

additional information as it is developed.

(9) Whenever the Bank determines during the course of an investigation that it is necessary to compel or induce the cooperation of an employee, the Bank shall first consult with the Department of Justice. The Department of Justice will coordinate with the Bank to determine the procedures the Bank may use to compel an employee's participation without foreclosing possible criminal proceedings.

(10) The Bank shall maintain records of all disclosures that have been reported or investigated.

(11) All employees shall cooperate fully with officials of the Bank or other agencies who are conducting investigations of unauthorized disclosures of classified information.

(12) Employees determined by the Bank to have knowingly participated in an unauthorized disclosure of classified information or who have refused to cooperate with an investigation of such a disclosure shall be denied further access to classified information and shall be subject to other appropriate administrative sanctions. Prior to taking action against an employee in connection with the unauthorized disclosure or classified information, the Bank shall consult with the Department of Justice, National Security Division.

[50 FR 27215, July 2, 1985, as amended at 72 FR 66043, Nov. 27, 2007]

## PART 404—INFORMATION DISCLOSURE

### Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

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- 404.38 No private right of action.

### Subparts D–E [Reserved]

AUTHORITY: 12 U.S.C. 635(a)(1); 5 U.S.C. 552, 5 U.S.C. 552(a), 5 U.S.C. 553.  
 Section 404.7 also issued under E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.  
 Section 404.21 also issued under 5 U.S.C. 552a note.  
 Subpart C also issued under 5 U.S.C. 301, 12 U.S.C. 635.

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SOURCE: 64 FR 14374, Mar. 25, 1999, unless otherwise noted.

### Subpart A—Procedures for Disclosure of Records Under the Freedom of Information Act

SOURCE: 87 FR 41034, July 11, 2022, unless otherwise noted.

#### § 404.1 General provisions.

(a) *Purpose.* This subpart contains the rules that the Export-Import Bank of the United States (EXIM) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. This subpart should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines).

(b) *Scope.* Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with EXIM's Privacy Act regulations in subpart B of this part as well as under this subpart.

(c) *Delegation.* Any action or determination in this subpart which is the responsibility of a specific EXIM employee may be delegated.

#### § 404.2 Proactive disclosures.

(a) Records that the FOIA requires agencies to make available for public inspection in an electronic format may be accessed through the EXIM internet site at <https://www.exim.gov/about/foia/frequently-requested-records-and-proactive-disclosures> and <https://data.exim.gov/>. EXIM is responsible for determining which 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. EXIM must ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. EXIM's FOIA Public Liaison can assist individuals in locating records particular to the agency. The contact information for the Public Liaison is available at <https://www.exim.gov/about/foia>, along with other FOIA resources.

(b) EXIM proactively discloses information at [data.exim.gov](https://data.exim.gov) on applications and transactions, whether denied or authorized, including: unique identifiers EXIM assigns; approval and declination decisions; the expiration date for a guarantee or insurance policy; whether an insurance policy was brokered or not; whether an approved transaction was cancelled after approval; the country where the credit risk is; the financing program or product that was applied for, including the type of any insurance; the primary export product; a product description; the length of financing on a deal; the principal applicant; the principal lender; the principal exporter; the city and state of the primary exporter; the company name of the principal borrower; the primary source of repayment; the amount of financing approved or declined; the amount of the loan or guarantee that has been disbursed or the amount that has been shipped on an insurance policy; the undisbursed exposure amount; the portion of the disbursed/shipped amount that has not been repaid; the portion of an approved amount that assisted a small business; the portion of an approved company that assisted a woman owned company; the portion of an approved amount that assisted a minority owned company; the interest rate being applied to a direct loan; and whether a working capital amount is pursuant to an extension of a previously approved working capital facility.

#### § 404.3 Request requirements.

(a) Before submitting a FOIA request, potential requesters are encouraged to review the information publicly available at <https://www.exim.gov/about/foia/frequently-requested-records-and-proactive-disclosures> and <https://data.exim.gov/>. The material you seek may be immediately available at no cost.

(b)(1)(i) A request for records must be made directly to EXIM in writing. Requests may be submitted to the EXIM FOIA Office:

(A) By email to [foia@exim.gov](mailto:foia@exim.gov);

(B) Using the online form available at <https://www.exim.gov/about/foia>;

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(C) Using the online FOIAXpress PAL Portal available at <https://palprod.eximefoia.com/>; and

(D) By mail addressed to the Freedom of Information and Privacy Office, 811 Vermont Ave. NW, Washington, DC 20571.

(E) In the alternative, requests may be submitted to the national request portal at <https://www.foia.gov>.

(ii) Additional resources and contact information are available at <https://www.exim.gov/about/foia>.

(2) A requester who is making a request for records about himself or herself must comply with the verification of identity requirements as set forth at § 404.16(d). This requires the request and signature to be notarized. Requester may instead submit a statement under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization.

(3) Where a request for records pertains to another individual, 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, EXIM can require a requester to supply additional information if necessary, in order to verify that a particular individual has consented to disclosure.

(c)(1) Each request must describe the records sought in sufficient detail to enable EXIM personnel to locate the records with a reasonable amount of effort. To the extent possible, requesters should include specific information that may help EXIM identify the requested records, such as relevant dates, format, subject matter, title, transaction or reference number, and the name of any person to whom the record is known to relate. For assistance in drafting a records request, requesters can contact EXIM's FOIA Public Liaison.

(2) If after receiving a request EXIM determines that it does not reasonably describe the records sought, EXIM

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 EXIM's FOIA contact or FOIA Public Liaison. If, after contacting the requestor, EXIM is unable to clarify the time-frame for which a particular request seeks records, EXIM may deem the request to be a request for records created within the preceding twelve months.

(d) Requests may specify the preferred form or format (including electronic formats) for the records sought. EXIM will accommodate your request if the records are readily reproducible in that form or format.

(e) Requesters must provide contact information, such as their phone number, email, and mailing address, to assist EXIM in communicating with them and providing released records.

(f) A request must state the requester's willingness to pay any applicable fees or contain a request for a fee waiver. A requester may set a maximum amount the requester is willing to pay. The fee schedule and related provisions are provided in § 404.10. The ability to request fee waivers is set forth at § 404.11. EXIM will not process your request while clarifying fee issues.

### § 404.5 Responsibility for responding to requests.

(a) *In general.* In determining which records are responsive to a request, EXIM ordinarily will only include records that qualify as agency records under the FOIA on the date EXIM begins its search. If any other date is used, EXIM 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 Freedom of Information and Privacy Office is authorized to grant or deny any requests for records. This is the initial determination that can be appealed. The Freedom of Information and Privacy Office is also responsible for coordinating the search for responsive records and other matters concerning the processing of the request.

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

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

(2) *Referral.* (i) When EXIM determines that a different agency is best able to determine whether to disclose the record, EXIM will typically refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. However, if the agency processing the request and the originating agency jointly agree that the agency processing the request is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever EXIM 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 in paragraph (c)(2) of this section 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 under FOIA, 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 pub-

licly 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, EXIM will typically coordinate with the originating agency to seek its views on the releasability of the record. Subsequently, EXIM will convey the release determination for the record that is the subject of the coordination to the requester.

(d) *Classified information.* On receipt of any request involving classified information, EXIM must determine whether the information is currently and properly classified in accordance with applicable laws. When a request involves a record containing information that has been classified or may be appropriate for classification by another agency under an applicable Executive order, EXIM must refer the request for response to the agency that classified the information, or should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), EXIM 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 EXIM will be handled according to the date that the first agency received the FOIA request.

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

**§ 404.6 Time for processing response to requests.**

(a) *In general.* EXIM is obligated to respond to requests within 20 working days of the date of receipt of the request unless unusual circumstances exist. EXIM ordinarily processes requests according to their order of receipt.

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

(1) *Unusual circumstances* means, only to the extent reasonably necessary to the proper process of requests:

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

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

(iii) The need for consultation with another agency that has a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein. EXIM shall conduct any such consultations with all practicable speed.

(2) *Working days* means all calendar days excluding Saturdays, Sundays, and Federal Government holidays.

(c) *Date of receipt.* A request will be deemed to have been received on the date that the request is received in the Freedom of Information and Privacy Office, provided that the requester has met all the mandatory requirements of § 404.4. EXIM will notify the requester of the date on which a request was officially received in the acknowledgment correspondence.

(d) *Order of processing.* EXIM will ordinarily process requests in order of receipt within their processing track.

(e) *Multitrack processing.* EXIM has designated processing tracks that distinguish between expedited, simple, and complex requests based on the estimated amount of work or time needed to process the request. Among the factors EXIM considers are the number of offices involved, the number of pages involved in processing the request and the need for consultation or referrals. EXIM will advise requesters of the track into which their request falls

and, when appropriate, EXIM may offer the requester an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(f) *Unusual circumstances.* When EXIM cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and extends the time limit on that basis, EXIM must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which EXIM estimates processing of the request will be completed. Where the extension exceeds 10 working days, EXIM must provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. EXIM’s FOIA contact or Public Liaison is available for this purpose. EXIM will also alert requesters to the availability of the Office of Government Information Services (OGIS) to provide dispute resolution services.

(g) *Aggregating requests.* To satisfy unusual circumstances under the FOIA, EXIM 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. EXIM cannot aggregate multiple requests that involve unrelated matters.

(h) *Expedited processing.* (1) EXIM must process requests and appeals on an expedited basis when EXIM determines that the requester or appellant has demonstrated:

(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; or

(ii) In the case of a requester who is primarily engaged in disseminating information, an urgency to inform the public concerning actual or alleged Federal Government activity. 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.

(2) A request for expedited processing may be made at any time. When making a request for expedited processing of an administrative appeal, the request should be submitted to the EXIM's Assistant General Counsel for Administrative Law and Board Support.

(3) A request for expedited processing and other submissions in support of the request must be accompanied by a statement certified by the requester to be true and correct to the best of his or her knowledge and belief. EXIM may waive this formal certification requirement as a matter of discretion. The statement must be in the form prescribed by 28 U.S.C. 1746:

(i) If executed within the United States: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date]. (signature)."

(ii) If executed outside the United States: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)."

(i) *Determination.* Upon receipt of a request for expedited processing, EXIM will consider the request and notify the requester of its determination within 10 calendar days of receipt of the request. If a request for expedited treatment is granted, the request will be given priority and will be placed in a processing track for expedited requests and processed as soon as practicable.

(j) *Appeal.* A requester may file an administrative appeal, as set forth at § 404.12, based on a denial of a request for expedited processing. EXIM will grant expeditious consideration to any such appeal. The appeal should be clearly marked "Appeal for Expedited Processing."

#### § 404.7 Release of records.

(a) *Foreseeable harm standard.* As required by the FOIA, EXIM will disclose material unless it reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law.

(b) *Segregable records.* Whenever it is determined that a portion of a record is exempt from disclosure, any reasonably segregable portion of the record will be provided to the requester after redaction of the exempt material.

#### § 404.8 Responses to requests.

(a) *General.* To the extent practicable, EXIM will communicate with requesters having access to the internet electronically through email or web portal available at <https://www.exim.gov/about/foia>.

(b) *Acknowledgment of request.* EXIM must acknowledge all FOIA requests in writing and assign a request number for reference and tracking the status of the request online. EXIM must also include in the acknowledgment a brief description of the records sought to allow requesters to more easily keep track of their request.

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

(d) *Grant of request.* Once EXIM has made a determination to grant a request in whole or in part, it will notify the requester in writing. EXIM also will inform the requester of any fees charged under § 404.10 and will disclose the requested records to the requester promptly upon payment of any applicable fees. EXIM shall inform the requester that EXIM's FOIA Public Liaison is available to offer assistance.

(e) *Adverse determination.* EXIM will notify the requester in writing if it makes an adverse determination denying a request in any respect. Adverse determination or denials of request may include decisions that: the requested records are exempt in whole or in part; the request does not reasonably describe the records sought; the

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information requested is not a record subject to the FOIA; the requested records do not exist, cannot be located or have 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. Whenever EXIM makes an adverse determination, the denial notice will be signed by the Chief FOIA Officer or other appropriate executive or designee and 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 applied 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;

(4) A statement that the denial may be appealed under § 404.12(a) and a description of the requirements of § 404.12(a); and

(5) A statement notifying the requester of the assistance available from FOIA Public Liaison and the dispute resolution services offered by the Office of Government Information Services (OGIS).

(f) *Markings on released documents.* Markings on released documents must be clearly visible to the requester. Records disclosed in part will be marked 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.

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

(2) When invoking an exclusion EXIM will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

### § 404.9 Confidential commercial information.

(a) *Definitions.* As used in this section:

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

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

(b) *Submitter designation.* All submitters of confidential commercial information must use good faith efforts to designate, by appropriate markings, at the time of submission, any portion of their submissions that they consider to be exempt from disclosure under Exemption 4. This obligation continues after submission, such that a submitter should inform EXIM if it later identifies submitted information that was not marked or newly considers submitted information to be protected by Exemption 4.

(c) *Pre-disclosure notice to the submitter.* EXIM must provide prompt written notice to the submitter of information that is potentially confidential commercial information whenever records containing such information are requested under the FOIA if EXIM determines that it may be required to disclose the records and:

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

(2) EXIM 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.

(d) *Notice requirements.* 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, EXIM 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) *When notice is not required.* EXIM does not need to send the notice called for by paragraph (c) of this section if:

(1) EXIM 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 Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, EXIM 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, as specified in paragraph (g) of this section for disclosures made over a submitter's objection.

(f) *Opportunity to object to disclosure—*  
(1) *Timeline for a response.* (i) A submitter located within the United States will have 10 working days from and including the date of the notification letter to respond to an EXIM notice sent under paragraph (c) of this section, unless another reasonable time period is specified in EXIM's notice.

(ii) A submitter located outside the United States will have 20 working days from and including the date of the notification letter to respond to an EXIM notice sent under paragraph (c) of this section, unless another reasonable time period is specified in EXIM's notice.

(iii) EXIM may extend the time for objection upon timely request from the submitter and for good cause shown.

(2) *Content of submitter's response.* (i) If a submitter has any objections to EXIM's disclosure of the information identified in the notice, the submitter should specify all grounds for EXIM to

withhold the particular information under the FOIA.

(ii) In order to rely on Exemption 4 as a basis for EXIM withholding any of the information as confidential commercial information, the submitter must provide a specific and detailed written explanation of why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. A submitter invoking Exemption 4 in its response should consider including or addressing the following:

(A) Why the information qualifies as a trade secret or is privileged; or

(B) Why the information is confidential commercial or financial information.

(iii) A submitter who fails to respond within the time period specified will be considered to have no objection to disclosure of the information. EXIM will not consider any information received after this time period.

(iv) Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA and should be appropriately marked if confidential.

(g) *Notices to the requester.* EXIM will notify the requester in writing whenever EXIM provides a submitter the opportunity to object to disclosure of records pursuant to paragraph (b) of this section; whenever EXIM notifies the submitter of EXIM's intent to disclose information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

(h) *Consideration of a submitter's response.* EXIM must consider a submitter's timely response prior to making its disclosure decision, including all objections and specific grounds for non-disclosure under the FOIA.

(i) *Notice of intent to disclose.* Whenever EXIM decides to disclose information over the objection of a submitter, EXIM must notify the submitter, in writing, of EXIM's determination. EXIM must include in this notice:

(1) The reasons for the disclosure decision, including a response to each of the submitter's disclosure objections; and

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

(3) A specified disclosure date, which must provide the submitter a reasonable time after the notice to file suit to prevent the disclosure. This time period will be at least 10 working days from EXIM's transmission of the notice of intent to disclose.

(j) *Appeals by requesters.* In response to a requester's administrative appeal of a withholding under Exemption 4, EXIM will comply with the provisions of this section before disclosing any such information.

(k) *Notice of requester's FOIA lawsuit.* EXIM must promptly notify the submitter whenever a requester brings suit against EXIM seeking to compel the disclosure of confidential commercial information.

(l) *Publicly available information.* EXIM may, upon request or on its own initiative, publicly disclose the information contained at *exim.data.gov*, listed at § 404.2, including the parties to transactions for which EXIM approves support, the amount of such support, the identity of any primary participants involved, a general description of the related U.S. exports, and the country to which such exports are destined.

#### § 404.10 Schedule of fees.

(a) *In general.* EXIM will charge fees to recover the full allowable direct costs it incurs in processing requests under the FOIA in accordance with the provisions of this section and OMB Guidelines. OMB Guidelines are accessible at <https://www.justice.gov/oip/foia-resources>. Requesters may seek a fee waiver. EXIM will consider requests for fee waiver in accordance with the requirements in § 404.11. To resolve any fee issues that arise under this section, EXIM may contact a requester for additional information. EXIM will attempt to conduct searches in the most efficient manner to minimize costs. EXIM 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 another method EXIM determines.

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

(1) *Commercial use request.* A request for a use or purpose that furthers the

commercial, trade or profit interest of the requester, which can include furthering those interests through litigation.

(2) *Direct costs.* Expenditures EXIM incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in response 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, including locality pay adjustment, plus 16 percent of that rate to cover benefits), fees associated with the return of records stored offsite, 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.

(4) *Educational institution.* Any school that operates a program of scholarly research. A requester in the fee category in this paragraph (b)(4) must show that the request is made in connection with his or her role at the education institution. EXIM may seek verification from the requester that the request is in furtherance of scholarly research and will 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 their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research

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purpose for the request, would qualify as part of this fee category.

(5) *Non-commercial scientific institution.* An institution that is not operated on a “commercial” basis, as defined in paragraph (b)(1) of this section for purposes of a “commercial use request,” and 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 the fee category in this paragraph (b)(5) 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 commercial use. EXIM will advise requesters of their placement in this category.

(6) *Representative of the news media.* Any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience. 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 disseminate solely on the internet. 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 EXIM can also consider a requester’s past publication record in making this determination. EXIM will advise requesters of their placement in the fee category in this paragraph (b)(6).

(7) *Review.* The process of examining a record in response to a request to determine whether any portion is exempt from disclosure. 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 confidential commercial information submitter under §404.9, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search.* The process of looking for, identifying, and collecting records responsive to a request. For fee purposes, this refers to all time spent looking for materials that is responsive to a request. Searches may be conducted manually or by electronic means. 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) *Categories of requesters.* Fees will be assessed depending on the category of the requester. The specific schedule of fees for each requester category is prescribed as follows:

(1) *Commercial use requesters.* EXIM will charge the full costs for search, review, and duplication.

(2) *Educational, non-commercial scientific institution, and representatives of the news media requesters.* When the records are not sought for commercial use, EXIM will charge only for the cost of duplication in excess of 100 pages and no fee will be charged for search or review.

(3) *All other requesters.* For requesters who are not covered by paragraphs (c)(1) and (2) of this section, EXIM will charge for the cost of search and duplication, except that the first 100 pages of duplication (or the cost equivalent of other media) and two hours of search time will be furnished without charge.

(d) *Search and review fees.* Subject to the restrictions in paragraph (i) of this section and in accordance with the applicable requester categories in paragraph (c) of this section, EXIM will charge the following fees for search and review, based on:

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(1) *Clerical*. Hourly rate—\$33.00.

(2) *Professional*. Hourly rate—\$57.00

(3) *Direct cost*. Hourly rate—based upon the salary of the employee performing (base salary, including locality pay adjustment, and 16 percent for benefits). May also include fees for the return of records stored offsite, the cost of operating computers and other electronic equipment.

(4) *Quarter-hour period*. 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.

(5) *No fee*. 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.

(e) *Search*. (1) Subject to the restrictions in paragraph (i) of this section EXIM will charge search fees.

(2) EXIM may properly charge for time spent searching even if EXIM does not locate any responsive records or if EXIM determines that the records are entirely exempt from disclosure.

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

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

(f) *Duplication*. EXIM will charge duplication fees to all requesters, subject to the restrictions of paragraph (b) of this section. EXIM must honor a requester's preference for receiving a record in a particular form or format where EXIM can readily produce it in the form or format requested. Where photocopies are supplied, EXIM will provide one copy per request at the cost of \$.10 per page. For copies of records produced on disk or other

media, EXIM will charge the direct cost 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, EXIM will charge the direct costs. EXIM may also offer the requester the opportunity to alter the request in order to reduce duplication costs.

(g) *Review*. EXIM will 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 EXIM 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 EXIM'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 (e) of this section.

(h) *Special services charges*. Complying with requests for special services such as those listed in this paragraph (h) is entirely at the discretion of EXIM. EXIM will recover the full costs of providing such services to the extent that it elects to provide them.

(1) *Certifications*. EXIM will charge \$25.00 to certify the authenticity of any EXIM record or any copy of such record.

(2) *Special shipping*. EXIM may ship by special means (*e.g.*, express mail) if the requester so desires, provided that the requester has paid or has expressly undertaken to pay all costs of such special services. EXIM will not charge for ordinary packaging and mailing.

(i) *Restrictions on charging fees*. (1) When EXIM 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) If EXIM fails to comply with the FOIA's time limits in which to respond to a request:

(i) It will not charge search fees, or, in the instance of request from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as follows in paragraphs (d)(2)(ii) through (iv) of this section.

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

(iii) If EXIM has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, EXIM 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. EXIM must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and EXIM 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 5 U.S.C. 552(a)(6)(B)(ii). If the exception in this paragraph (d)(2)(iii) is satisfied, EXIM 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.

(j) *Notice of anticipated fees in excess of \$25.00.* (1) When EXIM determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, EXIM 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 fees can be estimated readily, EXIM will advise the requester accordingly. If the request is not 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 EXIM 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 actual or estimated total fees, 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 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. EXIM will not accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but EXIM estimates that the total fee will exceed that amount, EXIM 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. EXIM 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 notifications.

(4) EXIM's FOIA Public Liaison or another FOIA professional is available to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(k) *Charging interest.* EXIM may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided by 31 U.S.C. 3717 and will accrue from the billing date until payment is received by EXIM. EXIM follow the provisions of the Debt Collection

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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.

(1) *Aggregating requests for fee purposes.* When EXIM 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, EXIM may aggregate those requests and charge accordingly. EXIM may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, EXIM will 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.

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

(2) When EXIM 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. EXIM 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 any agency within 30 calendar days of the billing date, EXIM may require that the requester pay the full amount due, plus any applicable interest on that prior request, and EXIM may require that the requester make an advance payment of the full amount of any anticipated fee before EXIM begins to process a new request or continues to process a pending request or any pending appeal. Where EXIM 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 EXIM 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 30 calendar days after the date of EXIM's fee determination, the request will be closed.

(n) *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. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, EXIM must inform the requester of the contact information for that program.

### § 404.11 Fee waivers or reductions.

(a) *General.* Requesters may seek a waiver of fees by submitting a written request 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.

(b) *Form of request for fee waiver.* EXIM must furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (b)(1) through (3) of this section are satisfied:

(1) Disclosure of the requester 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.

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

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(i) 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 substantially identical form, would not be meaningfully informative if nothing new would be added to the public understanding.

(ii) 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.

(3) 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, EXIM will consider the following criteria:

(i) EXIM 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.

(ii) If there is an identified commercial interest EXIM must determine whether that is the primary interest furthered by the request.

(4) A waiver or reduction of fees is justified when the requirements of paragraphs (b)(1) and (2) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. EXIM ordinarily will presume that when a news media requester has satisfied paragraphs (b)(1) and (2), 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.

(5) Where only some of the records to be released satisfy the requirements for a waiver of fees under this section, a

waiver must be granted for those records.

(6) Requests for a waiver or reduction of fees should be made when the request is first submitted to EXIM and should address the criteria referenced in paragraphs (b)(1) through (5) of this section. 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.

(7) In all cases, the requester has the burden of presenting sufficient evidence or information to justify the fee waiver or reduction. The requester may use the procedures set forth in § 404.12 to appeal a denial of a fee waiver request.

### § 404.12 Administrative appeals.

(a) *General requirements for making an appeal.* A requester may appeal any adverse determination to the EXIM's Assistant General Counsel for Administrative Law and Board Support. Requesters can submit appeals by mail or via email at [FOIA.Appeals@exim.gov](mailto:FOIA.Appeals@exim.gov) in accordance with the following requirements: Appeals must be made in writing and contain the appellant's contact information, such as return address, email, or telephone number. To be timely it must be postmarked, or in the case of electronic submissions, transmitted within 90 calendar days after the date of the final response. The appeal should clearly identify the EXIM determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) *Adjudication of appeals.* (1) The Assistant General Counsel for Administrative Law and Board Support or designee will act on behalf of EXIM'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 litigation.

(3) On receipt of any appeal involving classified information, EXIM must take appropriate action to ensure compliance with applicable classification laws.

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

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

(e) *When appeal is required.* Before seeking review by a court of an adverse determination, a requester generally must submit a timely administrative appeal.

#### § 404.13 Preservation of records.

EXIM will preserve all correspondence pertaining to the request 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 or the General Records Schedule 4.2 of the National Archives and Records Administration. EXIM will not dispose or destroy records while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

### Subpart B—Access to Records Under the Privacy Act of 1974

#### § 404.14 General provisions.

(a) *Purpose.* This subpart establishes policies, procedures, requirements, and responsibilities for administration of the Privacy Act of 1974, 5 U.S.C. 552a, at the Export-Import Bank of the United States (Ex-Im Bank).

(b) *Relationship to the Freedom of Information Act.* The Privacy Act applies to records contained in a systems of records, as defined in § 404.15. If an individual submits a request for access to records and cites the Privacy Act, but the records sought are not contained in a Privacy Act system of records, then the request shall be processed only under subpart A of this part, Procedures for Disclosure of Records Under the Freedom of Information Act. All requests properly processed under this subpart B shall also be processed under subpart A of this part.

(c) *Appellate authority.* The Ex-Im Bank Assistant General Counsel for Administration is the appellate authority for all Privacy Act requests.

(d) *Delegation.* Any action or determination in this subpart which is the responsibility of a specific Ex-Im Bank employee may be delegated to a duly designated alternate.

(e) *Ex-Im Bank address.* The Export-Import Bank of the United States is located at 811 Vermont Avenue, NW, Washington, DC 20571.

[64 FR 14374, Mar. 25, 1999. Redesignated and amended at 87 FR 41034, 41041, July 11, 2022]

#### § 404.15 Definitions.

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

*Appeal*—A written request to the Ex-Im Bank Assistant General Counsel for Administration for reversal of an adverse initial determination.

*Final determination*—The written decision by the Assistant General Counsel for Administration on an appeal.

*Individual*—A citizen of the United States or an alien lawfully admitted for permanent residence.

*Initial determination*—The initial written determination in response to a Privacy Act request.

*Record*—Any item, collection or grouping of information about an individual that is maintained within a system of records and that contains the individual's name or an identifying number, symbol or other identifying particular assigned to the individual.

*Redaction*—The process of removing non-disclosable material from a record so that the remainder may be released.

*Request for access*—A request to view a record.

*Request for accounting*—A request for a list of all disclosures of a record.

*Request for correction*—A request to modify a record.

*Requester*—An individual who makes a request under the Privacy Act.

*Review*—The process of examining a record to determine whether any portion is required to be withheld.

*Search*—The process of identifying and collecting records pursuant to a request.

*System of records*—A group of any records under the control of an agency from which information is retrieved by the name of the individual or some identifying number, symbol or other identifying particular assigned to the individual.

*Working days*—All calendar days excluding Saturdays, Sundays, and Federal Government holidays.

[64 FR 14374, Mar. 25, 1999. Redesignated at 87 FR 41034, July 11, 2022]

#### § 404.16 Requirements of request for access.

(a) *Form*. Requests for access must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in § 404.14(e) and should contain both the return address and telephone number of the requester.

(b) *Description of records sought*. A request for access must describe the records sought in sufficient detail so as to enable Ex-Im Bank personnel to locate the system of records containing the records with a reasonable amount of effort. To the extent practicable, such description should include the nature of the record sought, the date of the record or the period in which the record was compiled, and the name or identifying number of the system of

records in which the requester believes the record is kept. A requester may include his or her social security number in the request in order to facilitate the identification and location of the requested records.

(c) *Fee statement*. The request must contain a statement expressing willingness to pay fees for processing the request or a request for a fee waiver (see § 404.18(d)).

(1) Whenever a requester submits a request for access that does not contain a fee statement or a request for a fee waiver, Ex-Im Bank shall advise the requester of the requirements of this section. If the requester fails to respond within ten working days of such notification, then the Freedom of Information and Privacy Office shall notify the requester, in writing, that Ex-Im Bank will not process the request.

(2) A general statement by the requester expressing willingness to pay all applicable fees shall be deemed an agreement to pay up to \$25.00. If Ex-Im Bank estimates that the fees for a request will exceed \$25.00, then Ex-Im Bank shall notify the requester. Ex-Im Bank shall offer the requester the opportunity to agree, in writing, either to pay a greater fee or to modify the request as a means of limiting the cost.

(3) Whenever the estimated fee chargeable under this section exceeds \$25.00, Ex-Im Bank reserves the right to require a requester to make an advance payment prior to processing the request.

(4) Ex-Im Bank shall not process a request by a requester who has failed to pay a fee for a previous request unless and until such requester had paid the full amount owed and also has paid, in advance, the total estimated charges for the new request.

(d) *Verification of identity*. An individual who submits a request for access must verify his or her identity. The request must include the requesters full name, current address, and date and place of birth. In addition, such requester must provide a notarized statement attesting to his or her identity.

(e) *Verification of guardianship*. When a parent or guardian of a minor or the guardian of a person judicially determined to be incompetent submits a request for access to records that relate

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to the minor or incompetent, such parent or guardian must establish:

(1) His or her own identity and the identity of the subject of the record in accordance with paragraph (d) of this section; and

(2) Parentage or guardianship of the subject of the record, either by providing a copy of the subject's birth certificate showing parentage or by providing a court order establishing guardianship.

(f) *Written notice of amendment.* The requester must provide any amendment to the original request in writing to Ex-Im Bank.

(g) *Requester assistance.* Ex-Im Bank shall make reasonable efforts to assist a requester in complying with the requirements of this section.

(h) *Date of receipt.* Requests for access shall be deemed to have been received on the date that the request is received by the Freedom of Information and Privacy Office, provided that all the requirements of this section have been met. Ex-Im Bank shall notify the requester of the date on which it officially received a request.

[64 FR 14374, Mar. 25, 1999. Redesignated and amended at 87 FR 41034, 41041, July 11, 2022]

### § 404.17 Initial determination.

(a) *Time for processing.* The Freedom of Information and Privacy Office shall respond to valid requests for access within twenty working days of the date of receipt of the request letter. The time for response may be extended an additional ten working days for good cause, provided that the Freedom of Information and Privacy Office notifies the requester in writing.

(b) *Notice regarding request for access.* The Freedom of Information and Privacy Office shall notify the requester in writing of its decision to grant or deny a request for access.

(1) If the request is granted, then the notice shall either include the requested records, in releasable form, or shall describe the manner in which access to the record will be granted. The notice also shall inform the requester of any processing fee.

(2) A denial is a determination to withhold any requested record in whole or in part or a determination that the requested record does not exist or can-

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not be located. If the request is denied, then the denial notice shall state:

(i) The name, signature, and title or position of the person responsible for the denial;

(ii) The reasons for the denial; and

(iii) The procedure for appeal of the denial under § 404.19 and a brief description of the requirements of that section.

(c) *Form of record disclosure.* Ex-Im Bank shall grant access to the requested records either by providing the requester with a copy of the record or, at the requester's option, by making the record available for inspection at a reasonable time and place. If Ex-Im Bank makes the record available for inspection, such inspection shall not unreasonably disrupt Ex-Im Bank operations. In addition, the requester must provide a form of official photographic identification—such as a passport, driver's license or identification badge—and any other form of identification bearing his or her name and address prior to inspection of the requested records. Records may be inspected by the requester in the presence of another individual, provided that the requester signs a form stating that Ex-Im Bank is authorized to disclose the record in the presence of both individuals.

[64 FR 14374, Mar. 25, 1999. Redesignated and amended at 87 FR 41034, 41042, July 11, 2022]

### § 404.18 Schedule of fees.

(a) *Search and review.* Ex-Im Bank shall not charge for search and review.

(b) *Duplication.* Ex-Im Bank shall charge \$.10 per page for paper copy duplication. Ex-Im Bank shall charge the actual or estimated cost of copies prepared by computer, such as tape or printouts, or for other methods of reproduction or duplication.

(c) *Minimum fee.* Ex-Im Bank shall waive final fees of \$5.00 or less.

(d) *Fee waivers.* Ex-Im Bank may waive fees whenever it is determined to be in the public interest. Fees of less than \$50.00 shall be waived in connection with any request by an employee, former employee or applicant for employment, related to a grievance or complaint of discrimination against Ex-Im Bank.

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(e) *Special services charges.* Complying with requests for special services such as those listed in this paragraph is entirely at the discretion of Ex-Im Bank. Ex-Im Bank shall recover the full costs of providing such services to the extent that it elects to provide them.

(1) *Certifications.* Ex-Im Bank shall charge \$25.00 to certify the authenticity of any Ex-Im Bank record or any copy of such record.

(2) *Special shipping.* Ex-Im Bank may ship by special means (e.g., express mail) if the requester so desires, provided that the requester has paid or has expressly undertaken to pay all costs of such special services. Ex-Im Bank shall not charge for ordinary packaging and mailing.

[64 FR 14374, Mar. 25, 1999. Redesignated at 87 FR 41034, July 11, 2022]

### § 404.19 Appeal of denials of access.

(a) *Appeals to the Assistant General Counsel for Administration.* Whenever Ex-Im Bank denies a request for access or for waiver or reduction of fees, the requester may appeal the denial to the Assistant General Counsel for Administration within 30 working days of the date of Ex-Im Bank's issuance of notice of such action. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address in §404.14(e). Both the envelope and the appeal letter should be clearly marked in capital letters: "PRIVACY ACT APPEAL." Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter should include:

(1) A copy of the denied request or a description of the records requested;

(2) The name and title of the Ex-Im Bank employee who denied the request;

(3) The date on which the request was denied; and

(4) The Ex-Im Bank identification number assigned to the request.

(b) *Final determination.* The disposition of an access appeal shall be made in writing within twenty working days after the date of receipt of the appeal. The Assistant General Counsel for Ad-

ministration may extend the time for response an additional ten working days for good cause, provided that the requester is notified in writing. A decision affirming the denial of a request for access shall include a brief statement of the reasons for affirming the denial and shall advise the requester of the right to seek judicial review. If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

[64 FR 14374, Mar. 25, 1999. Redesignated and amended at 87 FR 41034, 41042, July 11, 2022]

### § 404.20 Requests for correction of records.

(a) *Form.* Requests for correction must be made in writing and must be signed by the requester. Requests should be addressed to the Freedom of Information and Privacy Office at the address in §404.14(e) and should contain both the return address and telephone number of the requester. The request must identify the particular record in question, state the correction sought, and set forth the justification for the correction. The requester also must verify his or her identity in accordance with the procedures set forth at §404.16(d) and (e). Both the envelope and the request for correction itself should be clearly marked in capital letters: "PRIVACY ACT CORRECTION REQUEST."

(b) *Initial determination.* The Freedom of Information and Privacy Office shall respond to valid correction requests within ten working days of receipt of the request letter. If Ex-Im Bank grants the request for correction, then the Freedom of Information and Privacy Office shall advise the requester of his or her right to obtain a copy, in releasable form, of the corrected record. A denial notice shall state the reasons for the denial and shall advise the requester of the right to appeal. Ex-Im Bank shall not charge for processing requests for correction.

(c) *Appeal of denial of request for correction.* Whenever Ex-Im Bank denies a request for correction, the requester may appeal the denial to the Assistant General Counsel for Administration within thirty working days of Ex-Im

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Bank's issuance of notice of such action. Appeals must be made in writing and must be signed by the appellant. Appeals should be addressed to the Assistant General Counsel for Administration at the address set forth in § 404.14(e). Both the envelope and the appeal letter should be clearly marked in capital letters: "PRIVACY ACT CORRECTION APPEAL." Failure to properly mark or address the appeal may slow its processing. An appeal shall not be deemed to have been received by Ex-Im Bank until the Assistant General Counsel for Administration receives the appeal letter. The letter must include:

(1) A copy of the denied request or a description of the correction sought;

(2) The name and title of the Ex-Im Bank employee who denied the request;

(3) The date on which the request was denied;

(4) The Ex-Im Bank identification number assigned to the request; and

(5) Any information said to justify the correction.

(d) *Final determination on correction appeal.* (1) The disposition of an appeal shall be made in writing within twenty working days after the date of receipt of an appeal. The Assistant General Counsel for Administration may extend the time for response an additional ten working days for good cause, provided that the requester is notified in writing.

(2) A decision affirming the denial of a request for access shall advise the appellant of the:

(i) Reasons for affirming the denial;

(ii) Right to seek judicial review; and

(iii) Right to file a statement of disagreement, as provided in paragraph (e) of this section.

(3) If the initial determination is reversed, then the request shall be remanded to the Freedom of Information and Privacy Office to be processed in accordance with the decision on appeal.

(e) *Statement of disagreement.* Upon denial of a correction appeal, the appellant shall have the right to file a statement of disagreement with Ex-Im Bank, setting forth his or her reasons for disagreeing with the Agency's action. The statement should be addressed to the Freedom of Information and Privacy Office at the address in

§ 404.14(e) and must be received within thirty working days of Ex-Im Bank's issuance of the denial notice. A statement of disagreement must not exceed one typed page per fact disputed. Statements exceeding this limit shall be returned to the requester for editing. Upon receipt of a statement of disagreement under this section, the Freedom of Information and Privacy Office shall have the statement included in the system of records in which the disputed record is maintained and shall have the disputed record marked so as to indicate that a Statement of Disagreement has been filed. Ex-Im Bank may also append to the disputed record a written statement regarding Ex-Im Bank's reasons for denying the request to correct the record.

(f) *Notices of correction or disagreement.*

In any disclosure of a record for which Ex-Im Bank has received a statement of disagreement, Ex-Im Bank shall clearly note any portion of the record which is disputed and shall provide a copy of the statement of disagreement. Ex-Im Bank also may provide its own statement regarding the disputed record. In addition, whenever Ex-Im Bank corrects a record or receives a statement of disagreement, Ex-Im Bank shall, as is reasonable under the circumstances, advise any person or agency to which it previously disclosed such record of the correction or statement, provided that an accounting of such disclosure exists.

[64 FR 14374, Mar. 25, 1999. Redesignated and amended at 87 FR 41034, 41042, July 11, 2022]

### § 404.21 Request for accounting of record disclosures.

(a) *Required information.* With respect to each system of records under Ex-Im Bank control, Ex-Im Bank shall maintain an accurate accounting of the date, nature, and purpose of each external disclosure of a record and the name and address of all persons, organizations, and agencies to which disclosure has been made. Ex-Im Bank shall retain this accounting for at least five years or the life of the record, whichever is longer.

(b) *Form.* An individual may obtain an accounting of all disclosures of a record, provided that such individual establishes his or her identity as the

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subject of such record in accordance with the procedures set forth at § 404.16(d) and (e). A request for an accounting must be made in writing and must be signed by the requester. The request should be addressed to the Freedom of Information and Privacy Office at the address in § 404.14(e) and should contain both the return address and telephone number of the requester. Both the envelope and the request itself should be clearly be marked in capital letters: "PRIVACY ACT ACCOUNTING REQUEST." Failure to properly mark or address the request may slow its processing. The request shall not be deemed to have been received by Ex-Im Bank until the Freedom of Information and Privacy Office receives the request. The letter must clearly identify the particular record for which the accounting is requested.

(c) *Initial determination.* The Freedom of Information and Privacy Office shall notify the requester whether the request will be granted or denied within ten working days of receipt of a valid request for an accounting. Ex-Im Bank shall not charge for processing such a request.

(d) *Exceptions.* Ex-Im Bank shall not be required to provide an accounting to an individual when the accounting relates to a disclosure made:

- (1) To an employee within the agency;
- (2) Under the FOIA; or
- (3) To a law enforcement agency for an authorized law enforcement activity in response to a written request from such agency which specified the law enforcement activity for which the disclosure was sought.

[64 FR 14374, Mar. 25, 1999. Redesignated and amended at 87 FR 41034, 41042, July 11, 2022]

### § 404.22 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 Assistant General Counsel for Administration shall make reasonable efforts to provide notice to the subject individual. Notice shall be given within a reasonable time after Ex-Im Bank's receipt of the order, except that in a case in which the order is not a matter of public record, notice shall be given

only after the order becomes public. Such notice shall be mailed to the individual's last known address and shall contain a copy of the order and a description of the information disclosed.

(b) *Emergency disclosures.* If a record has been disclosed by Ex-Im Bank under compelling circumstances affecting the health or safety of any person, then, within ten working days, the Assistant General Counsel for Administration shall notify the subject individual of the disclosure at his or her last known address. The notice of such disclosure shall be in writing and shall state the:

- (1) Nature of the information disclosed;
- (2) Person, organization or agency to which it was disclosed;
- (3) Date of disclosure; and
- (4) Compelling circumstances justifying the disclosure.

[64 FR 14374, Mar. 25, 1999. Redesignated at 87 FR 41034, July 11, 2022]

### § 404.23 Submission of social security and passport numbers.

(a) *Policy.* Ex-Im Bank recognizes the importance of assessing, to the extent reasonably possible, the risks associated with transactions supported by Ex-Im Bank. It is often difficult to assess risks related to individuals and non-publicly traded entities. Therefore, when an individual or a non-publicly traded entity applies for participation in an Ex-Im Bank program or is proposed as a guarantor for an Ex-Im Bank transaction, Ex-Im Bank may request social security and/or U.S. passport numbers from such individual or from the principals of such entity. Ex-Im Bank shall not require submission of this information, and unwillingness or inability to provide a social security or passport number shall not affect Ex-Im Bank's decision on an application for Ex-Im Bank assistance.

(b) *Use.* Ex-Im Bank shall use social security and passport numbers to assess the creditworthiness of Ex-Im Bank program participants and as a mechanism for enforcing agreements with Ex-Im Bank. Such information shall not be disclosed, except as warranted by law and regulation.

(c) *Notice.* Whenever Ex-Im Bank requests a social security or passport

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number, Ex-Im Bank shall place an appropriate Privacy Act notification on the form used to collect the information.

[64 FR 14374, Mar. 25, 1999. Redesignated at 87 FR 41034, July 11, 2022]

## § 404.24 Government contracts.

(a) *Approval by Assistant General Counsel for Administration.* Ex-Im Bank shall not contract for the operation of a system of records or for an activity that requires access to a system of records without the express, written approval of the Assistant General Counsel for Administration.

(b) *Contract clauses.* Any contract authorized under paragraph (a) of this section shall contain the standard contract clauses required by the Federal Acquisition Regulation (48 CFR 24.104) to ensure compliance with the requirements imposed by the Privacy Act. The division within Ex-Im Bank that is responsible for technical supervision of the contract shall be responsible for ensuring that the contractor complies with the Privacy Act contract requirements.

(c) *Contractor status.* Any contractor that operates an Ex-Im Bank system of records or engages in an activity that requires access to an Ex-Im Bank system of records shall be considered an Ex-Im Bank employee for purposes of this subpart. Ex-Im Bank shall supply any such contractor with a copy of the regulations in this subpart upon entering into a contract with Ex-Im Bank.

[64 FR 14374, Mar. 25, 1999. Redesignated at 87 FR 41034, July 11, 2022]

## § 404.25 Other rights and services.

Nothing in this subpart shall be construed to entitle any person to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

[64 FR 14374, Mar. 25, 1999. Redesignated at 87 FR 41034, July 11, 2022]

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### Subpart C—Demands for Testimony of Current and Former Ex-Im Bank Personnel and for Production of Ex-Im Bank Records

SOURCE: 71 FR 14361, Mar. 22, 2006, unless otherwise noted.

## § 404.26 Exemptions: EIB-35—Office of Inspector General Investigative Records.

(a) *Criminal Law Enforcement—(1) Exemption.* Under the authority granted by 5 U.S.C. 552a(j)(2), Ex-Im Bank hereby exempts the system of records entitled “EIB-35—Office of Inspector General Investigative Records” from the provisions of 5 U.S.C. 552a(c)(3), (c)(4), (d)(1) through (4), (e)(1) through (3), (e)(4)(G) and (H), (e)(5), (e)(8), (f), and (g) because the system contains information pertaining to the enforcement of criminal laws. “EIB-35—Office of Inspector General Investigative Records” is maintained by the Ex-Im Bank Office of Inspector General (“OIG” or “Ex-Im Bank OIG.”)

(2) *Reasons for exemption.* The reasons for asserting this exemption are:

(i) Disclosure to the individual named in the record pursuant to 5 U.S.C. 552a(c)(3), (c)(4), or (d)(1) through (4) could seriously impede or compromise the investigation by alerting the target(s), subjecting a potential witness or witnesses to intimidation or improper influence, and leading to destruction of evidence. Disclosure could enable suspects to take action to prevent detection of criminal activities, conceal evidence, or escape prosecution.

(ii) Application of 5 U.S.C. 552a(e)(1) is impractical because the relevance of specific information might be established only after considerable analysis and as the investigation progresses. Effective law enforcement requires the OIG to keep information that may not be relevant to a specific OIG investigation, but which may provide leads for appropriate law enforcement and to establish patterns of activity that might relate to the jurisdiction of the OIG and/or other agencies.

(iii) Application of 5 U.S.C. 552a(e)(2) would be counterproductive to the performance of a criminal investigation

because it would alert the individual to the existence of an investigation. In any investigation, it is necessary to obtain evidence from a variety of sources other than the subject of the investigation in order to verify the evidence necessary for successful litigation or prosecution.

(iv) Application of 5 U.S.C. 552a(e)(3) could discourage the free flow of information in a criminal law enforcement inquiry.

(v) The requirements of 5 U.S.C. 552a(e)(4)(G) and (H) and (f) would be counterproductive to the performance of a criminal investigation. To notify an individual at the individual's request of the existence of records in an investigative file pertaining to such individual, or to grant access to an investigative file could interfere with investigative and enforcement proceedings, deprive co-defendants of a right to a fair trial or other impartial adjudication, constitute an unwarranted invasion of personal privacy of others, disclose the identity or confidential sources, reveal confidential information supplied by these sources and disclose investigative techniques and procedures. Nevertheless, Ex-Im Bank OIG has published notice of its notification, access, and contest procedures because access may be appropriate in some cases.

(vi) Although the OIG endeavors to maintain accurate records, application of 5 U.S.C. 552a(e)(5) is impractical because maintaining only those records that are accurate, relevant, timely, and complete and that assure fairness in determination is contrary to established investigative techniques. Information that may initially appear inaccurate, irrelevant, untimely, or incomplete may, when collated and analyzed with other available information, become more pertinent as an investigation progresses.

(vii) Application of 5 U.S.C. 552a(e)(8) could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(viii) The provisions of subsection (g) do not apply to this system if an exemption otherwise applies.

(b) *Other Law Enforcement—(1) Exemption.* Under the authority granted by 5 U.S.C. 552a(k)(2), Ex-Im Bank hereby

exempts the system of records entitled "EIB-35—Office of Inspector General Investigative Records" from the provisions of 5 U.S.C. 552a(c)(3), (d)(1) through (4), (e)(1), (e)(4)(G) and (H), and (f) for the same reasons as stated in paragraph (a)(2) of this section, that is, because the system contains investigatory material compiled for law enforcement purposes other than material within the scope of subsection 552a(j)(2).

(2) *Reasons for exemption.* The reasons for asserting this exemption are because the disclosure and other requirements of the Privacy Act could substantially compromise the efficacy and integrity of OIG operations. Disclosure could invade the privacy of other individuals and disclose their identity when they were expressly promised confidentiality. Disclosure could interfere with the integrity of information which would otherwise be subject to privileges (see, e.g., 5 U.S.C. 552(b)(5)), and which could interfere with other important law enforcement concerns (see, e.g., 5 U.S.C. 552(b)(7)).

(c) *Federal Civilian or Contract Employment—(1) Exemption.* Under the authority granted by 5 U.S.C. 552a(k)(5), Ex-Im Bank hereby exempts the system of records entitled "EIB-35—Office of Inspector General Investigative Records" from the provisions of 5 U.S.C. 552a(c)(3), (d)(1) through (4), (e)(1), (e)(4)(G) and (H), and (f) because the system contains investigatory material compiled for the purpose of determining eligibility or qualifications for federal civilian or contract employment.

(2) *Reasons for exemption.* The reasons for asserting this exemption are the same as described in paragraph (a)(2) of this section.

[77 FR 41886, July 17, 2012, as amended at 77 FR 42949, July 23, 2012. Redesignated at 87 FR 41034, July 11, 2022]

#### § 404.27 Applicability.

This subpart applies exclusively to demands for testimony and/or production of records issued to Ex-Im Bank personnel, in connection with legal proceedings to which Ex-Im Bank is not a party, regarding information acquired in the course of the performance of official duties or due to their official

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status. Nothing in this subpart shall be construed to waive the sovereign immunity of the United States. This subpart shall not apply to the following:

(a) Demands for testimony and/or production of records pursuant to a legal proceeding to which Ex-Im Bank is a party;

(b) Demands for testimony and/or production of records in those instances in which Ex-Im Bank personnel are asked to disclose information wholly unrelated to their official duties; and

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

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

## § 404.28 Definitions.

For purposes of this subpart, the following definitions shall apply—

*Demand*—includes an order, subpoena, or other compulsory process issued by a party in litigation or a court of competent jurisdiction, requiring the production or release of Ex-Im Bank information or records, or requiring the testimony of Ex-Im Bank personnel.

*Ex-Im Bank personnel*—includes any current or former officer or employee of Ex-Im Bank, including all individuals who have been appointed by, or subject to, the official supervision, jurisdiction, or control of any Ex-Im Bank employees. This definition encompasses all individuals hired through contractual agreements with Ex-Im Bank, such as: consultants, contractors, sub-contractors, and their employees.

*Legal proceeding*—a case or controversy pending before any federal, state, or local court, including a grand jury proceeding; a proceeding before a federal, state, or local administrative judge, board, or other similar body with adjudicative powers; or a legislative proceeding before a state or local legislative body.

*Records*—all documentary materials that Ex-Im Bank creates or receives in connection with the transaction of official business, including any materials classified as “Federal records” under 44 U.S.C. 3301 and its implementing regulations.

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*Testimony*—written or oral statements, including, but not limited to, depositions, answers to interrogatories, affidavits, declarations, and any other statements made in a legal proceeding, including any expert or opinion testimony.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

## § 404.29 Demand requirements.

A party’s demand for testimony and/or production of records by Ex-Im Bank personnel regarding information acquired in the course of their performance of official duties or due to their official status shall be set forth in, or accompanied by, a signed affidavit or other written statement. Such affidavit or written statement must be submitted at least 30 days prior to the date such testimony and/or production of records is requested to be taken and/or produced. A copy of the affidavit or written statement shall be served on the other parties to the legal proceeding. The affidavit or written statement must:

(a) Be addressed to the Export-Import Bank of the United States, Office of the General Counsel, 811 Vermont Ave., NW., Washington, DC 20571;

(b) State the nature of the legal proceeding, including any docket number, title of the case, and the name of the administrative or adjudicative body before which the proceedings are to be heard;

(c) State the nature of the testimony or records sought;

(d) State the relevance of the information sought to the legal proceedings;

(e) State why such information can only be obtained through testimony or production of records by Ex-Im Bank personnel; and

(f) Comply with all procedures governing valid service of process.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

## § 404.30 Notification of General Counsel required.

Ex-Im Bank personnel receiving a demand for testimony and/or production of records regarding information acquired in the course of their performance of official duties, or due to their

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official status, shall immediately notify the General Counsel of Ex-Im Bank (“General Counsel”) upon receipt of such demand. The General Counsel maintains the exclusive authority to waive the requirements of any or all sections of this subpart and reserves the right to delegate his or her authority under this subpart to other appropriate Ex-Im Bank personnel.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

### § 404.31 Restrictions on testimony and production of records.

Ex-Im Bank personnel may not provide testimony and/or produce records regarding information acquired in the course of their performance of official duties, or due to their official status, in connection with any legal proceeding to which this subpart applies, without authorization by the General Counsel. Such authorization must be in writing, unless the General Counsel determines that circumstances warrant an oral authorization, and such oral authorization is subsequently documented.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

### § 404.32 Factors General Counsel may consider in determining whether to authorize testimony and/or the production of records.

In determining whether to authorize Ex-Im Bank personnel to provide testimony and/or produce records regarding information acquired in the course of their performance of official duties, or due to their official status, the General Counsel may consider factors including, but not limited to, the following:

(a) Efficiency—the conservation of the time and resources of Ex-Im Bank personnel for the conduct of official business;

(b) Undue burden—whether the demand creates an undue burden upon Ex-Im Bank or is otherwise inappropriate under any applicable administrative or court rules;

(c) Appearance of bias—whether the testimony and/or production of records could result in the public perception that Ex-Im Bank is favoring one party over another, or advocating the position of a party to the proceeding;

(d) Furtherance of agency policy—whether the testimony and/or production of records is consistent with the policy and mission of the Ex-Im Bank;

(e) Prevention of fraud or injustice—whether the disclosure of the information requested is necessary to prevent the perpetration of fraud or injustice;

(f) Relevance to litigation—whether the testimony and/or production of records sought is relevant to the subject litigation;

(g) Necessity—whether the testimony and/or production of records, including a release of such *in camera*, is appropriate or necessary as determined by either the procedural rules governing the legal proceeding, or according to the relevant laws concerning privilege;

(h) Availability from another source—whether the information sought through testimony or production of records is available from another source;

(i) Violations of laws or regulations—whether the testimony and/or production of records would violate a statute, regulation, executive order, or other official directive;

(j) Classified information—whether the testimony and/or production of records would improperly reveal information classified pursuant to applicable statute or Executive Order; and

(k) Compromise of rights and interests—whether the testimony and/or production of records would compromise any of the following: law enforcement interests, constitutional rights, national security interests, foreign policy interests, or the confidentiality of commercial and/or financial information.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

### § 404.33 Procedure for declining to testify and/or produce records.

Ex-Im Bank personnel receiving a demand to provide testimony and/or produce records regarding information acquired in the course of their performance of official duties, or due to their official status, and who have not received written authorization from the General Counsel to provide such information, shall:

(a) Respectfully decline to answer or appear for examination on the grounds

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that such testimony is forbidden by this subpart;

(b) Request the opportunity to consult with the General Counsel;

(c) Explain that only upon consultation may they be granted approval to provide such testimony;

(d) Explain that providing such testimony or records absent approval may subject the individual to criminal liability under 18 U.S.C. 641, as well as other applicable laws, and other disciplinary action; and

(e) Request a stay of the request or demand pending a determination by the General Counsel.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

#### § 404.34 Procedure in the event a decision concerning a demand is not made prior to the time a response to the demand is required.

If response to a demand is required before a determination has been rendered by the General Counsel, the U.S. Attorney or such other attorney as may be designated for the purpose will appear with the Ex-Im Bank personnel upon whom the demand has been made, and will furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been or is being, as the case may be, referred for prompt consideration of the General Counsel. The court or other authority shall be requested respectfully to stay the demand pending determination by the General Counsel.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

#### § 404.35 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 404.34 pending a determination by the General Counsel, or if the court or other authority rules that the demand must be complied with irrespective of the instructions from the General Counsel not to produce the material or disclose the information sought, the Ex-Im Bank personnel upon whom the demand has been made shall respectfully decline to comply with the

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demand (*United States ex rel. Touhy v. Ragen*, 340 U.S. 462).

[71 FR 14361, Mar. 22, 2006. Redesignated and amended at 87 FR 41034, 41042, July 11, 2022]

#### § 404.36 Procedure for demands for testimony or production of documents regarding confidential information.

In addition to compliance with the requirements of this subpart, demands to provide testimony and/or produce records that concern information protected by the Privacy Act, 5 U.S.C. 552a, or any other authority mandating confidentiality of certain classes of records or information, must also satisfy the requirements for disclosure imposed by such authority before records may be produced or testimony given.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

#### § 404.37 Procedures for requests for Ex-Im Bank employees to provide expert or opinion testimony.

No Ex-Im Bank personnel may, unless specifically authorized by the General Counsel, testify in any legal proceeding as an expert or opinion witness as to any matter related to his or her duties or the functions of the Ex-Im Bank, including the meaning of Ex-Im Bank documents. Any demand for expert or opinion testimony shall comply with the policies and procedures outlined in this subpart.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

#### § 404.38 No private right of action.

Nothing in this subpart shall be construed as creating any right, substantive or procedural, enforceable at law or equity by a party against Ex-Im Bank or the United States.

[71 FR 14361, Mar. 22, 2006. Redesignated at 87 FR 41034, July 11, 2022]

#### Subparts D–E [Reserved]

#### PART 405 [RESERVED]