

## § 1203.22

### § 1203.22 Enforcement of order.

(a) Any party may ask the Board to enforce a final order it has issued under this part. The request may be made by filing a petition for enforcement with the Office of the Clerk of the Board and by serving a copy of the petition on each party to the regulation review. The request may be filed in electronic form, provided the requirements of § 1201.14 are satisfied. The petition must include specific reasons why the petitioning party believes that there has been a failure to comply with the Board's order.

(b) The Board will take all action necessary to determine whether there has been compliance with its final order. If it determines that there has been a failure to comply with the order, it will take actions necessary to obtain compliance.

(c) Where appropriate, the Board may initiate the enforcement procedures described in 5 CFR 1201.183(c).

[54 FR 23632, June 2, 1989, as amended at 68 FR 59864, Oct. 20, 2003; 69 FR 57631, Sept. 27, 2004]

## PART 1204—AVAILABILITY OF OFFICIAL INFORMATION

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## 5 CFR Ch. II (1–1–23 Edition)

### Subpart A—Purpose and Scope

#### § 1204.1 Purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, by stating the procedures to follow when requesting information from the Board, and by stating the fees that will be charged for that information.

#### § 1204.2 Scope.

(a) For the purpose of this part, the term *record* and any other term used in reference to information includes any information that would be a Board record subject to the requirements of 5 U.S.C. 552 when maintained by the Board in any format including an electronic format. All written requests for information that are not processed under part 1205 of this chapter will be processed under this part. The Board may continue, without complying with this part, to furnish the public with the information it has furnished in the regular course of performing its official duties, unless furnishing the information would violate the Privacy Act of 1974, 5 U.S.C. 552a, or another law.

(b) When the subject of the record, or the subject's representative, requests a record from a Privacy Act system of records, as that term is defined by 5 U.S.C. 552a(a)(5), and the Board retrieves the record by the subject's name or other personal identifier, the Board will handle the request under the procedures and fees shown in part 1205 of this chapter. When a third party requests access to those records, without the written consent of the subject of the record, the Board will handle the request under this part.

(c) When a party to an appeal requests a copy of a tape recording, video tape, or transcript (if one has been prepared) of a hearing that the Board or a judge held under part 1201 or part 1209 of this chapter, the Board will handle the request under § 1201.53 of this chapter. When someone other than a party to the appeal makes this request, the Board will handle the request under this part.

(d) In accordance with 5 U.S.C. 552(a)(2), the Board's final opinions and orders (including concurring and dissenting opinions), those statements of

policy and interpretations adopted by the Board and that are not published in the FEDERAL REGISTER, administrative staff manuals and instructions to staff that affect a member of the public, and agency records processed and disclosed in response to a FOIA request that the Board determines have been or are likely to become the subject of additional requests for basically the same records and a general index of those records, are available for public review and copying in the Board's Headquarters' Library, 1615 M Street, NW., Washington, DC 20419-0001, and on the Board's World Wide Web site at <http://www.mspb.gov>.

[64 FR 51039, Sept. 21, 1999, as amended at 65 FR 48885, Aug. 10, 2000]

## Subpart B—Procedures for Obtaining Records Under the Freedom of Information Act

### § 1204.11 Request for access to Board records.

(a) *Sending a request.* A person may request a Board record under this part by writing to the office that has the record. If the requester believes that the records are located in a regional or field office, the request must be sent to that office. A list of the addresses of the Board's regional and field offices are in appendix II of part 1201 of this chapter and on the Board's World Wide Web site at <http://www.mspb.gov>. Other requests must be sent to the Clerk of the Board, 1615 M Street, NW., Washington, DC 20419-0001. Requests sent under this part must be clearly marked "Freedom of Information Act Request" on both the envelope and the request.

(b) *Description.* A request must describe the records wanted in enough detail for Board employees to locate the records with no more than a reasonable effort. Wherever possible, a request must include specific information about each record, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if the request asks for records on cases decided by the Board, it must show the title of the case, the MSPB docket number, and the date of the decision.

(c) *Time limits and decisions.* If a request is not properly labeled or is sent to the wrong office, the time for processing the request will begin when the proper office receives it. Requests to the Board's headquarters will be decided by the Clerk of the Board. Requests to one of the regional or field offices will be decided by the Regional Director or Chief Administrative Judge. The Board will decide a request within 20 workdays after the appropriate office receives it, except under the conditions that follow.

(1) *Extension of time.* If "unusual circumstances" exist, the Board may extend the time for deciding the request by no more than 10 additional workdays. An example of unusual circumstances could be the need to find and retrieve records from regional or field offices or from federal records centers or the need to search, collect and or examine a large number of records which are demanded in a single request, or the need to talk to another agency with a substantial interest in the determination of the request. When the Board extends the time to decide the request, it will inform the requester in writing and describe the "unusual circumstances", and it will state a date on which a decision on the request will be made. If the "unusual circumstances" are such that the Board cannot comply with the request within the time limit, the Board will offer the requester an opportunity:

(i) To limit the request so that it may be processed within the time limit, or

(ii) To arrange with the Board a different time frame for processing the request or a changed request.

(2) *Expedited processing.* Where a requester shows a "compelling need" and in other cases determined by the Board, a decision whether to provide expedited processing of a request and notification of that decision to the requester will be made within 10 workdays of the date of the request. An example of a compelling need could be that a failure to obtain the records expeditiously could reasonably be expected to be a threat to the life or physical safety of a person or that there is urgency to inform the public

about actual or alleged Federal Government activity by a person primarily engaged in distributing information. Where the Board approves expeditious processing, the Board will process the request within 5 workdays from the date of the decision to grant the expeditious processing. If, in order to fully satisfy the request, the Board requires the standard or additional processing time, or if it decides that good cause for expedited processing has not been made, it will provide written notice of its decision to the requester and will inform the requester of the right to administrative and court review of the decision. A showing of a compelling need must be made by a statement certified to be true to the best of the requester's knowledge and belief.

[64 FR 51039, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

#### § 1204.12 Fees.

(a) *General.* The Board will charge the requester fees for services provided in processing requests for information. Those fees will be charged according to the schedule in paragraph (d) of this section, and will recover the full allowable direct costs that the Board incurs. Fees may be charged for time spent searching for information, even if the Board fails to locate responsive records, and even if it determines that the information is exempt from disclosure.

(b) *Definitions.* (1) The term *direct costs* means the costs to an agency for searching for and copying (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of each employee performing work at the rate of \$5 per quarter hour. Overhead expenses, such as costs of space and of heating or lighting the facility in which the records are stored, are not included in direct costs.

(2) The term *search*, as defined by 5 U.S.C. 552(a)(3)(D), means either manual or automated review of Board records to locate those records asked for, and includes all time spent looking for material in response to a request, including page-by-page or line-by-line identification of material within documents. Searches will be done in the

most efficient and least expensive way to limit costs for both the Board and the requester. Searches may be done manually or by computer using existing programming. The Board will make a reasonable effort to search for the records in electronic form or format, except when such effort would interfere to a large extent with the operation of the Board's automated information system.

(3) The term *duplication* means the process of copying a document or electronically maintained information in response to a FOIA request. Copies can take the form of paper, microfilm, audio-visual materials, or machine-readable documentation (e.g., magnetic tape or disk), among others. The copy provided will be in a form or format requested if the record is readily reproducible by the Board in that form or format. The Board will make a reasonable effort to maintain its records in forms or formats that are reproducible.

(4) The term *review* includes the process of examining documents to determine whether any portion of them may be exempt from disclosure under the FOIA, when the documents have been located in response to a request that is for a commercial use. The term also includes processing any documents for disclosure, e.g., doing all that is necessary to edit them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues.

(5) The term *commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In deciding whether a requester properly belongs in this category, the Board will decide the use the requester will make of the documents requested. Also, where the Board has reasonable cause to doubt the use a requester will make of the records requested, or where that use is not clear from the request, the Board will seek additional clarification before assigning the request to a specific category.

(6) The term *educational institution* means a preschool, a public or private elementary or secondary school, an institution of graduate higher education,

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an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that operates a program or programs of scholarly research.

(7) The term *noncommercial scientific institution* means an institution that is not operated on a “commercial” basis as that term is used above, and that is operated solely for the purpose of conducting scientific research whose results are not intended to promote any particular product or industry.

(8) The term *representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that concerns current events or that would be of current interest to the public.

(c) *Categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and noncommercial scientific institutions; representatives of the news media; and all other requesters. To be included in the category of educational and noncommercial scientific institutions, requesters must show that the request is authorized by a qualifying institution and that they are seeking the records not for a commercial use, but to further scholarly or scientific research. To be included in the news media category, a requester must meet the definition in paragraph (b)(8) of this section and the request must not be made for a commercial use. To avoid commercial use charges, requesters must show that they should be included in a category or categories other than that of commercial use requesters. The Board will decide the categories to place requesters for fee purposes. It will make these determinations based on information given by the requesters and information otherwise known to the Board.

(d) The Board will not charge a requester if the fee for any request is less than \$100 (the cost to the Board of processing and collecting the fee).

(1) When the Board receives a request:

(i) From a commercial use requester, it will charge fees that recover the full direct costs for searching for the infor-

mation requested, reviewing it for release at the initial request stage, reviewing it after an appeal to determine whether other exemptions not considered before the appeal apply to it, and copying it.

(ii) From an educational and noncommercial scientific institution or, to the extent copying exceeds 100 pages, from a representative of the news media, it will charge fees only for the cost of copying the requested information.

(iii) From all other requesters, to the extent copying exceeds 100 pages and search time exceeds 2 hours, it will charge fees for the full direct cost of searching for and copying requested records.

(2) When the Board reasonably believes that a requester or group of requesters is attempting to divide a request into more than one request to avoid payment of fees, the Board will combine the requests and charge fees accordingly. The Board will not combine multiple requests on unrelated subjects from one requester.

(3) When the Board decides that charges for a request are likely to exceed \$250, the Board will require the requester to pay the entire fee in advance before continuing to process the request.

(4) When a requester has an outstanding fee charge or has not paid a fee on time, the Board will require the requester to pay the full amount of the estimated fee in advance before the Board begins to process a new or pending request from that requester, and before it applies administrative time limits for making a decision on the new or pending request.

(e) *Fee schedule.* (1) Fees for document searches for records will be charged at a rate of \$5 per quarter hour spent by each Board employee performing the search.

(2) Fees for computer searches for records will be \$5 per quarter hour spent by each employee operating the computer equipment and/or developing a new inquiry or report.

(3) Fees for review at the initial administrative level to determine whether records or portions of records are exempt from disclosure, and for review after an appeal to determine whether

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the records are exempt on other legal grounds, will be charged, for commercial use requests, at a rate of \$5 per quarter hour spent by each reviewing employee.

(4) Fees for photocopying records is 20 cents a page, the fee for copying audio tapes is the direct cost up to \$15 per cassette tape; the fee for copying video tapes is the direct cost up to \$20 per tape; and the fee for computer printouts is 10 cents a page. The fee for duplication of electronically maintained information in the requester's preferred format will be \$21 for copying computer tapes and \$4 for copying records on computer diskettes, if it is feasible for the Board to reproduce records in the format requested. Fees for certified copies of the Board's records will include a \$4 per page charge for each page displaying the Board's seal and certification. When the Board estimates that copying costs will exceed \$100, it will notify the requester of the estimated amount unless the requester has indicated in advance a willingness to pay an equal or higher amount.

(f) *Fee waivers.* (1) Upon request, the Clerk of the Board, Regional Director, or Chief Administrative Judge, as appropriate, will furnish information without charge or at reduced rates if it is established that disclosure "is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." This decision will be based on:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(ii) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(iii) Whether disclosure of the requested information is likely to contribute to public understanding of the subject of the disclosure; and

(iv) The significance of the contribution the disclosure would make to public understanding of government operations or activities.

(2) If information is to be furnished without charge or at reduced rates, the

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requester must also establish that disclosure of the information is not primarily in the commercial interest of the requester. This decision will be based on:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so,

(ii) Whether the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(3) The requester must establish eligibility for a waiver of fees or for reduced fees. The denial of a request for waiver of fees may be appealed under subpart C of this part.

### § 1204.13 Denials.

(a) The Board may deny: A request for reduced fees or waiver of fees; a request for a record, either in whole or in part; a request for expeditious processing based on the requester's compelling need; or a request that records be released in a specific electronic format. The denial will be in writing, will state the reasons, and will notify the requester of the right to appeal.

(b) If the Board applies one or more of the exemptions provided under the FOIA to deny access to some or all of the information requested, it will respond in writing, identifying for the requester the specific exemption(s), providing an explanation as to why the exemption(s) to withhold the requested information must be applied, and providing an estimate of the amount of material that has been denied to the requester, unless providing such an estimate would harm an interest protected by the exemptions.

(c) The amount of information deleted will be indicated on the released portion of the record at the place in the record where the deletion is made, if technically feasible and unless the indication would harm an interest protected by the exemption under which the deletion is made.

### § 1204.14 Requests for access to confidential commercial information.

(a) *General.* Confidential commercial information provided to the Board by a

business submitter will not be disclosed in response to a FOIA request except as required by this section.

(b) *Definitions.* (1) The term *confidential commercial information* means records provided to the government by a submitter that are believed to contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) The term *submitter* means any person or organization that provides confidential commercial information to the government. The term *submitter* includes, but is not limited to, corporations, state governments, and foreign governments.

(c) *Notice to business submitters.* The Board will provide a business submitter with prompt written notice of a request for its confidential commercial information whenever such written notice is required under paragraph (d) of this section. Exceptions to such written notice are at paragraph (h) of this section. This written notice will either describe the exact nature of the confidential information requested or provide copies of the records or parts of records containing the commercial information.

(d) *When initial notice is required.* (1) With respect to confidential commercial information received by the Board before January 1, 1988, the Board will give the business submitter notice of a request whenever:

(i) The information is less than 10 years old; or

(ii) The Board has reason to believe that releasing the information could reasonably be expected to cause substantial competitive harm.

(2) With respect to confidential commercial information received by the Board on or after January 1, 1988, the Board will give notice to the business submitter whenever:

(i) The business submitter has designated the information in good faith as commercially or financially sensitive information; or

(ii) The Board has reason to believe that releasing the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for commercially confidential information that was received by January 1, 1988, is required for a period of not more than 10 years after the date on which the information is submitted unless the business submitter requests, and provides justification for, a longer specific notice period. Whenever possible, the submitter's claim of confidentiality must be supported by a statement or certification, by an officer or authorized representative of the company, that the information in question is confidential commercial information and has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, the Board will give a business submitter a reasonable period to provide a detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act. In addition, in the case of Exemption 4, the statement must state why the information is considered to be a trade secret, or to be commercial or financial information that is privileged or confidential. Information a business submitter provides under this paragraph may itself be subject to disclosure under the Freedom of Information Act.

(f) *Notice of intent to release information.* The Board will consider carefully a business submitter's objections and specific grounds for claiming that the information should not be released before determining whether to release confidential commercial information. Whenever the Board decides to release confidential commercial information over the objection of a business submitter, it will forward to the business submitter a written notice that includes:

(1) A statement of the reasons for which the business submitter's objections to the release were not sufficient;

(2) A description of the confidential commercial information to be released; and

(3) *A specified release date.* The Board will forward the notice of intent to release the information a reasonable number of days, as circumstances permit, before the specified date upon

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which release is expected. It will forward a copy of the release notice to the requester at the same time.

(g) *Notice of Freedom of Information Act lawsuit.* Whenever a requester files a lawsuit seeking to require release of business information covered by paragraph (d) of this section, the Board will notify the business submitter promptly.

(h) *Exceptions to notice requirements.* The notice requirements of this section do not apply when:

(1) The Board decides that the information should not be released;

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

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The disclosure is required by an agency rule that:

(i) Was adopted after notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the FOIA; or

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification, at the time the information is submitted or a reasonable time thereafter, that release of the information could reasonably be expected to cause substantial competitive harm.

(5) The information requested is not designated by the submitter as exempt from release according to agency regulations issued under this section, when the submitter has an opportunity to do so at the time of sending the information or a reasonable time thereafter, unless the agency has good reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter according to Board regulations appears obviously frivolous; except that, in such case, the Board must provide the submitter with written notice of any final administrative release decision within a reasonable period before the stated release date.

## § 1204.15 Records of other agencies.

Requests for Board records that were created by another agency may, in ap-

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propriate circumstances, be referred to that agency for discussion or processing. In these instances, the Board will notify the requester.

## Subpart C—Appeals

### § 1204.21 Submission.

(a) A person may appeal the following actions, or failure to act by the Clerk of the Board, a Regional Director, or Chief Administrative Judge:

(1) A denial of access to agency records;

(2) A denial of a request for a waiver or reduced fees;

(3) A decision that it is technically not possible to reproduce electronically maintained information in the requester's preferred format;

(4) A denial of a request for expedited processing of information under this part; or

(5) A failure to decide a request for expedited processing within 10 workdays from the date of the request.

(b) Appeals must be filed with the Chairman, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419–0001 within 10 workdays from the date of the denial. Any appeal must include a copy of the initial request, a copy of the letter denying the request, and a statement of the reasons why the requester believes the denying employee erred.

[64 FR 51039, Sept. 21, 1999, as amended at 65 FR 48886, Aug. 10, 2000]

### § 1204.22 Decision on appeal.

A decision on an appeal will be made within 20 workdays after the appeal is received. A decision not to provide expeditious processing of a request will be made within 15 workdays after the appeal is received. The decision will be in writing and will contain the reasons for the decision and information about the appellant's right to seek court review of the denial.

## PART 1205—PRIVACY ACT REGULATIONS

### Subpart A—General Provisions

Sec.

1205.1 Purpose.

1205.2 Policy and scope.