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given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the NMB must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The NMB will presume that when a news media requester has satisfied the factors in paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

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

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

§ 1208.7 Subpoenas and other requests for testimony and production of documents in legal proceedings where the NMB is not a party.

(a) In legal proceedings between private litigants, a subpoena or other demand for the production of records held by the Agency or for oral or written testimony of a current or former NMB employee should be addressed to the General Counsel, National Mediation Board, 1301 K Street NW., Suite 250E, Washington, DC 20005. No other official or employee of the NMB is authorized to accept service of a demand or subpoena on behalf of the Agency.

(b) No current or former employee may produce official records or information or provide testimony in response to a demand or subpoena unless authorized by the General Counsel.

(c) The General Counsel may grant an employee permission to testify or produce official records or information in response to a demand or subpoena. In making this determination, the General Counsel shall consider whether:

(1) Release of the requested records or testimony is prohibited under § 1208.5;

(2) The disclosure is appropriate under the rules of procedure governing the case or matter;

(3) The requested testimony or records are privileged under the relevant substantive law concerning privilege;

(4) Disclosure would violate a statute or regulation;

(5) Disclosure would reveal trade secrets without the owner's consent; and

(6) Allowing testimony or production of records would be in the best interest of the NMB or the United States.

PART 1209—PUBLIC OBSERVATION OF NATIONAL MEDIATION BOARD MEETINGS

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AUTHORITY: 5 U.S.C. 552(b)(g).

SOURCE: 42 FR 60739, Nov. 29, 1977, unless otherwise noted.

§ 1209.01 Scope and purpose.

(a) The provisions of this part are intended to implement the requirements of section 3(a) of the Government in the Sunshine Act, 5 U.S.C. 552b.

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(b) It is the policy of the National Mediation Board that the public is entitled to the fullest practicable information regarding its decisionmaking processes. It is the purpose of this part to provide the public with such information while protecting the rights of individuals and the ability of the agency to carry out its responsibilities.

§ 1209.02 Definitions.

For purposes of this part:

(a) The terms *Board* or *Agency* mean the National Mediation Board, a collegial body composed of three members appointed by the President with the advice and consent of the Senate.

(b) The term *meeting* means the deliberations of at least two members of the Board where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted or with respect to any information proposed to be withheld under by 5 U.S.C. 552b(d) or (e)/5 U.S.C. 552b(c).

§ 1209.03 Conduct of National Mediation Board business.

Members shall not jointly conduct or dispose of agency business other than in accordance with this part.

§ 1209.04 Open meetings.

Every portion of every Board meeting shall be open to public observation except as otherwise provided by § 1209.05 of this part.

§ 1209.05 Closing of meetings; reasons therefor.

(a) Except where the Board determines that the public interest requires otherwise, meetings, or portions thereof, shall not be open to public observation where the deliberations concern the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct or disposition by the Board of any matter involving a determination on the record after opportunity for a hearing, or any court proceeding collateral or ancillary thereto.

(b) Except where the Board determines that the public interest requires otherwise, the Board also may close meetings, or portions thereof, when the

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deliberations concern matters or information falling within the scope of 5 U.S.C. 552b (c)(1) (secret matters concerning national defense or foreign policy); (c)(2) (internal personnel rules and practices); (c)(3) (matters specifically exempted from disclosure by statute); (c)(4) (trade secrets and commercial or financial information obtained from a person and privileged or confidential); (c)(5) (matters of alleged criminal conduct or formal censure); (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy); (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes); or (c)(9)(B) (disclosure would significantly frustrate implementation of a proposed agency action).

§ 1209.06 Action necessary to close meetings; record of votes.

A meeting shall be closed to public observation under § 1209.05, only when a majority of the members of the Board who will participate in the meeting vote to take such action.

(a) When the meeting deliberations concern matters specified in § 1209.05(a), the Board members shall vote at the beginning of the meeting, or portion thereof, on whether to close such meeting, or portion thereof, to public observation, and on whether the public interest requires that a meeting which may properly be closed should nevertheless be open to public observation. A record of such vote, reflecting the vote of each member of the Board, shall be kept and made available to the public at the earliest practicable time.

(b) When the meeting deliberations concern matters specified in § 1209.05(b), the Board shall vote on whether to close such meeting, or portion thereof, to public observation, and on whether the public interest requires that a meeting which may properly be closed should nevertheless be open to public observation. The vote shall be taken at a time sufficient to permit inclusion of information concerning the open or closed status of the meeting in the public announcement thereof. A single vote may be taken with respect to a series of meetings at which the deliberations will concern the same particular matters where subsequent

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meetings in the series are scheduled to be held within one day after the vote is taken.

(c) Whenever any person whose interests may be directly affected by deliberations during a meeting, or a portion thereof, requests that the Board close that meeting, or portion thereof, to public observation for any of the reasons specified in 5 U.S.C. 552b(c)(5) (matters of alleged criminal conduct or formal censure), (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy), or (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes), the Board members participating in the meeting upon request of any one member of the Board, shall vote on whether to close such meeting, or any portion thereof, for that reason. A record of such vote, reflecting the vote of each member of the Board participating in the meeting, shall be kept and made available to the public within one day after the vote is taken.

(d) After public announcement of a meeting as provided in §1209.07 of this part, a meeting, or portion thereof, announced as closed may be opened or a meeting, or portion thereof, announced as open may be closed, only if a majority of the members of the Board who will participate in the meeting determine by a recorded vote that Board business so requires and that an earlier announcement of the change was not possible. The change made and the vote of each member on the change shall be announced publicly at the earliest practicable time.

(e) Before a meeting may be closed pursuant to §1209.05 the General Counsel of the Board shall certify that in his or her opinion the meeting may properly be closed to public observation. The certification shall set forth each applicable exemptive provision for such closing. The certification shall be retained by the agency and made publicly available as soon as practicable.

§ 1209.07 Notice of meetings; public announcement and publication.

(a) A public announcement setting forth the time, place and subject matter of meetings or portions thereof closed to public observation pursuant

to the provisions of §1209.05(a) of this part, shall be made at the earliest practicable time.

(b) Except for meetings closed to public observation pursuant to the provisions of §1209.05(a) of this part, the agency shall make public announcement of each meeting at least 7 days before the scheduled date of the meeting. The announcement shall specify the time, place and subject matter of the meeting, whether it is to be open to public observation or closed, and the name, address and phone number of an agency official designated to respond to requests for information about the meeting. The 7 day period for advance notice may be shortened only upon a determination by a majority of the members of the Board who will participate in the meeting that agency business requires that such meeting be called at an earlier date, in which event the public announcement shall be made at the earliest practicable time. A record of the vote to schedule a meeting at an earlier date shall be kept and made available to the public.

(c) Within one day after a vote to close a meeting, or any portion thereof, pursuant to the provisions of §1209.05(b) of this part, the agency shall make publicly available a full written explanation of its action closing the meeting, or portion thereof, together with a list of all persons expected to attend the meeting and their affiliation.

(d) If after a public announcement required by paragraph (b) of this section has been made, the time and place of the meeting are changed, a public announcement of such changes shall be made at the earliest practicable time. The subject matter of the meeting may be changed after public announcement thereof only if a majority of the members of the Board who will participate in the meeting determine that agency business so requires and that no earlier announcement of the change was possible. When such a change in subject matter is approved a public announcement of the change shall be made at the earliest practicable time. A record of the vote to change the subject matter of the meeting shall be kept and made available to the public.

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(e) All announcements or changes thereof issued pursuant to the provisions of paragraphs (b) and (d) of this section, or pursuant to the provisions of §1209.06(d), shall be submitted for publication in the FEDERAL REGISTER immediately following their release to the public.

(f) Announcement of meeting made pursuant to the provisions of this section shall be posted on a bulletin board maintained for such purpose at the Board's offices, 1425 K Street, NW., Washington, DC. Interested individuals or organizations may request the Chief of Staff, National Mediation Board, Washington, DC 20572 to place them on a mailing list for receipt of such announcements.

[42 FR 60739, Nov. 29, 1977, as amended at 64 FR 40287, July 26, 1999]

§ 1209.08 Transcripts, recordings or minutes of closed meetings; retention; public availability.

(a) For every meeting or portion thereof closed under the provisions of §1209.05, the presiding officer shall prepare a statement setting forth the time and place of the meeting and the persons present, which statement shall be retained by the agency. For each such meeting or portion thereof there also shall be maintained a complete transcript or electronic recording of the proceedings, except that for meetings closed pursuant to §1209.05(a) the Board may, in lieu of a transcript or electronic recording, maintain a set of minutes fully and accurately summarizing any action taken, the reason therefor and views thereof, documents considered, and the members' vote on each roll call vote.

(b) The agency shall maintain a complete verbatim transcript, a complete electronic recording, or a complete set of minutes for each meeting or portion thereof closed to public observation, for a period of at least one year after the close of the agency proceeding of which the meeting was a part, but in no event for a period of less than two years after such meeting.

(c) The agency shall make promptly available to the public copies of transcripts, electronic recordings or minutes maintained as provided in paragraphs (a) and (b) of this section, ex-

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cept to the extent the items therein contain information which the agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552b(c).

(d) Upon request in accordance with the provisions of this paragraph and except to the extent they contain information which the agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552b(c), copies of transcripts or minutes, or transcriptions of electronic recordings including the identification of speakers, shall be furnished subject to the payment of duplication costs in accordance with the schedule of fees set forth in §1208.06 of the Board's Rules, and the actual cost of transcription. Requests for copies of transcripts or minutes, or transcriptions of electronic recordings of Board meetings shall be directed to the Chief of Staff, National Mediation Board, Washington, DC 20572. Such requests shall reasonably identify the records sought and include a statement that whatever costs are involved in furnishing the records will be acceptable or, alternatively, that costs will be acceptable up to a specified amount. The Board may determine to require prepayment of such costs.

[42 FR 60739, Nov. 29, 1977, as amended at 64 FR 40287, July 26, 1999]

§ 1209.09 Requests for records under Freedom of Information Act.

Requests to review or obtain copies of agency records other than notices or records prepared under this part may be pursued in accordance with the Freedom of Information Act (5 U.S.C. 552). Part 1208 of the Board's Rules addresses the requisite procedures under that Act.

§ 1209.10 Capacity of public observers.

The public may attend open Board meetings for the sole purpose of observation. Observers may not participate in meetings unless expressly invited or otherwise interfere with the conduct and disposition of agency business. When a portion of a meeting is closed to the public, observers will leave the meeting room upon request to enable discussion of the exempt matter therein under consideration.

PARTS 1210-1299 [RESERVED]