

§ 2003.6

§ 2003.6 Information exempt from public inspection.

(a) The Committee shall exempt from public inspection business information submitted by an interested party if the Committee determines that such information concerns or relates to trade secrets and commercial and financial information the disclosure of which is not authorized by the interested party furnishing such information and is not required by law.

(b) A party requesting that the Committee exempt from public inspection business information submitted in writing shall clearly mark each page "BUSINESS CONFIDENTIAL" at the top.

(c) The Committee may deny a request that it exempt from public inspection any particular business information if it determines that such information is not entitled to exemption under paragraph (a) of this section. In the event of such denial, the party submitting the particular business information will be notified of the reasons for the denial and will be permitted to withdraw his submission.

PART 2004—DISCLOSURE OF RECORDS AND INFORMATION

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AUTHORITY: 19 U.S.C. 2171(e)(3).

SOURCE: 81 FR 89846, Dec. 13, 2016, unless otherwise noted.

Subpart A—Definitions

AUTHORITY: 19 U.S.C. 2171(e)(3).

§ 2004.0 Definitions.

For purposes of this part:

Days, unless otherwise indicated, means working days, and does not include Saturdays, Sundays, and legal public holidays. If the last day of a specified period falls on a Saturday, Sunday, or legal public holiday, the period will be extended until the next working day.

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

Privacy Act means the Privacy Act of 1974, as amended, 5 U.S.C. 552a.

OGIS means the Office of Government Information Services of the National Archives and Records Administration. OGIS offers FOIA dispute resolution services, which is a voluntary

process. If USTR agrees to participate in the dispute resolution services provided by OGIS, USTR will actively engage as a partner to the process in an attempt to resolve the dispute.

USTR means the Office of the United States Trade Representative.

[81 FR 89846, Dec. 13, 2016, as amended at 82 FR 18985, Apr. 25, 2017]

Subpart B—Freedom of Information Act Policies and Procedures

AUTHORITY: 5 U.S.C. 552; 19 U.S.C. 2171(e)(3); Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, Mar. 27, 1987.

SOURCE: 81 FR 90717, Dec. 15, 2016, unless otherwise noted.

§ 2004.1 Purpose and scope.

(a) This subpart contains the rules we follow when processing requests for records under the FOIA, a Federal law that provides a right of access to certain records and information Federal agencies maintain and control. You should read this subpart in conjunction with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines). Additionally, our FOIA Reference Guide, which is available on our Web site at <http://www.ustr.gov>, contains information about the specific procedures for making FOIA requests and descriptions of the types of records we maintain.

(b) To maximize the amount of information we can provide to you, we may process requests you make for records about yourself under both this subpart and subpart C to part 2004, our rules implementing the Privacy Act.

(c) We administer the FOIA with a presumption of openness.

§ 2004.2 Proactive disclosures.

You can access records that the FOIA requires us to make available for public inspection and copying in an electronic format through our Web site: <http://www.ustr.gov>. You also can find press releases, links to FEDERAL REGISTER notices and comments, fact sheets, speeches and remarks, reports,

information about current initiatives, and historical information about U.S. trade issues. If you need assistance to locate a particular record, you can contact the Office of Public and Media Affairs at MEDIA@ustr.eop.gov or the FOIA Office at FOIA@ustr.eop.gov.

§ 2004.3 How do I make a request for records under the FOIA?

(a) *General information*—(1) *Where do I send my written request?* To make a request for records, you should write directly to the FOIA Office. Heightened security delays mail delivery. To avoid mail delivery delays, we strongly suggest that you email your request to FOIA@ustr.eop.gov. Our mailing address is: FOIA Office, Office of the United States Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW., Washington, DC 20509. To ensure that the FOIA Office receives your request without delay, you should include the notation “FOIA Request” in the subject line of your email or on the front of your envelope and also at the beginning of your request.

(2) *Security concerns.* To protect our computer systems, we will not open attachments to emailed requests—you must include your request within the body of the email. We will not process email attachments.

(3) *Verifying your identity.* (i) If you are making a request for records about yourself or about another individual, you may receive greater access by verifying your identity if the records are about you, or the other individual’s identity if the records are about them. To verify identity, you must provide an unsworn declaration under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury. To fulfill this requirement, you must include the following statement just before the signature on your request letter:

“I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].”

(ii) If the other individual is deceased, you should submit proof of death such as a copy of a death certificate or an obituary. As an exercise of

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administrative discretion, we may require that you provide additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *How do I describe the records I want?* (1) You must describe the records you seek in sufficient detail to enable USTR personnel to locate them with a reasonable amount of effort. To satisfy this requirement, you should be as detailed as possible when describing the records you seek. To the extent possible, you should include specific information that may help us identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. For example, we generally will ask you to clarify a request for all records related to a particular trade negotiation or agreement or a request for all communications between USTR and a particular third party. We suggest that you include a date limitation, particular topics, and if asking for correspondence, the subject matter and the relevant parties with contact information such as their email addresses.

(2) If a request does not provide sufficient specific descriptive information for the FOIA Office reasonably to ascertain exactly which records you are requesting and to locate them, our response may be delayed. Please note that in response to a FOIA request, we are not required to create records, conduct research for you, analyze data, answer written questions, or parse your narrative to try and determine the specific records you are seeking. You can contact the FOIA Office before you submit your request for assistance in describing the records you are seeking. If we determine that your request does not reasonably describe the records sought, we will explain why we cannot process your request and ask for additional information. For example, we might ask you to clarify your request if you ask for all documents in a certain date range but do not include a specific subject matter, topic or personnel. We can help you reformulate or modify your request.

(c) *Form or format of responsive records.* You can specify the preferred form or format (including electronic

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formats) for the records you seek. We will try to accommodate your request if the record is readily reproducible in that form or format.

(d) *Contact information.* You must provide contact information, such as your phone number, email address, and mailing address, so we will be able to communicate with you about your request and provide released records. If we cannot contact you, or you do not respond within thirty calendar days to our requests for clarification, we will close your request.

§ 2004.4 How will we handle confidential commercial information?

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

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

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

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

(c) *When will we notify a submitter?* (1) We promptly will notify the submitter of confidential commercial information in writing whenever we receive a FOIA request or appeal for records containing such information if we determine that we may have to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under exemption 4 of the FOIA, 5 U.S.C. 552(b)(4); or

(ii) We have reason to believe that the requested information may be protected from disclosure exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), but have not yet determined whether the information is protected from disclosure under that exemption or any other applicable FOIA exemption.

(2) Our notice either will 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, we may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure without publicly disclosing the records, instead of sending individual notifications.

(3) We promptly will notify the submitter whenever a requester files a lawsuit seeking to compel the disclosure of the submitter's confidential commercial information.

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

(1) We determine that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has officially been 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, *Predisclosure notification procedures for confidential commercial information*; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, we will give the submitter written notice of any final decision to disclose the information and a reasonable time period within which to object to disclosure under paragraph (e) of this section.

(e) *How can a submitter object to disclosure?* (1) If a submitter has any objections to disclosure, it should provide to us within the period listed in the notice a detailed written statement that specifies all grounds for withholding the particular information under any FOIA exemption. In order to rely on exemption 4 as a basis for nondisclo-

sure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(2) A submitter who does not respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. We will not consider any information we receive after the date of any disclosure decision. Any information provided by the submitter under this section may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* We will consider the submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* We will notify the submitter whenever we decide to disclose information over the submitter's objection. Our written notice will include:

(1) A statement of the reasons why we did not sustain each of the submitter's disclosure objections;

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

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

(h) *When will we notify a requester?* We will notify the requester whenever we provide the submitter with notice and an opportunity to object to disclosure; whenever we notify the submitter of our intent to disclose the requested information; and whenever the submitter files a lawsuit to prevent the disclosure of the information.

§ 2004.5 Who is responsible for responding to your FOIA request?

(a) *In general.* The FOIA Office is authorized to grant or to deny any requests for agency records that USTR maintains. In determining which records are responsive to a request, we ordinarily will include only the agency records in our possession as of the date that we begin our search. We will notify you if we use any other date.

(b) *Consultation, referral and coordination.* If we believe that another Federal agency is better able to determine whether a record we locate in response

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to your request is exempt from disclosure under the FOIA, then we will proceed in one of the following ways:

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

(2) *Referral.* If we believe that a different Federal agency is best able to determine whether to disclose the record, we typically refer 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. Whenever we refer any part of the responsibility for responding to a request to another agency, we will notify you of the referral, including the name of the agency and that agency's FOIA contact information.

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

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for the record that is the subject of the coordination.

(c) *Classified information.* On receipt of any request involving classified information, we will determine whether the information is currently and properly classified. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another Federal agency, we will refer responsibility for responding to the request regarding that information to the agency that classified the information, or that 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), we will refer responsibility for responding to that portion of the request to the agency that classified the underlying information.

(d) *Timing of responses to consultations and referrals.* We will handle all consultations and referrals we receive according to the date that the first agency received the perfected FOIA request.

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

§ 2004.6 When will we respond to your FOIA request?

(a) *In general.* We ordinarily will respond to a request within twenty working days based on the order in which we receive the request. We may toll the twenty-day period if we need additional information from you in order to process the request or need to clarify fee assessment issues.

(b) *Multitrack processing.* We use a multitrack processing system that distinguishes between simple and more complex requests based on the estimated amount of work or time we need to process the request. Among the factors we consider are the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. We will tell you if we place your request into other than the simple track, and if appropriate, we will offer you an

opportunity to narrow or modify your request so that it can be placed in a different processing track.

(c) *Unusual circumstances*—(1) *What is an unusual circumstance?* We will notify you if we extend the twenty-day period for processing your request. The notice will include the unusual circumstances—the need to search for and collect the requested records from separate offices or facilities, a request that involves a voluminous amount of separate and distinct records, or the need for consultation, and the date by which we estimate we will complete processing your request. If the extension exceeds ten days, we will give you the opportunity to modify your request or arrange an alternative time period for processing the original or modified request. If you need assistance, you can contact our FOIA Public Liaison at FOIA@ustr.eop.gov, or OGIS at OGIS@nara.gov.

(2) *Aggregating requests.* We may aggregate requests if it reasonably appears that multiple requests submitted either by a single requester or by a group of requesters acting in concert, involve related matters and constitute a single request that otherwise would involve unusual circumstances. For example, we may aggregate multiple requests for similar information filed within a short period of time.

(d) *Expedited processing*—(1) *How do I request expedited processing?* When you submit your request or appeal, you can ask us to expedite processing. If you seek expedited processing, you must submit a statement, certified to be true and correct, explaining in detail the basis for your expedited processing request.

(2) *When will we grant expedited processing?* We will process requests and appeals on an expedited basis if we determine that:

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

(ii) With respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public about a specific actual or alleged Federal Government activity that is the subject of the

request or appeal that extends beyond the public's right to know about government activity generally.

(3) *When will we respond to your request for expedited processing?* We will notify you within ten calendar days of the receipt of a request for expedited processing of our decision whether to grant or deny expedited processing. If we grant your request, we will give your request or appeal priority, place it in the processing track for expedited requests, and process it as soon as practicable. If we deny your request, we will process any appeal of that decision expeditiously.

[81 FR 90717, Dec. 15, 2016, as amended at 88 FR 47772, July 25, 2023]

§ 2004.7 What will our response to your FOIA request include?

(a) *In general.* We will notify you in writing of our determination regarding your request. To the extent practicable, we will communicate with you electronically.

(b) *Acknowledgement of requests.* We will acknowledge your request in writing, including a brief description of the records you are seeking, and assign an individualized tracking number. If we think that we will be unable to make a determination on your request within twenty days, we will send an acknowledgment within ten days and we may ask you to clarify your request or arrange for a longer period for processing.

(c) *Granting requests.* If we decide to grant your request in full or in part, our response will include the records we are disclosing unless we have assessed fees under § 2004.9. If your request involves a voluminous amount of material or searches in multiple locations, we may provide interim responses, releasing the records on a rolling basis. If we assessed fees, we will disclose the records promptly upon payment. If you need assistance, you can contact our FOIA Public Liaison at FOIA@ustr.eop.gov, or OGIS at OGIS@nara.gov.

(d) *Adverse determinations of requests*—(1) *What is an adverse determination?* Adverse determinations, or denials of requests, include decisions that: the requested record is exempt in whole or in part; the request does not reasonably

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

(2) *Our response.* If we make an adverse determination denying your request in any respect, our response will include:

(i) The name and title or position of the person responsible for the determination;

(ii) A brief statement of the reasons for the denial, including any FOIA exemption(s) we applied;

(iii) An estimate of the volume of any records or information we 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;

(iv) Information about our FOIA Public Liaison and the dispute resolution services provided by OGIS; and

(iv) Your right to appeal our decision under § 2004.8.

(3) *Markings on released documents.* If technically feasible, we will clearly mark records that we are disclosing in part to indicate the location and 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.

[81 FR 89846, Dec. 13, 2016, as amended at 82 FR 18985, Apr. 25, 2017]

§ 2004.8 What can I do if I am dissatisfied with USTR's response to my FOIA request?

(a) *How do I make an appeal?*—(1) *What can I appeal?* You can appeal any adverse determination in writing to our FOIA Appeals Committee within ninety calendar days after the date of our response. Examples of adverse determinations are provided in § 2004.7(d).

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You should specify the records that are the subject of your appeal and explain why the Committee should sustain the appeal.

(2) *Where do I send my appeal?* To avoid mail delivery delays caused by heightened security, we strongly suggest that you email any appeal to FOIA@ustr.eop.gov. Our mailing address is: FOIA Office, Office of the United States Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW., Washington DC 20509. To make sure that the FOIA Office receives your appeal without delay, you should include the notation “Freedom of Information Act Appeal” and the individualized tracking number in the subject line of your email or on the front of your envelope and also at the beginning of your appeal.

(b) *Who will decide your appeal?* (1) The FOIA Appeals Committee or designee will act on all appeals under this section.

(2) We ordinarily will not adjudicate an appeal if the request becomes a matter of FOIA litigation.

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

(c) *Decisions on appeals.* The FOIA Appeals Committee will notify you of its appeal decision in writing within twenty days from the date it receives the appeal. A decision that upholds the FOIA Office’s determination in whole or in part will identify the reasons for the affirmance, including any FOIA exemptions applied, and notify you of your statutory right to seek judicial review. The notice also will inform you of the dispute resolution services offered by OGIS as a non-exclusive alternative to litigation. If the FOIA Appeals Committee remands or modifies the original response, the FOIA Office will further process the request in accordance with the appeal determination and will respond directly to you.

(d) *When appeal is required.* Before seeking review by a court of an adverse determination, you generally first must submit a timely administrative appeal under this section.

[81 FR 89846, Dec. 13, 2016, as amended at 82 FR 18985, Apr. 25, 2017]

Office of the United States Trade Representative**§ 2004.9****§ 2004.9 Fees.**

(a) *In general.* We will assess a fee to process your FOIA request in accordance with the provisions of this section and the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: Commercial use requesters, non-commercial scientific or educational institutions or news media requesters, and all other requesters. Different fees are assessed depending on the category. You can seek a fee waiver, which we will consider in accordance with the requirements in paragraph (h) of this section. We will contact you to resolve any fee issues that arise under this section. We will conduct searches, review and duplication in the most efficient and least expensive manner. We ordinarily will collect all applicable fees before sending copies of records to you. You must pay fees by check or money order made payable to the Treasury of the United States.

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

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

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

(3) *Duplication* is reproducing a copy of a record, or 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* is any school that operates a program of scholarly research. You must show that your FOIA request is made in connection with your role at the educational institution. We may seek verification that you are seeking the records to further scholarly research and not for a commercial use. To fall within this fee category, your request must serve the scholarly research goals of the institution rather than an individual research goal. We will advise you of your placement in this category.

Example 1. We would presume that a request from a professor of economics for records relating to the economic effects of a trade agreement, written on letterhead of the university's department of economics, is a request from an educational institution.

Example 2. We would not presume that a request from the same professor of economics seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing is a request from an educational institution, regardless of whether it was written on institutional stationery.

Example 3. We would presume that a request from a student in furtherance of their coursework or other school-sponsored activities evidenced by a course syllabus or other reasonable documentation indicating the research purpose for the request would qualify as part of this fee category.

(5) *Noncommercial scientific institution* is an institution that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry and not on a commercial basis, as defined in paragraph (b)(1) of this section. To fall within this fee category, you must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records you seek are to further scientific research and not for a commercial use. We will advise you of your placement in this category.

(6) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term "news"

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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. We will not consider a request for records supporting a news-dissemination function to be for a commercial use. We will consider freelance journalists who demonstrate a solid basis for expecting publication through a news media entity as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, we also may consider your past publication record in making this determination. We will advise you of your placement in this category.

(7) *Review* is the examination of a record located in response to a request in order to determine if any portion of it 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 redacting the record and marking the appropriate exemptions. Review costs are properly charged even if we ultimately do not disclose a record. Review time also includes time spent both obtaining and considering any formal objection to disclosure a confidential commercial information submitter makes under § 2004.4, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

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

(c) *Charging fees.* In responding to FOIA requests, we will charge the following fees unless we granted a waiver or reduction of fees under paragraph (h) of this section, or the total fee to be charged is less than \$25. If we do not

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meet the time limits for responding to your request, and if no unusual circumstance described in § 2004.6(c) applies, we will not assess fees.

(1) *Search.* (i) We will not assess any search fees for processing requests made by educational institutions, non-commercial scientific institutions, or representatives of the news media. For all other requesters, we will charge for time spent searching even if we do not locate any responsive records or if we determine that the records are entirely exempt from disclosure. We will provide two hours of free search time except for requesters seeking records for a commercial use.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, we will charge \$76/hour, which is a blended hourly rate for all personnel in the FOIA Office, plus 16 percent of that rate to cover benefits.

(iii) We will charge the direct costs if it is necessary to create a new computer program to locate the requested records. We will notify you of the costs associated with creating such a program, and you must agree to pay the associated costs before we build the program.

(iv) If your request requires the retrieval of records stored at a Federal records center, we will charge additional costs in accordance with the Transactional Billing Rate Schedule established by the National Archives and Records Administration.

(2) *Duplication.* We will charge duplication fees to all requesters. We will honor your preference for receiving a record in a particular form or format if we can readily reproduce it in the form or format requested. If we provide photocopies, we will make one copy per request at the cost of \$.10 per page. For copies of records produced on tapes, disks or other media, we will charge the direct costs of producing the copy, including operator time. Where we must scan paper documents in order to comply with your preference to receive the records in an electronic format, we will charge you the direct costs associated with scanning those materials. For other forms of duplication, we will charge the direct costs. We will provide

the first 100 pages of duplication (or the cost equivalent for other media) without charge except for requesters seeking records for a commercial use.

(3) *Review.* We will charge review fees to requesters who make commercial use requests. We will assess review fees in connection with the initial review of the record, *i.e.*, the review we conduct to determine if an exemption applies to a particular record or portion of a record. We will not charge for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed no longer to apply, any costs associated with re-review of the records in order to consider the use of other exemptions may be assessed as review fees. We will charge review fees at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Other charges—(1) Special services.* We will charge you the direct cost of providing any special services you request, such as sending records by express mail, certifying that records are true copies, or providing multiple copies of the same document.

(2) *Interest.* We may assess interest charges on any unpaid fees starting on the 31st day following the day on which we sent the bill to you at the rate prescribed in Interest and Penalty on Claims, 31 U.S.C. 3717.

(e) *Aggregating requests.* We may aggregate separate FOIA requests for the purpose of assessing fees when we reasonably believe that a requester or a group of requesters acting in concert, is dividing a request into a series of requests for the purpose of avoiding or minimizing fees. For example, we may aggregate multiple requests for similar information filed within a short period of time.

(f) *If we anticipate fees will exceed \$25.* Unless you have indicated in advance a willingness to pay fees as high as anticipated, we will notify you if we estimate that charges will exceed \$25 including a breakdown of the fees for search, review or duplication and whether applicable entitlements to duplication and search at no charge have been provided. We will advise you if we can readily estimate only a portion of the fee.

(1) We will not process your request until you either commit in writing to pay the actual or estimated total fee, or designate some amount of fees you are willing to pay. If you are a non-commercial use requester and we have not yet provided your statutory entitlements (*i.e.*, two hours of search time and 100 free pages), you can tell us to stop when we exhaust the statutory entitlements. We will start the twenty-day response clock when we receive your written reply.

(2) If you agree to pay some designated amount of fees, but we estimate that the total fee will exceed that amount, we will toll processing when we notify you of the estimated fees in excess of the amount you had indicated a willingness to pay. When we receive your written commitment to pay the actual or estimated total fee, or designate an additional amount of fees you are willing to pay, we will restart the processing clock.

(3) If you decide to reformulate your request to reduce costs, you can contact USTR's FOIA Public Liaison at *FOIA@ustr.eop.gov* for assistance.

(4) We will close your request if you do not respond in writing within thirty calendar days after the date we notify you of the fee estimate.

(g) *Advance payments.* (1) If we determine or estimate that the total fee will exceed \$250, we may require you to make an advance payment up to the amount of the entire anticipated fee before we begin to process your request.

(2) If you previously failed to pay a properly charged FOIA fee to any Federal agency within thirty calendar days of the billing date, we may require proof that you paid the full amount due, plus any applicable interest on that prior request, and that you make an advance payment to us of the full amount of any anticipated fee before we begin to process a new request or continue to process a pending request or any pending appeal. If we have a reasonable basis to believe that you have misrepresented your identity in order to avoid paying outstanding fees, we may require you to provide proof of identity.

(3) If we require advance payment, we will not consider your request received

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and will not do any additional work until we receive the required payment. We will close your request if you do not pay the advance payment within thirty calendar days after the date of our fee determination.

(4) Before we provide records in response to your request, we may collect payments you owe for work we already have completed.

(h) *Requirements for waiver or reduction of fees.* (1) You can seek a fee waiver or reduction by explaining in writing 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 your commercial interest. In determining whether to waive or reduce a fee we will consider whether disclosure of the requested information would:

(i) Shed light on the operations or activities of the government. The subject of the request must specifically concern identifiable operations or activities of the Federal government with a connection that is direct and clear, not remote or attenuated.

(ii) Likely contribute significantly to public understanding of those operations or activities. Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding. The disclosure must contribute to the understanding of a reasonably broad audience interested in the subject. We will consider your expertise in the subject area as well as your ability and intention to effectively convey information to the public.

(iii) Primarily advance your commercial interests. For example, we ordinarily presume that the public's interest is greater than the requester's commercial interest when we receive a request from a representative of the news media. We will not presume that disclosure to data brokers or others who merely compile and market government information for direct economic

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return primarily serves the public interest.

(2) We will grant a partial waiver when only some of the records to be released satisfy the requirements in this section.

(3) You should include your fee waiver or reduction request when you first submit your FOIA request to us. You can submit a fee waiver or reduction request at a later time so long as the underlying record request is pending or on administrative appeal. If you already committed to pay fees and subsequently request a waiver of those fees that we deny, you must pay any costs incurred up to the date the fee waiver request was received.

[81 FR 89846, Dec. 13, 2016, as amended at 82 FR 18986, Apr. 25, 2017]

Subpart C—Privacy Act Policies and Procedures

AUTHORITY: 5 U.S.C. 552a; 19 U.S.C. 2171(e)(3).

SOURCE: 82 FR 18986, Apr. 25, 2017, unless otherwise noted.

§ 2004.20 Definitions.

For purposes of this subpart:

Access means making a record available to a subject individual.

Amendment means any correction, addition to or deletion of information in a record.

Individual means a natural person who either is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence.

Maintain means to keep or hold and preserve in an existing state, and includes the terms collect, use, disseminate and control.

Privacy Act Office means the USTR officials who are authorized to respond to requests and to process requests for amendment of records USTR maintains under the Privacy Act.

Record means any item, collection or grouping of information about an individual that USTR maintains within a system of records and contains the individual's name or the identifying number, symbol or other identifying particular assigned to the individual,

such as a finger or voice print or photograph.

System of records means a group of records USTR maintains or controls from which information is retrieved by the name of an individual or by some identifying number, symbol or other identifying particular assigned to the individual. USTR publishes notices in the FEDERAL REGISTER announcing the creation, deletion or amendment of its systems of records. You can find a description of our systems of records on the USTR Web site: www.ustr.gov.

§ 2004.21 Purpose and scope.

(a) This subpart implements the Privacy Act, 5 U.S.C. 552a, a Federal law that requires Federal agencies to protect private information about individuals that the agencies collect or maintain. It establishes USTR's rules for access to records in systems of records we maintain that are retrieved by an individual's name or another personal identifier. It describes the procedures by which individuals may request access to records, request amendment or correction of those records, and request an accounting of disclosures of those records by USTR. Whenever it is appropriate to do so, USTR automatically processes a Privacy Act request for access to records under both the Privacy Act and the FOIA, following the rules contained in this subpart and subpart B of part 2004. USTR processes a request under both the Privacy Act and the FOIA so you will receive the maximum amount of information available to you by law.

(b) This subpart does not entitle you to any service or to the disclosure of any record to which you are not entitled under the Privacy Act. It also does not, and may not be relied upon to create any substantive or procedural right or benefit enforceable against USTR.

§ 2004.22 How do I make a Privacy Act request?

(a) *In general.* You can make a Privacy Act request on your own behalf for records or information about you. You also can make a request on behalf of another individual as the parent or guardian of a minor, or as the guardian of someone determined by a court to be incompetent. You may request access

to another individual's record or information if you have that individual's written consent, unless other conditions of disclosure apply.

(b) *How do I make a request?*—(1) *Where do I send my written request?* To make a request for access to a record, you should write directly to our Privacy Act Office. Heightened security delays mail delivery. To avoid mail delivery delays, we strongly suggest that you email your request to PRIVACY@ustr.eop.gov. Our mailing address is: Privacy Act Office, Office of the US Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW., Washington, DC 20509. To make sure that the Privacy Act Office receives your request without delay, you should include the notation 'Privacy Act Request' in the subject line of your email or on the front of your envelope and also at the beginning of your request.

(2) *Security concerns.* To protect our computer systems, we will not open attachments to emailed requests—you must include your request within the body of the email. We will not process email attachments.

(c) *What should my request include?* You must describe the record that you seek in enough detail to enable the Privacy Act Office to locate the system of records containing the record with a reasonable amount of effort. Include specific information about each record sought, such as the time period in which you believe it was compiled, the name or identifying number of each system of records in which you believe it is kept, and the date, title or name, author, recipient, or subject matter of the record. As a general rule, the more specific you are about the record that you seek, the more likely we will be able to locate it in response to your request.

(d) *How do I request amendment or correction of a record?* If you are requesting an amendment or correction of a USTR record, you must identify each particular record in question and the system of records in which the record is located, describe the amendment or correction that you seek, and state why you believe that the record is not accurate, relevant, timely or complete. You may submit any documentation

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that you think would be helpful, including an annotated copy of the record.

(e) *How do I request an accounting of record disclosures?* If you are requesting an accounting of disclosures made by USTR to another person, organization or Federal agency, you must identify each particular record in question. An accounting generally includes the date, nature and purpose of each disclosure, as well as the name and address of the person, organization, or Federal agency to which the disclosure was made.

(f) *Verification of identity.* When making a Privacy Act request, you must verify your identity in accordance with these procedures to protect your privacy or the privacy of the individual on whose behalf you are acting. If you make a Privacy Act request and you do not follow these identity verification procedures, USTR cannot process your request.

(1) *How do I verify my own identity?* You must state your full name, current address, and date and place of birth. In order to help identify and locate the records, you also may, at your option, include your Social Security number. To verify your own identity, you must provide an unsworn declaration under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury. To fulfill this requirement, you must include the following statement just before the signature on your request:

I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].

(2) *How do I verify parentage or guardianship?* If you make a request as the parent or guardian of a minor, or as the guardian of someone determined by a court to be incompetent, for access records or information about that individual, you must establish:

(i) The identity of the individual who is the subject of the record, by stating the individual's name, current address and date and place of birth, and, at your option, the Social Security number of the individual;

(ii) Your own identity, as required in paragraph (f)(1) of this section;

(iii) That you are the parent or guardian of the individual, which you may prove by providing a copy of the

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individual's birth certificate showing your parentage or a court order establishing your guardianship; and

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

§ 2004.23 How will USTR respond to my Privacy Act request?

(a) *When will we respond to your request?* We will search to determine if the requested records exist in a system of records USTR owns or controls. The Privacy Act Office will respond to you in writing within twenty days after we receive your request, if it meets the requirements of this subpart. We may extend the response time in unusual circumstances, such as the need to consult with another agency about a record or to retrieve a record shipped offsite for storage.

(b) *What will our response include?* Our written response will include our determination whether to grant or deny your request in whole or in part, a brief explanation of the reasons for the determination, and the amount of the fee charged, if any, under § 2004.25. If you requested access to records, we will make the records, if any, available to you. If you requested amendment or correction of a record, the response will describe any amendments or corrections made and advise you of your right to obtain a copy of the amended or corrected record.

(c) *Adverse determinations—(1) What is an adverse determination?* An adverse determination is a response to a Privacy Act request that:

(i) Withholds any requested record in whole or in part;

(ii) Denies a request to amend or correct a record in whole or in part;

(iii) Declines to provide an accounting of disclosures;

(iv) Advises that a requested record does not exist or cannot be located;

(v) Finds that what you requested is not a record subject to the Privacy Act; or

(vi) Advises on any disputed fee matter.

(2) *Responses that include an adverse determination.* If the Privacy Act Office makes an adverse determination with respect to your request, our written response will identify the person responsible for the adverse determination,

that the adverse determination is not a final agency action, and that you may appeal the adverse determination under § 2004.24.

§ 2004.24 What can I do if I am dissatisfied with USTR's response to my Privacy Act request?

(a) *What can I appeal?* You can appeal any adverse determination in writing to our Privacy Act Appeals Committee within thirty calendar days after the date of our response. We provide a list of adverse determinations in § 2004.23(c).

(b) *How do I make an appeal?*—(1) *What should I include?* You may appeal by submitting a written statement giving the reasons why you believe the Committee should overturn the adverse determination. Your written appeal may include as much or as little related information as you wish to provide, as long as it clearly identifies the determination (including the request number, if known) that you are appealing.

(2) *Where do I send my appeal?* You should mark both your letter and the envelope, or the subject of your email, “Privacy Act Appeal”. To avoid mail delivery delays caused by heightened security, we strongly suggest that you email any appeal to PRIVACY@ustr.eop.gov. Our mailing address is: Privacy Office, Office of the US Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW., Washington, DC 20509.

(c) *Who will decide your appeal?* (1) The Privacy Act Appeals Committee or designee will act on all appeals under this section.

(2) We ordinarily will not adjudicate an appeal if the request becomes a matter of litigation.

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

(d) *When will we respond to your appeal?* The Privacy Act Appeals Committee will notify you of its appeal decision in writing within thirty days from the date it receives an appeal that meets the requirements of paragraph (b) of this section. We may extend the

response time in unusual circumstances, such as the need to consult with another agency about a record or to retrieve a record shipped offsite for storage.

(e) *What will our response include?* The written response will include the Committee's determination whether to grant or deny your appeal in whole or in part, a brief explanation of the reasons for the determination, and information about the Privacy Act provisions for court review of the determination.

(1) *Appeals concerning access to records.* If your appeal concerns a request for access to records and the appeal is granted in whole or in part, we will make the records, if any, available to you.

(2) *Appeals concerning amendments or corrections.* If your appeal concerns amendment or correction of a record, the response will describe any amendment or correction made and advise you of your right to obtain a copy of the amended or corrected record. We will notify all persons, organizations or Federal agencies to which we previously disclosed the record, if an accounting of that disclosure was made, that the record has been amended or corrected. Whenever the record is subsequently disclosed, the record will be disclosed as amended or corrected. If our response denies your request for an amendment or correction to a record, we will advise you of your right to file a statement of disagreement under paragraph (f) of this section.

(f) *Statements of disagreement*—(1) *What is a statement of disagreement?* A statement of disagreement is a concise written statement in which you clearly identify each part of any record that you dispute and explain your reason(s) for disagreeing with our denial in whole or in part of your appeal requesting amendment or correction.

(2) *How do I file a statement of disagreement?* We must receive your statement of disagreement within thirty calendar days of our denial in whole or in part of your appeal concerning amendment or correction of a record.

(3) *What will we do with your statement of disagreement?* We will place your statement of disagreement in the system(s) of records in which the disputed

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record is maintained. We also may append a concise statement of our reason(s) for denying the request to amend or correct the record. Whenever the record is subsequently disclosed, the record will be disclosed along with your statement of disagreement and our explanation, if any.

(g) *When appeal is required.* Before seeking review by a court of an adverse determination or denial of a request, you generally first must submit a timely administrative appeal under this section.

§ 2004.25 What does it cost to get records under the Privacy Act?

(a) *Your request is an agreement to pay fees.* We consider your Privacy Act request as your agreement to pay all applicable fees unless you specify a limit on the amount of fees you agree to pay. We will not exceed the specified limit without your written agreement.

(b) *How do we calculate fees?* We will charge a fee for duplication of a record under the Privacy Act in the same way we charge for duplication of records under the FOIA in § 2004.9. There are no fees to search for or review records requested under the Privacy Act.

§ 2004.26 Are there any exemptions from the Privacy Act?

(a) *What is a Privacy Act exemption?* The Privacy Act authorizes USTR to exempt records or information in a system of records from some of the Privacy Act requirements, if we determine that the exemption is necessary. With the exception of certain law enforcement records, we will not provide you with an accounting of disclosures or make available to you records that are exempt.

(b) *How do I know if the records or information I want are exempt?* Each USTR system of records notice will advise you if we have determined that records or information in records are exempt from Privacy Act requirements. If we have claimed an exemption for a system of records, the system of records notice will identify the exemption and the provisions of the Privacy Act from which the system is exempt.

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§ 2004.27 How are records secured?

(a) *Controls.* USTR must establish administrative and physical controls to prevent unauthorized access to its systems of records, unauthorized or inadvertent disclosure of records, and physical damage to or destruction of records. The stringency of these controls corresponds to the sensitivity of the records that the controls protect. At a minimum, the administrative and physical controls must ensure that:

(1) Records are protected from public view;

(2) The area in which records are kept is supervised during business hours to prevent unauthorized persons from having access to them;

(3) Records are inaccessible to unauthorized persons outside of business hours; and

(4) Records are not disclosed to unauthorized persons or under unauthorized circumstances in either oral or written form.

(b) *Limited access.* Access to records is restricted only to individuals who require access in order to perform their official duties.

§ 2004.28 Use and collection of Social Security numbers.

We will collect Social Security numbers only when it is necessary and we are authorized to do so. At least annually, the Privacy Act Office will inform employees who are authorized to collect information that:

(a) Individuals may not be denied any right, benefit or privilege as a result of refusing to provide their Social Security numbers, unless the collection is authorized either by a statute or by a regulation issued prior to 1975; and

(b) They must inform individuals who are asked to provide their Social Security numbers:

(1) If providing a Social Security number is mandatory or voluntary;

(2) If any statutory or regulatory authority authorizes collection of a Social Security number; and

(3) The uses that will be made of the Social Security number.

§ 2004.29 Employee responsibilities under the Privacy Act.

At least annually, the Privacy Act Office will inform employees about the

provisions of the Privacy Act, including the Act's civil liability and criminal penalty provisions. Unless otherwise permitted by law, a USTR employee must:

- (a) Collect from individuals only information that is relevant and necessary to discharge USTR's responsibilities.
- (b) Collect information about an individual directly from that individual whenever practicable.
- (c) Inform each individual from whom information is collected of:
 - (1) The legal authority to collect the information and whether providing it is mandatory or voluntary;
 - (2) The principal purpose for which USTR intends to use the information;
 - (3) The routine uses, *i.e.*, disclosures of records and information contained in a system of records without the consent of the subject of the record, USTR may make; and
 - (4) The effects on the individual, if any, of not providing the information.
- (d) Ensure that the employee's office does not maintain a system of records without public notice and notify appropriate officials of the existence or development of any system of records that is not the subject of a current or planned public notice.
- (e) Maintain all records that are used in making any determination about an individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to ensure fairness to the individual in the determination.
- (f) Except for disclosures made to an agency or under the FOIA, make reasonable efforts, prior to disseminating any record about an individual, to ensure that the record is accurate, relevant, timely and complete.
- (g) When required by the Privacy Act, maintain an accounting in the specified form of all disclosures of records by USTR to persons, organizations or agencies.
- (h) Maintain and use records with care to prevent the unauthorized or inadvertent disclosure of a record to anyone.
- (i) Notify the appropriate official of any record that contains information that the Privacy Act does not permit USTR to maintain.

Subpart D—Production or Disclosure of USTR Records, Information and Employee Testimony in Legal Proceedings

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 2171(e)(3).

§ 2004.30 Purpose and scope.

(a) *Why are we issuing this rule?* This subpart establishes the procedures USTR will follow when any federal, state or local government court or other authority seeks production of USTR records or information, or testimony relating to an employee's official duties, in the context of a legal proceeding. Parties seeking records, information or testimony must comply with these requirements when submitting demands or requests to USTR.

(b) *What does this rule cover?* This subpart applies to demands or requests for records, information or testimony in legal proceedings in which USTR is not a named party. It does not apply to: Demands or requests for a USTR employee to testify as to facts or events that are unrelated to his or her official duties or to USTR's functions; FOIA or Privacy Act requests; or Congressional demands or requests for records or testimony.

(c) *Not a waiver.* (1) By providing these policies and procedures, USTR does not waive the sovereign immunity of the United States.

(2) The production of records, information or testimony pursuant to this subpart does not constitute a waiver by USTR of any privilege.

(d) This subpart provides guidance for USTR's internal operations and does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against USTR or the United States.

§ 2004.31 Definitions.

For purposes of this subpart:

Demand means a request, order, subpoena or other demand of a federal, state or local court or other authority for records, information or employee testimony in a legal proceeding in which USTR is not a named party.

Employee means any current or former employee or officer of USTR,

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including contractors, detailees, interns, and any individual who has served or is serving in any consulting or advisory capacity to USTR, whether formal or informal.

General Counsel means USTR's General Counsel or a person within USTR's Office of General Counsel to whom the General Counsel has delegated authority to act under this subpart.

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

Records or information means all documents and materials that are USTR agency records under the FOIA; any original or copy of a record or other property, no matter what media, contained in USTR files; and any other information or materials acquired by a USTR employee in the performance of his or her official duties or because of his or her official status.

Request means any informal request, by whatever method, in connection with a legal proceeding, seeking production of records, information or testimony that has not been ordered by a court or other competent authority.

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

§ 2004.32 Production prohibited unless approved.

(a) *Approval required.* An employee or any other person or entity in possession of records or information may not produce those records or information, or provide any testimony related to the records or information, in response to any demand or request without prior written approval from the General Counsel.

(b) *Penalties.* Any person or entity that fails to comply with this subpart may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. A current employee also may be subject to administrative or disciplinary proceedings.

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The General Counsel may grant an employee permission to testify regarding USTR matters and to produce records and information in response to a demand or request. Among the relevant factors the General Counsel may consider in making this determination are whether:

(a) The requested records, information or testimony are reasonable in scope, relevant and material to the pending action, and unavailable from other sources such as a non-USTR employee, or a USTR employee other than the employee named.

(b) Production of the records, information or testimony might result in USTR appearing to favor one litigant over another.

(c) USTR has an interest in the decision that may be rendered in the legal proceeding.

(d) Approving the demand or request would assist or hinder USTR in performing statutory duties or unduly burden USTR resources.

(e) The demand or request is unduly burdensome or otherwise inappropriate under the rules of discovery or procedure governing the case or matter in which the demand or request arose.

(f) Production of the records, information or testimony might violate or be inconsistent with a statute, Executive Order, regulation or other legal authority.

(g) Disclosure, including release in camera, is appropriate or necessary under the relevant substantive law concerning privilege.

(h) Disclosure, except when in camera and necessary to assert a claim of privilege, would reveal information properly classified or other matters exempt from unrestricted disclosure.

(i) Disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, or disclose trade secrets or similarly confidential commercial or financial information.

(j) Any other appropriate factor.

§ 2004.34 Submitting demands and requests.

(a) *Where do I send a demand or request?* To make a demand or request for records, information or testimony you should write directly to the General Counsel. Heightened security delays mail delivery. To avoid mail delivery delays, we strongly suggest that you email your demand or request to *TOUHY@ustr.eop.gov*. The mailing address is General Counsel, Office of the United States Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW., Washington, DC 20509. To ensure delivery, you should mark the subject line of your email or your envelope and letter “Touhy Request.”

(b) *When should I submit it?* You should submit your demand or request at least 45 calendar days in advance of the date on which the records, information or testimony is needed.

(c) *What must be included?* (1) A demand or request must include an affidavit or, if that is not feasible, a clear and concise statement by the party or his or her counsel summarizing the legal and factual issues in the proceeding and explaining how the records, information or testimony will contribute substantially to the resolution of one or more specifically identified issues.

(2) A demand or request for testimony also must include an estimate of the amount of time that the employee will need to devote to the process of testifying (including anticipated travel time and anticipated duration of round trip travel), plus a showing that no document or the testimony of non-USTR persons, including retained experts, could suffice in lieu of the employee’s testimony.

(d) *Limits.* The General Counsel will limit any authorization for testimony to the scope of the demand, and the scope of permissible production of records and information to that set forth in the written authorization.

(e) *Failure to meet requirements and exceptions.* USTR may oppose any demand or request that does not meet the requirements set forth in this subpart. The General Counsel may grant exceptions to the requirements in this subpart upon a showing of compelling

need, to promote a significant interest of USTR or the United States, or for other good cause.

§ 2004.35 Processing demands and requests.

(a) The General Counsel will review a request or demand to produce or disclose records, information or testimony and determine whether, or under what conditions, to authorize the employee to testify regarding USTR matters or produce records and information. The General Counsel will notify the requester of the final determination, the reasons for the grant or denial of the demand or request, and any conditions on disclosure.

(b) When necessary, the General Counsel will coordinate with the U.S. Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(c) The General Counsel will process demands and requests in the order in which they are received. Absent unusual circumstances and depending on the scope of the demand or request, the General Counsel will respond within 45 calendar days of the date USTR receives all information necessary to evaluate the demand or request.

§ 2004.36 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of USTR employees including, for example, limiting the scope of testimony or requiring the requester and other parties to the legal proceeding to agree that the testimony transcript will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel also may require a copy of the testimony transcript at the requester’s expense.

(b) USTR may offer the employee’s written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this subpart, an employee may testify as to relevant facts within his or her personal knowledge, but, unless specifically authorized to do so by the

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General Counsel, the employee must not:

- (1) Disclose classified, confidential or privileged information; or
- (2) For a current USTR employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or USTR's mission or functions, unless testimony is provided on behalf of the United States. A former employee can provide expert or opinion testimony where the testimony involves only general expertise gained while employed as a USTR employee.

§ 2004.37 Restrictions that apply to released records and information.

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

(b) If the General Counsel so determines, USTR may present original records for examination in response to a demand or request, but the records cannot be marked or altered or presented as evidence or otherwise used in a manner by which they could lose their status as original records. In lieu of original records, certified copies will be presented for evidentiary purposes. (See 28 U.S.C. 1733).

§ 2004.38 In the event of an adverse ruling.

(a) Notwithstanding USTR's rejection of a demand or request for records, information or testimony, if a court or other competent authority orders a USTR employee to comply with the demand, the employee promptly must notify the General Counsel of the order, and must respectfully decline to comply, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

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(b) To seek reconsideration of USTR's rejection of a demand or request, or of any restrictions on receiving records, information or testimony, a requester must send a petition for reconsideration in accordance with § 2004.34(a) within 10 days of the date of the determination. The petition must contain a clear and concise statement of the basis for the reconsideration with supporting authorities. Determinations about petitions for reconsideration are within the discretion of the United States Trade Representative or his/her designee, and are final.

(c) Pursuant to section 704 of the Administrative Procedure Act, 5 U.S.C. 704, a petition for reconsideration of a final determination under this section is a prerequisite to judicial review.

§ 2004.39 Fees.

(a) USTR may condition the production of records, information or an employee's appearance on advance payment of reasonable costs, which may include but are not limited to those associated with employee search time, copying, computer usage, and certifications.

(b) Witness fees will include fees, expenses and allowances prescribed by the rules applicable to the particular legal proceeding. If no fees are prescribed, USTR will base fees on the rule of the federal district court closest to the location where the witness will appear. Such fees may include but are not limited to time for preparation, travel and attendance at the legal proceeding.

PART 2006—PROCEDURES FOR FILING PETITIONS FOR ACTION UNDER SECTION 301 OF THE TRADE ACT OF 1974, AS AMENDED

Sec.

- 2006.0 Submission of petitions requesting action under section 301.
- 2006.1 Information to be included in petition.
- 2006.2 Adequacy of the petition.
- 2006.3 Determinations regarding petitions.
- 2006.4 Requests for information made to Foreign Governments or Instrumentalities.
- 2006.5 Consultations with the Foreign Government.