

Office of Special Counsel

Pt. 1820

(a) of this section with OSC. Such disclosures must be filed in writing (including electronically—see paragraph (b)(3)(i) of this section).

(1) Filers are encouraged to use OSC Form-14 to file a disclosure of the type of information described in paragraph (a) of this section with OSC. OSC Form-14 provides more information about OSC jurisdiction, and procedures for processing whistleblower disclosures. OSC Form-14 is available:

- (i) *Online*, at: <http://www.osc.gov>;
- (ii) *By calling OSC*, at: (800) 572-2249 (toll-free), or (202) 254-3640; or
- (iii) *By writing to OSC*, at: U.S. Office of Special Counsel, 1730 M Street NW., Suite 218, Washington, DC 20036-4505.

(2) Filers may use another written format to submit a disclosure to OSC, but the submission should include:

- (i) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when OSC can contact that person about his or her disclosure;
- (ii) The department or agency, location and organizational unit complained of; and
- (iii) A statement as to whether the filer consents to disclosure of his or her identity by OSC to the agency involved, in connection with any OSC referral to that agency.

(3) A disclosure may be filed in writing with OSC by any of the following methods:

- (i) *Electronically*, at: <http://www.osc.gov> (for completion and filing electronically);
- (ii) *By fax*, to: (202) 254-3711; or
- (iii) *By mail*, to: U.S. Office of Special Counsel, 1730 M Street NW., Suite 218, Washington, DC 20036-4505.

[82 FR 26741, June 9, 2017]

§ 1800.3 Advisory opinions.

The Special Counsel is authorized to issue advisory opinions only about political activity of state or local officers and employees (under title 5 of the United States Code, at chapter 15), and political activity of Federal officers and employees (under title 5 of the United States Code, at chapter 73, subchapter III). A person can seek an advisory opinion from OSC by any of the following methods:

(a) By phone, at: (800) 854-2824 (toll-free), or (202) 653-7143 (in the Washington, DC area);

(b) By mail, to: Office of Special Counsel, Hatch Act Unit, 1730 M Street NW., Suite 218, Washington, DC 20036-4505;

(c) By fax, to: (202) 653-5151; or

(d) By e-mail, to: hatchact@osc.gov.

[68 FR 66697, Nov. 28, 2003]

PART 1810—INVESTIGATIVE AUTHORITY OF THE SPECIAL COUNSEL

AUTHORITY: 5 U.S.C. 1212(e).

§ 1810.1 Investigative policy in discrimination complaints.

The Special Counsel is authorized to investigate allegations of discrimination prohibited by law, as defined in 5 U.S.C. 2302(b)(1). Since procedures for investigating discrimination complaints have already been established in the agencies and the Equal Employment Opportunity Commission, the Special Counsel will normally avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation.

[54 FR 47342, Nov. 14, 1989]

PART 1820—FREEDOM OF INFORMATION ACT REQUESTS; PRODUCTION OF RECORDS OR TESTIMONY

Sec.

- 1820.1 General provisions.
- 1820.2 Requirements for making FOIA requests.
- 1820.3 Consultations and referrals.
- 1820.4 Timing of responses to requests.
- 1820.5 Responses to requests.
- 1820.6 Appeals.
- 1820.7 Fees.
- 1820.8 Business information.
- 1820.9 Other rights and services.

Subpart A—Touhy Regulations General Provisions

- 1820.10 Scope and purpose.
- 1820.11 Applicability.
- 1820.12 Definitions.

§ 1820.1

Subpart B—Demands or Requests for Testimony and Production of Documents

- 1820.13 General prohibition.
- 1820.14 Factors the OSC will consider.
- 1820.15 Filing requirements for litigants.
- 1820.16 Service of requests or demands.
- 1820.17 Processing requests or demands.
- 1820.18 Final determinations.
- 1820.19 Restrictions that apply to testimony.
- 1820.20 Restrictions that apply to released records.
- 1820.21 Procedure when a decision is not made prior to the time a response is required.
- 1820.22 Procedure in the event of an adverse ruling.

Subpart C—Schedule of Fees

- 1820.23 Fees.

Subpart D—Penalties

- 1820.24 Penalties.

Subpart E—Conformity With Other Laws

- 1820.25 Conformity with other laws.

AUTHORITY: 5 U.S.C. 552 and 1212(e).

SOURCE: 72 FR 40711, July 25, 2007, unless otherwise noted.

§ 1820.1 General provisions.

This part contains rules and procedures followed by the U.S. Office of Special Counsel (OSC) in processing requests for records under the Freedom of Information Act (FOIA), as amended, at 5 U.S.C. 552. These rules and procedures should be read together with the FOIA, which provides additional information about access to agency records. Further information about the FOIA and access to OSC records is available on the FOIA page of OSC's Web site (<https://www.osc.gov>). Information routinely provided to the public as part of a regular OSC activity—for example, forms, press releases issued by the public affairs officer, records published on the agency's Web site, or public lists maintained at OSC headquarter offices pursuant to 5 U.S.C. 1219—may be requested and provided to the public without following this part. This part also addresses responses to demands by a court or other authority to an employee for production of offi-

5 CFR Ch. VIII (1–1–22 Edition)

cial records or testimony in legal proceedings.

[81 FR 73016, Oct. 24, 2016]

§ 1820.2 Requirements for making FOIA requests.

(a) *Submission of requests.* (1) A request for OSC records under the FOIA must be made in writing. The request must be sent by:

(i) Regular mail addressed to: FOIA Officer, U.S. Office of Special Counsel, 1730 M Street NW., Suite 218, Washington, DC 20036-4505; or

(ii) By fax sent to the FOIA Officer at 202-254-3711, the number provided on the FOIA page of OSC's Web site (<https://osc.gov/Pages/FOIA-Resources.aspx>) (<https://www.osc.gov>); or

(iii) By email to foiarequest@osc.gov or other electronic means as described on the FOIA page of OSC's Web site, <https://osc.gov/Pages/FOIA-Resources.aspx>.

(2) For the quickest handling, both the request letter and envelope or any fax cover sheet or email subject line should be clearly marked "FOIA Request." Whether sent by mail, fax, email, or other prescribed electronic method, a FOIA request will not be considered to have been received by OSC until it reaches the FOIA office.

(b) *Description of records sought.* Requesters must describe the records sought in enough detail for them to be located with a reasonable amount of effort. When requesting records about an OSC case file, the case file number, name, and type (for example, prohibited personnel practice, Hatch Act, USERRA or other complaint; Hatch Act advisory opinion; or whistleblower disclosure) should be provided, if known. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter.

(c) *Agreement to pay fees.* Making a FOIA request shall be considered an agreement by the requester to pay all applicable fees chargeable under § 1820.7, up to and including the amount of \$25.00, unless the requester asks for a waiver of fees or specifies a willingness to pay a greater or lesser amount.

[81 FR 73017, Oct. 24, 2016]

Office of Special Counsel

§ 1820.4

§ 1820.3 Consultations and referrals.

When OSC receives a FOIA request for a record in the agency's possession, it may determine that another office is better able to decide whether or not the record is exempt from disclosure under the FOIA. If so, OSC will either:

(a) Respond to the request for the record after consulting with the other office that has a substantial interest in the record; or

(b) Refer the responsibility for responding to the request to another Federal agency deemed better able to determine whether to disclose it. Consultations and referrals will be handled according to the date that the FOIA request was initially received by the first agency or Federal government office.

[82 FR 15610, Mar. 30, 2017]

§ 1820.4 Timing of responses to requests.

(a) *In general.* OSC ordinarily will respond to FOIA requests according to their order of receipt. In determining which records are responsive to a request, OSC ordinarily will include only records in its possession as of the date on which it begins its search for them. If any other date is used, OSC will inform the requester of that date.

(b) *Multitrack processing.* (1) OSC may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process the request.

(2) When using multitrack processing, OSC may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the faster track(s).

(c) *Expedited processing.* (1) Requests and appeals will be taken out of order and given expedited treatment whenever OSC has established to its satisfaction that:

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

(ii) With respect to a request made by a person primarily engaged in disseminating information, an urgency exists

to inform the public about an actual or alleged federal government activity; or

(iii) The requested records relate to an appeal for which the requester faces an imminent deadline for filing with the Merit Systems Protection Board or other administrative tribunal or a court of law, seeking personal relief pursuant to a complaint filed by the requester with OSC, or referred to OSC pursuant to title 38 of the U.S. Code. Expedited status granted under this provision will apply only to the following requested records: Letters sent to the complainant by OSC; and the official complaint form submitted to OSC by the complainant or the original referred complaint if referred to OSC pursuant to title 38 of the U.S. Code. All other requested records will be processed according to the order in which OSC received the request.

(2) A request for expedited processing must be made in writing and sent to OSC's FOIA Officer. Such a request will not be considered to have been received until it reaches the FOIA Officer.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (c)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. The formality of certification may be waived as a matter of OSC's administrative discretion.

(4) OSC shall decide whether to grant a request for expedited processing and notify the requester of its decision within 10 calendar days of the FOIA Officer's receipt of the request. If the request for expedited processing is granted, the request for records shall be processed as soon as practicable. If a request for expedited processing is denied, any administrative appeal of that decision shall be acted on expeditiously.

(d) *Aggregated requests.* OSC may aggregate multiple requests by the same requester, or by a group of requesters

§ 1820.5

acting in concert, if it reasonably believes that such requests constitute a single request involving unusual circumstances, as defined by the FOIA, supporting an extension of time to respond, and the requests involve clearly related matters.

[81 FR 73017, Oct. 24, 2016]

§ 1820.5 Responses to requests.

(a) *General.* Ordinarily, OSC shall have 20 business days from when a request is received to determine whether to grant or deny the request. Once OSC makes a determination to grant a FOIA request for records, or makes an adverse determination denying a request in any respect, it will notify the requester 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 a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited treatment.

(b) *Adverse determinations.* A notification to a requester of an adverse determination on a request shall include:

(1) A brief statement of the reason(s) for the denial of the request, including any FOIA exemption applied by OSC in denying the request; and

(2) A statement that the denial may be appealed under section 1820.6(a), with a description of the requirements of that subsection.

(c) *Dispute resolution program.* OSC shall inform FOIA requesters at all stages of the FOIA process of the availability of dispute resolution services. In particular, OSC's FOIA acknowledgment letters shall notify requesters that the FOIA Liaison is available to assist them with requests. The acknowledgment letter and any agency response will include a notice that the FOIA Public Liaison may provide dispute resolution services, and will also notify the requester of the dispute resolution services provided by the National Archives and Records Adminis-

5 CFR Ch. VIII (1–1–22 Edition)

tration's (NARA) Office of Government Information Services (OGIS).

(d) *Maintenance of files.* OSC must preserve federal record correspondence and copies of requested records until disposition is authorized pursuant to Title 44 of the United States Code and the relevant approved records retention schedule.

[72 FR 40711, July 25, 2007, as amended at 82 FR 15610, Mar. 30, 2017]

§ 1820.6 Appeals.

(a) *Appeals of adverse determinations.* A requester may appeal a determination denying a FOIA request in any respect to the Office of General Counsel, U.S. Office of Special Counsel, 1730 M Street NW., Suite 218, Washington, DC 20036–4505. The appeal must be in writing, and must be submitted either by:

(1) Regular mail sent to the address listed in this subsection, above; or

(2) By fax sent to the FOIA Officer at, (202) 254–3711, or the number provided on the FOIA page of OSC's Web site <https://osc.gov/Pages/FOIAResources.aspx>; or

(3) By email to foiaappeal@osc.gov, or other electronic means as described on the FOIA page of OSC's Web site, <https://osc.gov/Pages/FOIAResources.aspx>.

(b) *Submission and content.* The Office of General Counsel must receive the appeal within 90 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet or email subject line should be clearly marked "FOIA Appeal." The appeal letter must clearly identify the OSC determination (including the assigned FOIA request number, if known) being appealed. OSC will not ordinarily act on a FOIA appeal if the request becomes a matter of FOIA litigation.

(c) *Responses to appeals.* Ordinarily, OSC shall have 20 business days from receipt of the appeal to issue an appeal decision. 5 U.S.C. 552(a)(6)(A)(ii). OSC's decision on an appeal will be in writing. A decision affirming a denial in whole or in part shall inform the requester of the provisions for judicial review of that decision. If the denial is reversed or modified on appeal, in whole or in part, OSC will notify the requester in a written decision and

OSC will reprocess the request in accordance with that appeal decision. OSC will notify the requester of the availability of dispute resolution services provided by the FOIA Public Liaison and the dispute resolution services provided by the National Archives and Records Administration's (NARA) Office of Government Information Services (OGIS).

(d) *Maintenance of files.* OSC must preserve federal record correspondence and copies of requested records until disposition is authorized pursuant to Title 44 of the United States Code and the relevant approved records retention schedule.

[82 FR 15610, Mar. 30, 2017]

§ 1820.7 Fees.

(a) *In general.* OSC shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (k) of this section. OSC may collect all applicable fees before sending copies of requested records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) "Commercial use request" means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. OSC shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because OSC has reasonable cause to doubt a requester's stated use, OSC shall provide the requester with a reasonable opportunity to submit further clarification.

(2) "Direct costs" means those expenses that OSC incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the

salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating equipment. Direct costs do not include overhead expenses such as the costs of space, and heating or lighting the facility in which the records are kept.

(3) "Duplication" means the process of making of 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, microform, audiovisual materials, or electronic records (for example, on digital data storage discs), among others.

(4) "Educational institution" means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(5) "Non-commercial scientific institution" means an institution that is not operated on a "commercial" basis, as that term is referenced 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. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(6) "Representative of the news media" or "news media requester" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. A non-exhaustive list of news media entities could include, in addition to television or radio stations broadcasting to the

public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of “news”), electronic outlets for print newspapers, magazines, and television and radio stations, and web-only outlets or other alternative media as methods of news delivery evolve. For “freelance” journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization, whether print or electronic. A publication contract would be the clearest proof, but OSC may also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

(7) “Review” means the process of examining a record located in response to a request in order to determine whether any portion of the record is exempt from disclosure. It includes processing any record for disclosure—for example, doing all that is necessary to redact it and otherwise prepare it for disclosure. Review time also includes time spent obtaining and considering any formal objection to disclosure made by a business submitter under §1820.8(f). It does not include time spent resolving general legal or policy issues about the application of exemptions. Review costs are properly charged in connection with commercial use requests even if a record ultimately is not disclosed.

(8) “Search” means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records when undertaken, and reasonable efforts to locate and retrieve information from records maintained in electronic form or format, to the extent that such efforts would not significantly interfere with the operation of an automatic information system.

(c) *Fees.* In responding to FOIA requests, OSC shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section:

(1) *Search.* (i) Search fees will be charged for all requests—other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media—subject to the limitations of paragraph (d) of this section. OSC may charge for time spent searching even if it fails to locate responsive records, or records located after a search are determined to be exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be \$5.50. Where a search and retrieval cannot be performed entirely by clerical personnel - for example, where the identification of records within the scope of a request requires the use of professional personnel - the fee will be \$9.00 for each quarter hour of search time spent by professional personnel. Where the time of managerial personnel is required, the fee will be \$17.50 for each quarter hour of time spent by those personnel.

(iii) For electronic searches of records, requesters will be charged the direct costs of conducting the search, including the costs of operator/programmer staff time apportionable to the search.

(iv) For requests requiring the retrieval of records from any Federal Records Center, additional costs may be charged in accordance with the applicable billing schedule established by the National Archives and Records Administration.

(2) *Duplication.* Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For a standard paper photocopy of a record (no more than one copy of which need be supplied), the fee will be 25 cents per page. For copies produced by computer, such as discs or printouts, OSC will charge the direct costs, including staff time, of producing the copy. For other forms of duplication, OSC will charge the direct costs of that duplication.

(3) *Review.* Review fees will be charged to requesters who make a commercial use request. Review fees will be charged for only initial record review - in other words, the review done when OSC analyzes whether an exemption applies to a particular record or

record portion at the initial request level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable where it is made necessary by such a change of circumstances. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

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

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

(3) Except for requesters seeking records for a commercial use, OSC will provide without charge:

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

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

(4) Whenever a total fee calculated under paragraph (c) of this section is \$20.00 or less for any request, no fee will be charged.

(5) The provisions of paragraphs (d)(3) and (d)(4) of this section work together. This means that for requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than \$20.00.

(e) *Notice of anticipated fees in excess of \$25.00.* When OSC determines or estimates that the fees to be charged under this section will amount to more than \$25.00, OSC shall notify the requester of the actual or estimated amount of the fees, 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, OSC will advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or esti-

mated fees amount to more than \$25.00, the request shall not be considered received and further work will not be done on it until the requester agrees to pay the anticipated total fee. A notice under this paragraph will offer the requester an opportunity to discuss the matter with OSC in order to reformulate the request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Apart from the other provisions of this section, when OSC chooses as a matter of administrative discretion to provide a special service—such as sending records by other than ordinary mail—the direct costs of providing the service ordinarily will be charged.

(g) *Charging interest.* OSC may charge interest on any unpaid fee starting on the 31st day after the date of on which the billing was sent to the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of billing until payment is received by OSC. OSC will follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended by the Debt Collection Act of 1996 (Public Law 104-134, 110 Stat. 1321-358), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

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

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) and (i)(3) of this section, OSC will not require the requester to make an advance payment before work is begun or continued on a request.

§ 1820.7

Payment owed for work already completed (that is, pre-payment after processing a request but before copies are sent to the requester) is not an advance payment.

(2) Where OSC determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester who has a history of prompt payment.

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

(4) In cases in which OSC requires advance payment or payment due under paragraph (i)(2) or (3) of this section, the request shall not be considered received and further work will not be done on the request until the required payment is received.

(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 an agency to set and collect fees for particular types of records. Where records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, OSC will provide contact information for use by requesters in obtaining records from those sources.

(k) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request shall be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where OSC determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly

5 CFR Ch. VIII (1–1–22 Edition)

to public understanding of the operations or activities of the government, and

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

(2) To determine whether the first fee waiver requirement is met, OSC will consider the following factors:

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

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

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

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public’s understanding

of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. OSC shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.

(3) To determine whether the second fee waiver requirement is met, OSC will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. OSC shall consider any commercial interest of the requester (with reference to the definition of “commercial use” in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information about this consideration.

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

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

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (3) of this section, insofar as they apply to each request. OSC will exercise its dis-

cretion to consider the cost-effectiveness of its investment of administrative resources in this decision making process, however, in deciding to grant waivers or reductions of fees.

[72 FR 40711, July 25, 2007, as amended at 82 FR 15610, Mar. 30, 2017]

§ 1820.8 Business information.

(a) *In general.* Business information obtained by OSC from a submitter will be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section:

(1) “Business information” means commercial or financial information obtained by OSC from a submitter that may be protected from disclosure under exemption 4 of the FOIA.

(2) “Submitter” means any person or entity from whom the OSC obtains business information, directly or indirectly. The term includes corporations, and state, local, tribal and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* OSC shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (f) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

§ 1820.9

5 CFR Ch. VIII (1–1–22 Edition)

(e) *When notice is required.* Notice shall be given to a submitter wherever:

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

(2) OSC has reason to believe that the information may be protected from disclosure under exemption 4.

(f) *Opportunity to object to disclosure.* OSC will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. If a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that is not received by OSC until after its disclosure decision has been made shall not be considered by OSC. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* OSC shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSC decides to disclose business information over the objection of a submitter, OSC shall give the submitter written notice, which shall include:

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

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

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) OSC determines that the information should not be disclosed;

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

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

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous - except that, in such a case, OSC shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSC shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever OSC provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSC shall also notify the requester(s). Whenever OSC notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSC shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSC shall notify the requester(s).

§ 1820.9 Other rights and services.

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

**Subpart A—Touhy Regulations
General Provisions**

§ 1820.10 Scope and purpose.

(a) This part establishes policy, assigns responsibilities and prescribes procedures with respect to:

(1) The production or disclosure of official information or records by current and former OSC employees, and contractors; and

(2) The testimony of current and former OSC employees, advisors, and consultants relating to official information, official duties, or the OSC's records, in connection with federal or

Office of Special Counsel

§ 1820.12

state litigation or administrative proceedings in which the OSC is not a party.

(b) The OSC intends this part to:

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

(2) Minimize the involvement of OSC employees in issues unrelated to OSC's mission;

(3) Maintain the impartiality of OSC employees in disputes between private litigants; and

(4) Protect sensitive, confidential information and the deliberative processes of the OSC.

(c) In providing for these requirements, the OSC does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of OSC. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

[81 FR 73018, Oct. 24, 2016]

§ 1820.11 Applicability.

This part applies to demands and requests to current and former employees, and contractors, for factual or expert testimony relating to official information or official duties or for production of official records or information, in legal proceedings in which the OSC is not a named party. This part does not apply to:

(a) Demands upon or requests for current or former OSC employees or contractors to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the OSC;

(b) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; or

(c) Congressional demands and requests for testimony, records or information.

[81 FR 73018, Oct. 24, 2016]

§ 1820.12 Definitions.

The following definitions apply to this part.

Demand means an order, subpoena, or other command of a court or other competent authority for the production, disclosure, or release of records or

for the appearance and testimony of an OSC employee in a legal proceeding.

General Counsel means the General Counsel of the OSC or a person to whom the General Counsel has delegated authority under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

OSC means the U.S. Office of Special Counsel.

OSC employee or employee means:

(1)(i) Any current or former employee of the OSC; and

(ii) Any other individual hired through contractual agreement by or on behalf of the OSC or who has performed or is performing services under such an agreement for the OSC.

(2) This definition does not include persons who are no longer employed by the OSC and who agree to testify about matters available to the public.

Records or official records and information means all information in the custody and control of the OSC, relating to information in the custody and control of the OSC, or acquired by an OSC employee in the performance of his or her official duties or because of his or her official status, while the individual was employee by or on behalf of the OSC.

Request means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court of other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

[81 FR 73018, Oct. 24, 2016]

Subpart B—Demands or Requests for Testimony and Production of Documents

SOURCE: 81 FR 73018, Oct. 24, 2016, unless otherwise noted.

§ 1820.13

§ 1820.13 General prohibition.

No employee of OSC may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior written approval of the General Counsel.

§ 1820.14 Factors the OSC will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

- (a) The purposes of this part are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;
- (c) Allowing such testimony or production of records would assist or hinder the OSC in performing its statutory duties;
- (d) Allowing such testimony or production of records would be in the best interest of the OSC or the United States;
- (e) The records or testimony can be obtained from other sources;
- (f) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rule of procedure governing the case or matter in which the demand or request arose;
- (g) Disclosure would violate a statute, Executive Order or regulation;
- (h) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;
- (i) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;
- (j) Disclosure would result in the OSC appearing to favor one litigant over another;
- (k) A substantial government interest is implicated;

5 CFR Ch. VIII (1–1–22 Edition)

(1) The demand or request is within the authority of the party making it; and

(m) The demand or request is sufficiently specific to be answered.

§ 1820.15 Filing requirements for litigants seeking documents or testimony.

A litigant must comply with the following requirements when filing a request for official records and information or testimony under this part. A request should be filed before a demand is issued.

(a) The request must be in writing and must be submitted to the General Counsel.

(b) The written request must contain the following information:

(1) The caption of the legal or administrative proceeding, docket number, and name and address of the court or other administrative or regulatory authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal or administrative proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs any need to maintain the confidentiality of the information and outweighs the burden on the OSC to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than an OSC employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

Office of Special Counsel

§ 1820.19

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require of each OSC employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The OSC reserves the right to require additional information to complete the request where appropriate.

(d) The request should be submitted at least 30 days before the date that records or testimony is required. Requests submitted in less than 30 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with the request.

(f) The request should state that the requester will provide a copy of the OSC employee's statement free of charge and that the requester will permit the OSC to have a representative present during the employee's testimony.

§ 1820.16 Service of requests or demands.

Requests or demands for official records or information or testimony under this subpart must be served by mail or hand delivery to the Office of General Counsel, U.S. Office of Special Counsel, 1730 M St. NW., Suite 213, Washington, DC 20036; or sent by fax to 202-254-3711.

§ 1820.17 Processing requests or demands.

(a) After receiving service of a request or demand for testimony, the General Counsel will review the request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) Absent exigent circumstances, the OSC will issue a determination within

30 days from the date the request is received.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of the OSC or the United States, or for other good cause.

(d) *Certification (authentication) of copies of records.* The OSC may certify that records are true copies in order to facilitate their use as evidence. If a requester seeks certification, the requester must request certified copies from the OSC at least 30 days before the date they will be needed.

§ 1820.18 Final determination.

The General Counsel makes the final determination regarding requests to employees for production of official records and information or testimony in litigation in which the OSC is not a party. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and, when appropriate, the court or other competent authority of the final determination, the reasons for the grant or denial of the request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of an OSC employee. The General Counsel's decision exhausts administrative remedies for purposes of disclosure of the information.

§ 1820.19 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of OSC employees including, for example:

- (1) Limiting the areas of testimony;
- (2) Requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal;
- (3) Requiring that the transcript will be used or made available only in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The OSC may offer the employee's written declaration in lieu of testimony.

§ 1820.20

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not;

(1) Disclose confidential or privileged information; or

(2) For a current OSC employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the OSC unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made available for testimony, will be subject to the OSC's approval.

§ 1820.20 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the OSC may condition the release of official records and information on an amendment to the existing protective order (subject to court approval) or confidentiality agreement.

(b) If the General Counsel so determines, original OSC records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official OSC records, nor may they be marked or altered. In lieu of the original records, certified copies may be presented for evidentiary purposes.

§ 1820.21 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination referred

5 CFR Ch. VIII (1–1–22 Edition)

to in § 1820.28, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the request is being reviewed, provide an estimate as to when a decision will be made, and seek a stay of the demand or request pending a final determination.

§ 1820.22 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay a demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

Subpart C—Schedule of Fees

§ 1820.23 Fees.

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the OSC.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowances, and benefits). Fees for duplication will be the same as those charged by the OSC in its Freedom of Information Act regulations at § 1820.7.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the federal district closest to the location where the witness will appear and on 28 U.S.C.

1821, as applicable. Such fees will include cost of time spent by the witness to prepare for testimony, in travel and for attendance in the legal proceeding, plus travel costs.

(d) *Payment of fees.* A requester must pay witness fees for current OSC employees and any record certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the United States Department of Treasury. In the case of testimony of former OSC employees, the requester must pay applicable fees directly to the former OSC employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(f) *De minimis fees.* Fees will not be assessed if the total charge would be \$10.00 or less.

[81 FR 73020, Oct. 24, 2016]

Subpart D—Penalties

§ 1820.24 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the OSC, or as ordered by a federal court after the OSC has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former OSC employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OSC employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.

[81 FR 73020, Oct. 24, 2016]

Subpart E—Conformity With Other Laws

§ 1820.25 Conformity with other laws.

This regulation is not intended to conflict with 5 U.S.C. 2302(b)(13).

[81 FR 73020, Oct. 24, 2016]

PART 1830—PRIVACY

Sec.

1830.1 General provisions.

1830.2 Requirements for making Privacy Act requests.

1830.3 Medical records.

1830.4 Requirements for requesting amendment of records.

1830.5 Appeals.

1830.6 Exemptions.

1830.7 Fees.

1830.8 Other rights and services.

AUTHORITY: 5 U.S.C. 552a(f), 1212(e).

SOURCE: 72 FR 56617, Oct. 4, 2007, unless otherwise noted.

§ 1830.1 General provisions.

This part contains rules and procedures followed by the Office of Special Counsel (OSC) in processing requests for records under the Privacy Act (PA), at 5 U.S.C. 552a. Further information about access to OSC records generally is available on the agency's web site (<http://www.osc.gov/foia.htm>).

§ 1830.2 Requirements for making Privacy Act requests.

(a) *How made and addressed.* A request for OSC records under the Privacy Act should be made by writing to the agency. The request should be sent by regular mail addressed to: Privacy Act Officer, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036-4505. Such requests may also be faxed to the Privacy Act Officer at the number provided on the FOIA/PA page of OSC's web site (see 1830.1). For the quickest handling, both the request letter and envelope or any fax cover sheet should be clearly marked "Privacy Act Request." A Privacy Act request may also be delivered in person at OSC's headquarters office in Washington, DC. Whether sent by mail or by fax, or delivered in person, a Privacy Act request will not be considered to have been received by OSC until it reaches the Privacy Act Officer.

(b) *Description of records sought.* Requesters must describe the records sought in enough detail for them to be located with a reasonable amount of effort. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter.