expiration of the time provided in paragraph (d) of this section for appeal of the exclusion of counsel, unless the witness consents to an earlier date.

[66 FR 17363, Mar. 30, 2001]

§ 1610.4 Deposition Transcripts.

(a) Transcripts of depositions of witnesses compelled by subpoena to appear during a Board investigation, shall be recorded solely by an official reporter designated by the person conducting the deposition.

(b) Such a witness, after completing the compelled testimony, may file a petition with the Board's General Counsel to procure a copy of the official transcript of such testimony. The General Counsel shall rule on the petition, and may deny it for good cause. Whether or not such a petition is filed, the witness (and his or her attorney), upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony. If such a petition is denied by the General Counsel, he shall inform the petitioner of the right to inspect the transcript.

(c) Good cause for denying a witness' petition to procure a transcript of his or her testimony may include, but shall not be limited to, the protection of: trade secrets and confidential business information contained in the testimony, security-sensitive operational and vulnerability information, and the integrity of Board investigations.

[68 FR 4393, Jan. 29, 2003]

PART 1611—TESTIMONY BY EMPLOYEES IN LEGAL PROCEEDINGS

Sec.

- 1611.1 General.
- 1611.2 Definitions.
- 1611.3 Scope of permissible testimony.
- 1611.4 Manner in which testimony is given in civil litigation.
- 1611.5 Request for testimony in civil litigation.
- 1611.6 Testimony of former CSB employees.
- 1611.7 Testimony by current CSB employees regarding prior activity.
- 1611.8 Procedure in the event of a subpoena in civil litigation.
- 1611.9 Testimony in Federal, State, or local criminal investigations and other proceedings.
- 1611.10 Obtaining CSB investigation reports and supporting information.

AUTHORITY: 5 U.S.C. 301, 42 U.S.C. 7412(r)(6)(G).

SOURCE: 66 FR 17366, Mar. 30, 2001, unless otherwise noted.

§ 1611.1 General.

(a) This part prescribes policies and procedures regarding the testimony of employees of the Chemical Safety and Hazard Investigation Board (CSB) in suits or actions for damages and criminal proceedings arising out of chemical incidents when such testimony is in an official capacity and arises out of or is related to an incident investigation. The purpose of this part is to ensure that the time of CSB employees is used only for official purposes, to avoid embroiling the CSB in controversial issues that are not related to its duties, to avoid spending public funds for non-CSB purposes, to preserve the impartiality of the CSB, and to prohibit the discovery of opinion testimony.

(b) This part does not apply to:

- (1) Congressional requests or subpoenas for testimony or records;
- (2) Federal court civil proceedings in which the United States is a party;
- (3) Federal administrative proceedings;
- (4) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the CSB. The employee must state for the record that the testimony represents

§ 1611.2

40 CFR Ch. VI (7-1-18 Edition)

the employee's own views and is not necessarily the official position of the CSB.

(c) This part only provides guidance for the internal operations of the CSB, and neither creates nor is intended to create any enforceable right or benefit against the United States.

§ 1611.2 Definitions.

CSB incident report means the report containing the CSB's determinations, including the probable cause of an incident, issued either as a narrative report or in a computer format. Pursuant to 42 U.S.C. 7412(r)(6)(G), no part of the conclusions, findings or recommendations of the CSB relating to an accidental release or the investigation thereof, may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report.

Employee, for the purpose of this part and part 1612 of this chapter, refers to current or former CSB Board Members or employees, including student interns, and contractors, contract employees, or consultants (and their employees). This definition does not include persons who are no longer employed by or under contract to the CSB, and who are retained or hired as expert witnesses or agree to testify about matters that do not involve their work for the CSB.

[66 FR 17366, Mar. 30, 2001, as amended at 66 FR 23854, May 10, 2001]

§ 1611.3 Scope of permissible testimony.

(a) The statute creating the CSB, 42 U.S.C. 7412(r)(6)(G), precludes the use or admission into evidence of CSB investigative reports in any suit or action for damages arising from such incidents. This provision would be undermined if expert opinion testimony of CSB employees, which may be reflected in the views of the CSB expressed in its reports, were admitted in evidence or used in litigation arising out of an incident. The CSB relies heavily upon its investigators' opinions in its deliberations. Furthermore, the use of CSB employees as experts to give opinion testimony would impose a significant administrative burden on the CSB's investigative staff.

(b) For the reasons stated in paragraph (a) of this section and §1611.1, CSB employees may only testify as to the factual information they obtained during the course of an investigation. However, they shall decline to testify regarding matters beyond the scope of their investigation, and they shall not give any expert or opinion testimony.

(c) CSB employees may testify about the firsthand information they obtained during an investigation that is not reasonably available elsewhere, including their own factual observations. Consistent with the principles cited in §1611.1 and this section, current CSB employees are not authorized to testify regarding other employee's observations or reports, or other types of CSB documents, including but not limited to safety recommendations, safety studies, safety proposals, safety accomplishments, reports labeled studies, and analysis reports, as they contain staff analysis and/or CSB conclusions.

(d) Consistent with 42 U.S.C. 7412(r)(6)(G), a CSB employee may not use the CSB's investigation report for any purpose during his testimony.

(e) No employee may testify in any matter absent advance approval by the General Counsel as provided in this part.

§ 1611.4 Manner in which testimony is given in civil litigation.

(a) Testimony of CSB employees with unique, firsthand information may be made available for use in civil actions or civil suits for damages arising out of incidents through depositions or written interrogatories. CSB employees are not permitted to appear and testify in court in such actions.

(b) Normally, depositions will be taken and interrogatories answered at the CSB's headquarters in Washington, DC, and at a time arranged with the employee reasonably fixed to avoid substantial interference with the performance of his or her duties.

(c) CSB employees are authorized to testify only once in connection with any investigation they have made of an incident. Consequently, when more than one civil lawsuit arises as a result of an incident, it shall be the duty of counsel seeking the employee's deposition to ascertain the identity of all

Chem. Safety and Hazard Invest. Board

§ 1611.9

parties to the multiple lawsuits and their counsel, and to advise them of the fact that a deposition has been granted, so that all interested parties may be afforded the opportunity to participate therein.

(d) Upon completion of the deposition of a CSB employee, the original of the transcript will be provided to the deponent for signature and correction, which the CSB does not waive. A copy of the transcript of the testimony and any videotape shall be furnished, at the expense of the party requesting the deposition, to the CSB's General Counsel at Washington, DC headquarters for the CSB's files.

(e) If CSB employees are required to travel to testify, under the relevant substantive and procedural laws and regulations the party requesting the testimony must pay for the costs, including travel expenses. Costs must be paid by check or money order payable to the Chemical Safety and Hazard Investigation Board.

§ 1611.5 Request for testimony in civil litigation.

(a) A written request for testimony by deposition or interrogatories of a CSB employee relating to an incident shall be addressed to the General Counsel, who may approve or deny the request consistent with this part. Such request shall set forth the title of the civil case, the court, the date and place of the incident, the reasons for desiring the testimony, and a showing that the information desired is not reasonably available from other sources.

(b) Where testimony is sought in connection with civil litigation, the General Counsel shall not approve it until the CSB's investigation report is issued.

(c) The General Counsel shall attach to the approval of any deposition such reasonable conditions as may be deemed appropriate in order that the testimony will be consistent with § 1611.1, will be limited to the matters delineated in § 1611.3, will not interfere with the performance of the duties of the employee as set forth in § 1611.4, and will otherwise conform to the policies of this part.

(d) A subpoena shall not be served upon a CSB employee in connection

with the taking of a deposition in civil litigation.

§ 1611.6 Testimony of former CSB employees.

(a) It is not necessary to request CSB approval for testimony of a former CSB employee, nor is such testimony limited to depositions. However, the scope of permissible testimony continues to be constrained by all the limitations set forth in § 1611.3 and § 1611.4.

(b) Any former employee who is served with a subpoena to appear and testify in connection with civil litigation that relates to his or her work with the CSB, shall immediately notify the CSB General Counsel and provide all information requested by the General Counsel.

[66 FR 17366, Mar. 30, 2001, as amended at 66 FR 23854, May 10, 2001]

§ 1611.7 Testimony by current CSB employees regarding prior activity.

Any testimony regarding any incident within the CSB's jurisdiction, or any expert testimony arising from employment prior to CSB service is prohibited absent approval by the General Counsel. Approval shall only be given if testimony will not violate § 1611.1 and § 1611.3, and is subject to whatever conditions the General Counsel finds necessary to promote the purposes of this part as set forth in § 1611.1 and § 1611.3.

§ 1611.8 Procedure in the event of a subpoena in civil litigation.

(a) If the CSB employee has received a subpoena to appear and testify in connection with civil litigation, a request for his deposition shall not be approved until the subpoena has been withdrawn.

(b) Upon receipt of a subpoena, the employee shall immediately notify the General Counsel and provide all information requested by the General Counsel.

(c) The General Counsel shall determine the course of action to be taken and will so advise the employee.

§ 1611.9 Testimony in Federal, State, or local criminal investigations and other proceedings.

(a) As with civil litigation, the CSB prefers that testimony be taken by

§ 1611.10

deposition if court rules permit, and that testimony await the issuance of the investigation report. The CSB recognizes, however, that in the case of coroner's inquests and grand jury proceedings this may not be possible. The CSB encourages those seeking testimony of CSB employees to contact the General Counsel as soon as such testimony is being considered. Whenever the intent to seek such testimony is communicated to the employee, he shall immediately notify the General Counsel.

(b) In any case, CSB employees are prohibited from testifying in any civil, criminal, or other matter, either in person or by deposition or interrogatories, absent advance approval of the General Counsel.

(c) If permission to testify by deposition or in person is granted, testimony shall be limited as set forth in §1611.3. Only factual testimony is authorized; no expert or opinion testimony shall be given.

§ 1611.10 Obtaining CSB investigation reports and supporting information.

It is the responsibility of the individual requesting testimony to obtain desired documents. There are a number of ways to obtain CSB investigation reports, and accompanying investigation docket files. The rules at part 1612 of this chapter explain CSB procedures for production of records in legal proceedings, and the CSB's Freedom of Information Act rules at part 1601 of this chapter explain CSB procedures for producing documents more generally. See also the information available on the CSB web site, at www.csb.gov. You may also call the CSB Office of General Counsel, at (202) 261-7600. Documents will not be supplied by witnesses at depositions, nor will copying services be provided by deponents.

PART 1612—PRODUCTION OF RECORDS IN LEGAL PROCEEDINGS

Sec.

1612.1 Purpose and scope.

1612.2 Applicability.

1612.3 Published reports and material contained in the public incident investigation dockets.

40 CFR Ch. VI (7-1-18 Edition)

1612.4 Requests for authentication or certification of records.

1612.5 Other material.

AUTHORITY: 5 U.S.C. 301, 42 U.S.C. 7412(r)(6)(G).

SOURCE: 66 FR 17366, Mar. 30, 2001, unless otherwise noted.

§ 1612.1 Purpose and scope.

(a) This part sets forth procedures to be followed when requesting material for use in legal proceedings (including administrative proceedings) in which the Chemical Safety and Hazard Investigation Board (CSB) is not a party, and procedures to be followed by the employee upon receipt of a subpoena, order, or other demand (collectively referred to here as a demand) for such material by a court or other competent authority or by a private litigant. *Material*, as used in this part, means any type of physical or documentary evidence, including but not limited to paper documents, electronic media, videotapes, audiotapes, etc.

(b) The purposes of this part are to:

(1) Conserve the time of employees for conducting official business;

(2) Minimize the possibility of involving the CSB in controversial issues not related to its mission;

(3) Maintain the impartiality of the CSB among private litigants;

(4) Avoid spending the time and money of the United States for private purposes; and

(5) To protect confidential, sensitive information, and the deliberative processes of the CSB.

§ 1612.2 Applicability.

This part applies to requests to produce material concerning information acquired in the course of performing official duties or because of the employee's official status. Specifically, this part applies to requests for: material contained in CSB files; and any information or material acquired by an employee of the CSB in the performance of official duties or as a result of the employee's status. Two sets of procedures are here established, dependent on the type of material sought. Rules governing requests for employee testimony, as opposed to material production, can be found at part

1611 of this chapter. Document production shall not accompany employee testimony, absent compliance with this part and General Counsel approval.

§ 1612.3 Published reports and material contained in the public incident investigation docket.

(a) Demands for published investigation reports should be directed to the Office of Congressional and Public Affairs, U.S. Chemical Safety and Hazard Investigation Board, 2175 K Street, NW, Suite 400, Washington, DC 20037. Demands for material contained in the CSB's official public docket files of its incident investigations shall be submitted, in writing, to CSB Records Officer, U.S. Chemical Safety and Hazard Investigation Board, 2175 K Street, NW, Suite 400, Washington, DC 20037. For information regarding the types of documents routinely issued by the CSB, see part 1601 of this chapter.

(b) No subpoena shall be issued to obtain materials subject to this section, and any subpoena issued shall be required to be withdrawn prior to release of the requested information. Payment of reproduction fees may be required in advance.

§ 1612.4 Requests for authentication or certification of records.

The CSB may authenticate or certify records to facilitate their use as evidence. Requests for certified copies should be made to the General Counsel at least 30 days before the date they will be needed. The CSB may charge a certification fee of \$5.00 per document.

§ 1612.5 Other material.

(a) *Production prohibited unless approved.* Except in the case of the material referenced in § 1612.3, no employee or former employee of the CSB shall, in response to a demand of a private litigant, court, or other authority, produce any material contained in the files of the CSB (whether or not agency records under 5 U.S.C. 552) or produce any material acquired as part of the performance of the person's official duties or because of the person's official status, without the prior written approval of the General Counsel.

(b) *Procedures to be followed for the production of material under this section.*

(1) All demands for material shall be submitted to the General Counsel at CSB headquarters, 2175 K Street, NW., Suite 400, Washington, DC 20037. If an employee receives a demand, he shall forward it immediately to the General Counsel.

(2) Each demand must contain an affidavit by the party seeking the material or his attorney setting forth the material sought and its relevance to the proceeding, and containing a certification, with support, that the information is not available from other sources, including CSB materials described in § 1612.3 and part 1601 of this chapter.

(3) In the absence of General Counsel approval of a demand, the employee is not authorized to comply with the demand.

(4) The General Counsel shall advise the requester of approval or denial of the demand, and may attach whatever conditions to approval considered appropriate or necessary to promote the purposes of this part. The General Counsel may also permit exceptions to any requirement in this part when necessary to prevent a miscarriage of justice, or when the exception is in the best interests of the CSB and/or the United States.

PARTS 1613–1619 [RESERVED]

PART 1620—ADMINISTRATIVE CLAIMS ARISING UNDER THE FEDERAL TORT CLAIMS ACT

Sec.

- 1620.1 Purpose and scope of regulations.
- 1620.2 Administrative claim; when presented.
- 1620.3 Administrative claim; who may file.
- 1620.4 Investigations.
- 1620.5 Administrative claim; evidence and information to be submitted.
- 1620.6 Authority to adjust, determine, compromise, and settle.
- 1620.7 Limitations on authority.
- 1620.8 Referral to Department of Justice.
- 1620.9 Final denial of claim.
- 1620.10 Action on approved claim.

AUTHORITY: 28 U.S.C. 2672; 42 U.S.C. 7412(r)(6)(N); 28 CFR 14.11.

SOURCE: 69 FR 55513, Sept. 15, 2004, unless otherwise noted.

§ 1620.1

40 CFR Ch. VI (7-1-18 Edition)

§ 1620.1 Purpose and scope of regulations.

The regulations in this part apply only to administrative claims presented or filed with the Chemical Safety and Hazard Investigation Board (CSB), under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2401(b), 2671-2680, as amended, for money damages against the United States for damage to or loss of property, personal injury, death, or other damages caused by the negligent or wrongful act or omission of an officer or employee of CSB while acting within the scope of his or her office or employment, but only under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 1620.2 Administrative claim; when presented.

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim is deemed to have been presented when the CSB receives from a claimant, and/or his or her authorized agent, attorney, or other legal representative, an executed Standard Form 95 (Claim for Damage, Injury or Death), or other written notification of an incident, accompanied by a claim for money damages stating a sum certain (a specific dollar amount) for specified damage to or loss of property, personal injury, death, or other compensable damages alleged to have occurred as a result of the incident. A claimant must present a claim within 2 years of the date of accrual of the claim. The date of accrual generally is determined to be the time of death, injury, or other alleged damages, or if the alleged damages are not immediately apparent, when the claimant discovered (or reasonably should have discovered) the alleged damages and its cause, though the actual date of accrual will always depend on the facts of each case. Claimants should be advised that mailing a claim by the 2-year time limit is not sufficient if the CSB does not receive the claim through the mail by that date. Additionally, claimants should be advised that a claim is not considered presented by the CSB until the CSB receives all information requested in this paragraph.

Incomplete claims will be returned to the claimant.

(b) All claims filed under the FTCA as a result of the alleged negligence or wrongful act or omission of the CSB or its employees must be mailed or delivered to the Office of the General Counsel, 2175 K Street NW., Suite 650, Washington, DC 20037.

(c) The FTCA requires that a claim must be presented to the Federal agency whose activities gave rise to the claim. A claim that should have been presented to CSB, but was mistakenly addressed to or filed with another Federal agency, is presented to the CSB, as required by 28 U.S.C. 2401(b), as of the date the claim is received by the CSB. When a claim is mistakenly presented to the CSB, the CSB will transfer the claim to the appropriate Federal agency, if ascertainable, and advise the claimant of the transfer, or return the claim to the claimant if the appropriate Federal agency cannot be determined.

(d) A claimant whose claim arises from an incident involving the CSB and one or more other Federal agencies will identify each agency to which the claim has been submitted at the time the claim is presented to the CSB. The CSB will contact all other affected Federal agencies in order to designate a single agency that will investigate and decide the merits of the claim. In the event a designation cannot be agreed upon by the affected agencies, the Department of Justice will be consulted and that agency will designate a specific agency to investigate and determine the merits of the claim. The designated agency will then notify the claimant that all future correspondence concerning the claim must be directed to the designated Federal agency. All involved Federal agencies may agree to conduct their own administrative reviews and to coordinate the results, or to have the investigation conducted solely by the designated Federal agency. However, in any event, the designated agency will be responsible for the final determination of the claim.

(e) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's

option under 28 U.S.C. 2675(a). Amendments must be in writing and signed by the claimant or his or her authorized agent, attorney, or other legal representative. Upon the timely filing of an amendment to a pending claim, the CSB will have an additional 6 months in which to investigate the claim and to make a final disposition of the claim as amended. A claimant's option under 28 U.S.C. 2675(a) will not accrue until 6 months after the filing of an amendment.

§ 1620.3 Administrative claim; who may file.

(a) A claim for damage to or loss of property may be presented by the owner of the property, or his or her authorized agent, attorney, or other legal representative.

(b) A claim for personal injury may be presented by the injured person, or his or her authorized agent, attorney or other legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate, or by any other person legally entitled to assert a claim under the applicable State law, provided that the basis for the representation is documented in writing.

(d) A claim for loss totally compensated by an insurer with the rights to subrogate may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights to subrogate may be presented by the insurer or the insured individually as their respective interests appear, or jointly. When an insurer presents a claim asserting the rights to subrogate the insurer must present appropriate evidence that it has the rights to subrogate.

(e) A claim presented by an agent or legal representative must be presented in the name of the claimant, be signed by the agent, attorney, or other legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his or her authority to present a claim on behalf of the claimant as agent, attorney, executor, administrator, parent, guardian, conservator, or other legal representative.

§ 1620.4 Investigations.

CSB may investigate, or may request any other Federal agency to investigate, a claim filed under this part.

§ 1620.5 Administrative claim; evidence and information to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his or her monthly or yearly salary or earnings (if any), and the duration of his or her last employment or occupation.

(3) Full names, addresses, birth date, kinship and marital status of the decedent's survivors, including identification of those survivors who were dependent on support provided by the decedent at the time of death.

(4) Degree of support afforded by the decedent to each survivor dependent on him or her for support at the time of death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses.

(7) If damages for pain and suffering before death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injuries and death.

(8) True and correct copies of relevant medical treatment records, laboratory and other tests, including X-Rays, MRI, CT scans and other objective evidence of medical evaluation and diagnosis, treatment of injury/illness, and prognosis, if any had been made.

(9) Any other evidence or information that may have a bearing on either the responsibility of the United States for the death or the amount of damages claimed.

§ 1620.6

40 CFR Ch. VI (7-1-18 Edition)

(b) *Personal injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by the attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. If damages for pain and suffering are claimed, a physician's detailed statement specifying the duration of pain and suffering, a listing of drugs administered for pain, and the claimant's general physical condition.

(2) True and correct copies of relevant medical treatment records, laboratory and other tests including X-Rays, MRI, CT scans and other objective evidence of medical evaluation and diagnosis, treatment injury/illness and prognosis.

(3) The claimant may be required to submit to a physical or mental examination by a physician employed by CSB or another Federal agency. On written request, CSB will make available to the claimant a copy of the report of the examining physician employed by the United States, provided the claimant has furnished CSB with the information noted in paragraphs (b)(1) and (b)(2) of this section. In addition, the claimant must have made or agrees to make available to CSB all other physicians' reports previously or thereafter made of the physical or mental condition that is subject matter of his or her claim.

(4) Itemized bills for medical, dental, and hospital expenses incurred, and/or itemized receipts of payment for such expenses.

(5) If the prognosis reveals the necessity for future treatment, a statement of the expected treatment and the expected expense for such treatment.

(6) If a claim is made for loss of time from employment, a written statement from his or her employer showing actual time lost from employment, whether he or she is a full-time or part-time employee, and wages or salary actually lost.

(7) If a claim is made for loss of income and the claimant is self-em-

ployed, documentary evidence showing the amount of earnings actually lost.

(8) Any other evidence or information that may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed.

(c) *Property damage.* In support of a claim for damage to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership of the property.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, and salvage value.

(5) Photographs or video footage documenting the damage, including photographs showing the condition of the property at issue both before and after the alleged negligence or wrongful act or omission.

(6) Any other evidence or information that may have a bearing on either the responsibility of the United States for the damage to or loss of property or the damages claimed.

§ 1620.6 Authority to adjust, determine, compromise, and settle.

The General Counsel of CSB, or his or her designee, is delegated authority to consider, ascertain, adjust, determine, compromise and settle claims under the provision of 28 U.S.C. 2672, and this part. The General Counsel, in his or her discretion, has the authority to further delegate the responsibility for adjudicating, considering, adjusting, compromising and settling any claim submitted under the provision of 28 U.S.C. 2672, and this part, that is based on the alleged negligence or wrongful act or omission of a CSB employee acting in the scope of his or her employment. However, in any case, any offer of compromise or settlement in excess of \$5,000 exercised by the CSB Chairperson or any other lawful designee can only

be made after a legal review is conducted by an attorney within the CSB Office of General Counsel.

§ 1620.7 Limitations on authority.

(a) An award, compromise, or settlement of a claim under 28 U.S.C. 2672, and this part, in excess of \$25,000 can be made only with the prior written approval of the CSB General Counsel and Chairperson, after consultation and approval by the Department of Justice. For purposes of this paragraph a principal claim and any derivative or subrogated claim will be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised or settled under this part only after consultation with the Department of Justice when, in the opinion of the General Counsel of CSB, or his or her designee:

(1) A new precedent or a new point of law is involved; or

(2) A question of policy is or may be involved; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and CSB is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed \$25,000.

(c) An administrative claim may be adjusted, determined, compromised or settled under 28 U.S.C. 2672 and this part only after consultation with the Department of Justice when CSB is informed or is otherwise aware that the United States or an employee, agent or contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

§ 1620.8 Referral to Department of Justice.

When Department of Justice approval or consultation is required, or the advice of the Department of Justice is otherwise to be requested, under this regulation, the written referral or request will be transmitted to the Department of Justice by the General Counsel of CSB, or his or her designee.

§ 1620.9 Final denial of claim.

Final denial of an administrative claim must be in writing and sent to the claimant, his or her agent, attorney, or other legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial. However, it must include a statement that, if the claimant is dissatisfied with the CSB action, he or she may file suit in an appropriate United States District Court not later than 6 months after the date of mailing of the notifications, along with the admonition that failure to file within this 6 month timeframe could result in the suit being time-barred by the controlling statute of limitations. In the event that a claimant does not hear from the CSB after 6 months have passed from the date that the claim was presented, a claimant should consider the claim denied and, if desired, should proceed with filing a civil action in the appropriate U.S. District Court.

§ 1620.10 Action on approved claim.

(a) Payment of a claim approved under this part is contingent on claimant's execution of a Standard Form 95 (Claim for Damage, Injury or Death); a claims settlement agreement; and a Standard Form 1145 (Voucher for Payment), as well as any other forms as may be required. When a claimant is represented by an attorney, the Voucher for Payment will designate both the claimant and his or her attorney as payees, and the check will be delivered to the attorney, whose address is to appear on the Voucher for payment.

(b) Acceptance by the claimant, his or her agent, attorney, or legal representative, of an award, compromise or settlement made under 28 U.S.C. 2672 or 28 U.S.C. 2677 is final and conclusive on the claimant, his or her agent, attorney, or legal representative, and any other person on whose behalf or for whose benefit the claim has been presented, and constitutes a complete release of any and all claims against the United States and against any employee of the Federal Government whose act(s) or omission(s) gave rise to the claim, by reason of the same subject matter. To that end, as noted above, the claimant, as well as any

§ 1620.10

agent, attorney or other legal representative that represented the claimant during any phase of the process (if applicable) must execute a settlement

40 CFR Ch. VI (7-1-18 Edition)

agreement with the CSB prior to payment of any funds.

PARTS 1621-1699 [RESERVED]