

**PART 1631—AVAILABILITY OF
RECORDS**

**Subpart A—Production or Disclosure of
Records Under the Freedom of Infor-
mation Act, 5 U.S.C. 552**

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Subpart A—Production or Disclosure of Records Under the Freedom of Information Act, 5 U.S.C. 552

AUTHORITY: 5 U.S.C. 552.

§ 1631.1 Definitions.

(a) *Board* means the Federal Retirement Thrift Investment Board.

(b) *Agency* means agency as defined in 5 U.S.C. 552(e).

(c) *Executive Director* means the Executive Director of the Federal Retirement Thrift Investment Board, as defined in 5 U.S.C. 8401(13) and as further described in 5 U.S.C. 8474.

(d) *FOIA* means Freedom of Information Act, 5 U.S.C. 552, as amended.

(e) *FOIA Officer* means the Board's General Counsel or his or her designee.

(f) *General Counsel* means the General Counsel of the Federal Retirement Thrift Investment Board.

(g) *Working days* or *workdays* means those days when the Board is open for the conduct of Government business, and does not include Saturdays, Sundays, and Federal holidays.

(h) *Requester* means a person making a FOIA request.

(i) *Submitter* means any person or entity which provides confidential commercial information to the Board. The term includes, but is not limited to, corporations, state governments, and foreign governments.

(j) *FOIA Public Liaison* means the Board official who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(k) *Requestor category* means one of the three categories that agencies place requesters in for the purpose of determining whether a requester will be charged fees for search, review, and/or duplication, including:

- (1) Commercial use requestors,
- (2) Non-commercial scientific or educational institutions or news media requestors, and
- (3) All other requestors.

(1) *Fee waiver* means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied including that the information is in the public interest and is not requested for a commercial interest.

[55 FR 41052, Oct. 9, 1990, as amended at 79 FR 68094, Nov. 14, 2014; 82 FR 24826, May 31, 2017]

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§ 1631.2 Purpose and scope.

This subpart contains the regulations of the Federal Retirement Thrift Investment Board, implementing 5 U.S.C. 552. The regulations of this subpart describe the procedures by which records may be obtained from all organizational units within the Board and from its recordkeeper. Official records of the Board, except those already published in bulk by the Board, available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public only as prescribed by this subpart. To the extent that it is not prohibited by other laws the Board also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the interest of the Thrift Savings Plan.

§ 1631.3 Organization and functions.

(a) The Federal Retirement Thrift Investment Board was established by the Federal Employees' Retirement System Act of 1986 (Pub. L. 99-335, 5 U.S.C. 8401 et seq.). Its primary function is to manage and invest the Thrift Savings Fund for the exclusive benefit of its participants (e.g., participating Federal employees, Federal judges, and Members of Congress). The Board is responsible for investment of the assets of the Thrift Savings Fund and the management of the Thrift Savings Plan. The Board consists of:

- (1) The five part-time members who serve on the Board;
- (2) The Office of the Executive Director;
- (3) The Office of Participant Services;
- (4) The Office of General Counsel;
- (5) The Office of Investments;
- (6) The Office of Communications and Education;
- (7) The Office of Planning and Risk;
- (8) The Office of External Affairs;
- (9) The Office of Chief Financial Officer;
- (10) The Office of Resource Management; and
- (11) The Office of Technology Services.

(b) The Board has no field organization; however, it provides for its recordkeeping responsibility by contract or interagency agreement. The recordkeeper may be located outside of the

Washington, DC area. Thrift Savings Plan records maintained for the Board by its recordkeeper are Board records subject to these regulations. Board offices are presently located at 77 K Street, NE., Suite 1000, Washington, DC 20002.

[55 FR 41052, Oct. 9, 1990, as amended at 59 FR 55331, Nov. 7, 1994; 77 FR 11384, Feb. 27, 2012; 79 FR 68094, Nov. 14, 2014; 87 FR 31680, May 24, 2022]

§ 1631.4 Proactive disclosure of Board records.

(a) Records that are required by the FOIA to be made available for public inspection and copying may be accessed through the Board's Web site at <https://www.frtib.gov>. The Board is responsible for determining which of its records are required to be made publicly available, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The Board shall ensure that its Web site of posted records and indices is reviewed and updated on an ongoing basis. The Board has a FOIA Public Liaison who can assist individuals in locating records particular to a component. The FOIA Public Liaison can be contacted at frtibfoialiaison@tsp.gov.

(b) The FOIA Officer shall maintain an index of Board regulations, directives, bulletins, and published materials.

(c) The FOIA officer shall also maintain a file open to the public, which shall contain copies of all grants or denials of FOIA requests, appeals, and appeal decisions by the Executive Director. The materials shall be filed by chronological number of request within each calendar year, indexed according to the exceptions asserted, and, to the extent feasible, indexed according to the type of records requested.

[55 FR 41052, Oct. 9, 1990, as amended at 59 FR 55331, 55332, Nov. 7, 1994; 63 FR 41708, Aug. 5, 1998; 77 FR 11384, Feb. 27, 2012; 79 FR 68094, Nov. 14, 2014; 82 FR 24826, May 31, 2017]

§ 1631.5 Records of other agencies.

Requests for records that originated in another agency and that are in the custody of the Board may, in appropriate circumstances, be referred to

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that agency for consultation or processing, and the requestor shall be notified of the part or parts of the request that have been referred and provided with a point of contact within the receiving agency.

[82 FR 24826, May 31, 2017]

§ 1631.6 How to request records—form and content.

(a) A request made under the FOIA may be submitted by one of the following methods:

(1) In writing addressed to FOIA Officer, Federal Retirement Thrift Investment Board, 77 K Street NE., Suite 1000, Washington, DC 20002. The words “FOIA Request” should be clearly marked on both the letter and the envelope.

(2) By electronic mail at *FOIAREQUEST@tsp.gov*. The subject should include the words “FOIA Request.”

(3) By facsimile, Attn: FOIA Officer, at 202-942-1676. The facsimile should be clearly marked with the words “FOIA Request.”

(b) Each request must reasonably describe the record(s) sought, including, when known: Entity/individual originating the record, date, subject matter, type of document, location, and any other pertinent information which would assist in promptly locating the record(s). Each request should also describe the type of entity the requester is for fee purposes. See § 1631.11.

(c) When a request is not considered reasonably descriptive, or requires the production of voluminous records, or places an extraordinary burden on the Board, seriously interfering with its normal functioning to the detriment of the Thrift Savings Plan, the Board may require the person or agent making the FOIA request to confer with a Board representative in order to attempt to verify, and, if possible, narrow the scope of the request.

(d) Upon initial receipt of the FOIA request, the FOIA Officer will determine which official or officials within the Board shall have the primary responsibility for collecting and reviewing the requested information and drafting a proposed response.

(e) Any Board employee or official who receives a FOIA request shall

promptly forward it to the FOIA Officer, at the above address. Any Board employee or official who receives an oral request for records shall inform the requestor that FOIA requires requests to be in writing according to the procedures set out herein.

(f) When a person requesting expedited access to records has demonstrated a compelling need, or when the Board has determined that it is appropriate to expedite its response, the Board will process the request ahead of other requests.

(g) To demonstrate compelling need in accordance with paragraph (f) of this section, the requester must submit a written statement that contains a certification that the information provided therein is true and accurate to the best of the requester’s knowledge and belief. The statement must demonstrate that:

(1) The failure to obtain the record on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) The requester is a person primarily engaged in the dissemination of information, and there is an urgent need to inform the public concerning an actual or alleged Federal Government activity that is the subject of the request.

[55 FR 41052, Oct. 9, 1990, as amended at 59 FR 55331, Nov. 7, 1994; 63 FR 41708, Aug. 5, 1998; 77 FR 11384, Feb. 27, 2012; 77 FR 61229, Oct. 9, 2012; 82 FR 24826, May 31, 2017]

§ 1631.7 Initial determination.

The FOIA Officer shall have the authority to approve or deny requests received pursuant to these regulations. The decision of the FOIA Officer shall be final, subject only to administrative review as provided in § 1631.10.

§ 1631.8 Prompt response.

(a)(1) When the FOIA Officer receives a request for expedited processing, he or she will determine within 10 work days whether to process the request on an expedited basis.

(2) When the FOIA Officer receives a request for records which he or she, in good faith, believes is not reasonably descriptive, he or she will so advise the requester within 5 work days. The time

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limit for processing such a request will not begin until receipt of a request that reasonably describes the records being sought.

(b) The FOIA Officer will either approve or deny a reasonably descriptive request for records within 20 workdays after receipt of the request. Whenever the Board cannot meet the statutory time limit for processing a request because of “unusual circumstances,” as defined in the FOIA, and the Board extends the time limit on that basis, the Board must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which the Board estimates processing of the request will be completed. Where the extension exceeds 10 working days, the Board must, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request through the Board’s FOIA Public Liaison or FOIA Officer.

(c) When additional time is required for one of the reasons stated in paragraph (b) of this section, the FOIA Officer will extend this time period for an additional 10 work days by written notice to the requester. If the Board will be unable to process the request within this additional time period, the requester will be notified and given the opportunity to—

(1) Limit the scope of the request; or

(2) Arrange with the FOIA Officer an alternative time frame for processing the request.

[63 FR 41708, Aug. 5, 1998, as amended at 82 FR 24826, May 31, 2017]

§ 1631.9 Responses—form and content.

(a) When a requested record has been identified and is available, the FOIA officer shall notify the person making the request as to where and when the record is available for inspection or that copies will be made available. The notification shall also provide the requester with an estimated amount of fees assessed under § 1631.13 of this part, including a breakdown of the fees for search, review, and/or duplication.

(b) A denial or partial denial of a request for a record shall be in writing

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signed by the FOIA Officer and shall include:

(1) The name and title of the person making the determination;

(2) A statement of fees assessed, if any; and

(3) A reference to the specific exemption under the FOIA authorizing the withholding of the record, and a brief explanation of how the exemption applies to the record withheld; or

(4) If appropriate, a statement that, after diligent effort, the requested records have not been found or have not been adequately examined during the time allowed by § 1631.8, and that the denial will be reconsidered as soon as the search or examination is complete; and

(5) A statement that the denial may be appealed to the Executive Director within 90 calendar days of receipt of the denial or partial denial, that the requestor has the option to contact the Agency’s FOIA Liaison at frtibfoialiaison@tsp.gov, and that the requestor has the option to contact the Office of Government Information Service (OGIS) as a non-exclusive alternative to litigation.

(c) If, after diligent effort, existing requested records have not been found, or are known to have been destroyed or otherwise disposed of, the FOIA Officer shall so notify the requester.

[55 FR 41052, Oct. 9, 1990, as amended at 79 FR 68094, Nov. 14, 2014; 82 FR 24827, May 31, 2017]

§ 1631.10 Appeals to the Executive Director from initial denials.

(a) A requestor may appeal any adverse determinations to the Executive Director. The appeal must be made in writing and for it to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days of receipt of the denial or partial denial. The appeal should be addressed to the Executive Director, Federal Retirement Thrift Investment Board, 77 K Street NE., Suite 1000, Washington, DC 20002, and should be clearly labeled as a “Freedom of Information Act Appeal.”

(b)(1) The Executive Director will act upon the appeal of a denial of a request for expedited processing within 5 work days of its receipt.

(2) The Executive Director will act upon the appeal of a denial of a request for records within 20 work days of its receipt.

(c) The Executive Director will decide the appeal in writing and mail the decision to the requester.

(d) If the appeal concerns an expedited processing request and the decision is in favor of the person making the request, the Executive Director will order that the request be processed on an expedited basis. If the decision concerning a request for records is in favor of the requester, the Executive Director will order that the subject records be promptly made available to the person making the request.

(e) If the appeal of a request for expedited processing of records is denied, in whole or in part, the Executive Director's decision will set forth the basis for the decision. If the appeal of a request for records is denied, in whole or in part, the Executive Director's decision will set forth the exemption relied on and a brief explanation of how the exemption applies to the records withheld and the reasons for asserting it, if different from the reasons described by the FOIA Officer under §1631.9. The denial of a request for records will state that the person making the request may, if dissatisfied with the decision on appeal, file a civil action in Federal court. (A Federal court does not have jurisdiction to review a denial of a request for expedited processing after the Board has provided a complete response to the request.) The denial will also inform the requester of the mediation services offered by the Office of Government Information Services (OGIS) of the National Archives and Records Administration as a non-exclusive alternative to litigation. If the FOIA Officer's decision is remanded or modified on appeal, the requester will be notified of that determination in writing.

(f) No personal appearance, oral argument, or hearing will ordinarily be permitted in connection with an appeal of a request for expedited processing or an appeal for records.

(g) On appeal of a request concerning records, the Executive Director may reduce any fees previously assessed.

(h) Seeking mediation and dispute resolution services through OGIS is a voluntary process. If the requestor chooses to use these services, the Board will work with OGIS to resolve disputes between requestors and the Board as a non-exclusive alternative to litigation.

(i) Before seeking review by a court of the FOIA Officer's adverse determination, a requestor generally must first submit a timely administrative appeal to the Executive Director.

[79 FR 68094, Nov. 14, 2014, as amended at 82 FR 24827, May 31, 2017]

§ 1631.11 Fees to be charged—categories of requesters.

(a) In general, the Board will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees there are three categories of FOIA requestors—commercial use requestors, non-commercial scientific or educational institutions or news media requestors, and all other requestors.

(1) Fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use. Commercial users are not entitled to two hours of free search time or 100 free pages of reproduction of documents. The full allowable direct cost of searching for, and reviewing records will be charged even if there is ultimately no disclosure of records. A 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. The Board's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. The Board will notify requestors of their placement in this category.

(2) Fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by a representative of the news media. A 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” means information that is about current events or that would be of current interest to the public. The Board will advise requesters of their placement in this category.

(3) Fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research. A noncommercial scientific institution is an institution that is not operated on a “commercial” basis, as defined in paragraph (a)(1) of this section and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. The Board will advise requesters of their placement in this category.

(4) For any request which does not meet the criteria contained in paragraphs (a)(1) through (3) of this section, fees shall be limited to reasonable standard charges for document search and duplication, except that the first 100 pages of reproduction and the first two hours of search time will be furnished without charge. If computer search time is required, the first two hours of computer search time will be based on the hourly cost of operating the central processing unit and the operator’s hourly salary plus 23.5 percent. When the cost of the computer search, including the operator time and the cost of operating the computer to process the request, equals the equivalent dollar amount of two hours of the salary of the person performing the search, *i.e.*, the operator, the Board shall begin assessing charges for computer search. Requests from individuals requesting records about themselves filed in the Board’s systems of records shall continue to be treated

under the provisions of the Privacy Act of 1974, which permit fees only for reproduction. The Board’s fee schedule is set out in §1631.14 of this part.

(b) Except for requests that are for a commercial use, the Board may not charge for the first two hours of search time or for the first 100 pages of reproduction. However, a requestor may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board believes that a requester or, on rare occasions, a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading the assessment of fees, the Board may aggregate any such requests and charge accordingly. For example, it would be reasonable to presume that multiple requests of this type made within a 30 calendar day period had been made to avoid fees. For requests made over a long period, however, the Board must have a reasonable basis for determining that aggregation is warranted in such cases. Before aggregating requests from more than one requester, the Board must have a reasonable basis on which to conclude that the requesters are acting in concert and are acting specifically to avoid payment of fees. In no case may the Board aggregate multiple requests on unrelated subjects from one requester.

(c) In accordance with the prohibition of section (4)(A)(iv) of the Freedom of Information Act, as amended, the Board shall not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself.

(1) For commercial use requesters, if the direct cost of searching for, reviewing for release, and duplicating the records sought would not exceed \$25, the Board shall not charge the requester any costs.

(2) For requests from representatives of news media or educational and noncommercial scientific institutions, excluding the first 100 pages which are provided at no charge, if the duplication cost would not exceed \$25, the Board shall not charge the requester any costs.

(3) For all other requests not falling within the category of commercial use requests, representatives of news media, or educational and noncommercial scientific institutions, if the direct cost of searching for and duplicating the records sought, excluding the first two hours of search time and first 100 pages which are free of charge, would not exceed \$25, the Board shall not charge the requester any costs.

(d) Except as provided in paragraphs (d)(1) through (d)(3) of this section, the Board will not assess any search fees (or duplication fees for requesters under (a)(2) or (3) of this section) if the Board fails to comply with the time limits set forth in §1631.8.

(1) If the Board determines that “unusual circumstances,” as defined in the FOIA, apply and the Board provided a timely written notice to the requester in accordance with §1631.8, the Board is excused for an additional 10 days from the restrictions of this section.

(2) If the Board has determined that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, the Board may charge search fees (or duplication fees for requesters under (a)(2) or (3) of this section) if the Board provided a timely written notice to the requester in accordance with §1631.8 and the Board has discussed with the requester, or made not less than 3 good-faith attempts to do so, how the requester could effectively limit the scope of the request.

(3) If a court has determined that exceptional circumstances exist, as defined in the FOIA, the Agency’s delay shall be excused in accordance with the court order.

[55 FR 41052, Oct. 9, 1990, as amended at 63 FR 41708, Aug. 5, 1998; 82 FR 24827, May 31, 2017]

§ 1631.12 Waiver or reduction of fees.

(a) The Board may waive all fees or levy a reduced fee when disclosure of the information requested is deemed to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Board or Federal Government and is not primarily in the commercial interest of the requester. In making its decision on waiving or

reducing fees, the Board will consider the following factors:

(1) Whether the subject of the requested records concerns the operations or activities of the Board or the Government,

(2) Whether the disclosure is likely to contribute to an understanding of Government operations or activities (including those of the Board),

(3) Whether the disclosure is likely to contribute significantly to public understanding of TSP or Government operations or activities,

(4) Whether the requester has a commercial interest that would be furthered by the requested disclosure, and

(5) Whether the magnitude of 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.

(b) A fee waiver request must indicate the existence and magnitude of any commercial interest that the requester has in the records that are the subject of the request.

§ 1631.13 Prepayment of fees over \$250.

(a) When the Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, the Board may require a requester to make an advance payment of the entire fee before continuing to process the request.

(b) When a requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 calendar days of the date of the billing), the Board may require the requester to pay the full amount owed plus any applicable interest as provided in §1631.14(d), and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(c) When the Board acts under paragraph (a) or (b) of this section, the administrative time limits prescribed in subsection (a)(6) of the FOIA (*i.e.*, 20 working days from the receipt of initial requests and 20 working days from receipt of appeals from initial denial,

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plus permissible extensions of these time limits) will begin only after the Board has received fee payments under paragraph (a) or (b) of this section.

[55 FR 41052, Oct. 9, 1990, as amended at 63 FR 41709, Aug. 5, 1998]

§ 1631.14 Fee schedule.

(a) *Manual searches for records.* The Board will charge at the salary rate(s) plus 23.5 percent (to cover benefits) of the employee(s) conducting the search. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure.

(b) *Computer searches for records.* The Board will charge the actual direct cost of providing the service. This will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary, plus 23.5 percent, apportionable to the search. The Board may assess charges for time spent searching, even if the Board fails to locate the records or if records located are determined to be exempt from disclosure.

(c) *Duplication costs.* (1) For copies of documents reproduced on a standard office copying machine in sizes up to 8½ × 14 inches, the charge will be \$.15 per page.

(2) The fee for reproducing copies of records over 8½ × 14 inches, or whose physical characteristics do not permit reproduction by routine electrostatic copying, shall be the direct cost of reproducing the records through Government or commercial sources. If the Board estimates that the allowable duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester had indicated in advance his/her willingness to pay fees as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(3) For copies prepared by computer, such as tapes, printouts, or CD's the Board shall charge the actual cost, including operator time, of producing the

tapes, printouts, or CD's. If the Board estimates that the allowable duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(4) For other methods of reproduction or duplication, the Board shall charge the actual direct costs of producing the document(s). If the Board estimates that the allowable duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his/her willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the objective of reformulating the request to meet his/her needs at a lower cost.

(d) Interest may be charged to those requesters who fail to pay fees charged. The Board may begin assessing interest charges on the amount billed starting on the 31st calendar day following the day on which the billing was sent. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code, and it will accrue from the date of the billing.

(e) The Board shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The Board may choose to contract with private sector services to locate, reproduce, and disseminate records in response to FOIA requests when that is the most efficient and least costly method. When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service, the Board will inform requesters of the steps necessary to obtain records from those sources.

[55 FR 41052, Oct. 9, 1990, as amended at 63 FR 41709, Aug. 5, 1998; 82 FR 24828, May 31, 2017]

§ 1631.15 Information to be disclosed.

(a) In general, all records of the Board are available to the public, as required by the Freedom of Information Act. However, the Board claims the right, where it is applicable, to withhold material under the provisions specified in the Freedom of Information Act as amended (5 U.S.C. 552(b)). Nevertheless, the Board will consider whether partial disclosure of information is possible whenever full disclosure of the record is not and take reasonable steps to segregate and release nonexempt information.

(b) *Records from non-U.S. Government source.* (1)(i) Board personnel will generally consider two of the nine exemptions in the FOIA in deciding whether to withhold from disclosure material from a non-U.S. Government source.

(ii) Exemption 4 permits withholding of "trade secrets and commercial or financial information obtained from a person as privileged or confidential." The term "person" refers to individuals as well as to a wide range of entities, including corporations, banks, state governments, agencies of foreign governments, and Native American tribes or nations, who provide information to the government. Exemption 6 permits withholding certain information, the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy."

(2)(i) *Exemption 4.* Commencing January 1, 1988, the submitter of confidential commercial information must, at the time the information is submitted to the Board or within 30 calendar days of such submission, designate any information the disclosure of which the submitter claims could reasonably be expected to cause substantial competitive harm. The submitter as part of its submission, must explain the rationale for the designation of the information as commercial and confidential.

(ii) Confidential commercial information means records provided to the Board by a submitter that arguably contains material exempt from release under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(iii) After January 1, 1988, a submitter who does not designate portions

of a submission as confidential commercial information waives that basis for nondisclosure unless the Board determines that it has substantial reason to believe that disclosure of the requested records would result in substantial harm to the competitive position of the submitter.

(3) When the Board determines that it has substantial reason to believe that disclosure of the requested records would result in substantial competitive harm to the submitter, and has no designation from the submitter, it shall notify the submitter of the following:

(i) That a FOIA request has been received seeking the record,

(ii) That disclosure of the record may be required,

(iii) That disclosure of the record could result in competitive harm to the submitter,

(iv) That the submitter has a period of seven workdays from date of notice within which it or a designee may object to the disclosure its records, and

(v) That a detailed explanation should be submitted setting forth all grounds as to why the disclosure would result in substantial competitive harm, such as, the general custom or usage in the business of the information in the record, the number and situation of the persons who have access to the record, the type and degree of risk of financial injury that release would cause, and the length of time the record needs to be kept confidential.

(4) In exceptional circumstances, the Board may extend by seven workdays the time for a submitter's response for good cause.

(5) The Board shall give careful consideration to all specified grounds for nondisclosure prior to making an administrative determination on the issue of competitive harm.

(6) Should the Board determine to disclose the requested records, it shall provide written notice to the submitter, explaining briefly why the submitter's objections were not sustained and setting forth the date for disclosure, which date may be less than 10 calendar days after the date of the letter to the submitter.

(7) A submitter who provided records to the Board prior to January 1, 1988, and did not designate which records

§ 1631.16

contain confidential commercial information, shall be notified as provided in § 1631.15(b)(3). After making such notification, the Board will follow the procedures set forth in § 1631.15(b)(4)–(6).

(8) The Board will, as a general rule, look favorably upon recommendations for withholding information about ideas, methods, and processes that are unique; about equipment, materials, or systems that are potentially patentable; or about a unique use of equipment which is specifically outlined.

(9) The Board will not withhold information that is known through custom or usage in the relevant trade, business, or profession, or information that is generally known to any reasonably educated person. Self-evident statements or reviews of the general state of the art will not ordinarily be withheld.

(10) The Board will withhold all cost data submitted, except the total estimated costs from each year of a contract. It will release these total estimated costs and ordinarily release explanatory material and headings associated with the cost data, withholding only the figures themselves. If a contractor believes that some of the explanatory material should be withheld, that material must be identified and a justification be presented as to why it should not be released.

(11) *Exemption 6.* This exemption is not a blanket exemption for all personal information submitted by a non-U.S. Government source. The Board will balance the need to keep a person's private affairs from unnecessary public scrutiny with the public's right to information on Board records. As a general practice, the Board will release information about any person named in a contract itself or about any person who signed a contract as well as information given in a proposal about any officer of a corporation submitting that proposal. Depending upon the circumstances, the Board may release most information in resumes concerning employees, including education and experience. Efforts will be made to identify information that should be deleted and offerors are urged to point out such material for guidance. Any information in the proposal, such as the names of staff persons, which might, if released, constitute an unwarranted in-

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vasion of personal privacy if released should be identified and a justification for non-release provided in order to receive proper consideration.

[55 FR 41052, Oct. 9, 1990, as amended at 82 FR 24828, May 31, 2017]

§ 1631.16 Exemptions.

The Freedom of Information Act exempts from all of its publication and disclosure requirements nine categories of records which are described in 5 U.S.C. 552(b). These categories include such matters as national defense and foreign policy information, investigatory files, internal procedures and communications, materials exempted from disclosure by other statutes, information given in confidence and matters involving personal privacy.

§ 1631.17 Deletion of exempted information.

Where requested records contain matters which are exempted under 5 U.S.C. 552(b) but which matters are reasonably segregable from the remainder of the records, they shall be disclosed by the Board with deletions. To each such record, the Board shall indicate, if technically feasible, the precise amount of information deleted and the exemption under which the deletion is made, at the place in the records where the deletion is made, unless including that indication would harm an interest protected by the exemption.

[82 FR 24828, May 31, 2017]

§ 1631.18 Annual report.

The Executive Director will submit annually, on or before February 1, a Freedom of Information report covering the preceding fiscal year to the Attorney General of the United States. The report will include matters required by 5 U.S.C. 552(e).

[63 FR 41709, Aug. 5, 1998]

§ 1631.19 Preservation of records.

(a) The Board must preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the Board's General Records Schedule of

the National Archives and Records Administration (NARA) or other NARA-approved records retention schedule.

(b) Materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal of lawsuit is pending. This is true even if they would otherwise be authorized for disposition under the Board's General Records Schedule of NARA or other NARA-approved records schedule.

[82 FR 24828, May 31, 2017]

Subpart B—Production in Response to Subpoenas or Demands of Courts or Other Authorities

SOURCE: 85 FR 67266, Oct. 22, 2020.

AUTHORITY: 5 U.S.C. 301, 522, and 8474(b).

§ 1631.30 Applicability.

This subpart applies to demands and requests to a Board employee for factual or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which neither the Board or nor the Board employee is a named party. However, it does not apply to:

(a) Demands upon, or requests for, a current Board employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the Board;

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

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

§ 1631.31 Definitions.

Demand means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of a Board employee that is issued in a legal proceeding.

General Counsel means the General Counsel of the Board or his or her delegatee.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, admin-

istrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

Board employee or employee means:

(1) Any current or former officer or employee of the Board;

(2) Any other individual hired through contractual agreement by or on behalf of the Board or who has performed or is performing services under such an agreement for the Board; and

(3) Any individual who served or is serving in any consulting or advisory capacity to the Board, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by the Board and who are retained or hired as expert witnesses or who agree to testify about general matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the Board.

Records or official records and information mean:

(1) All documents and materials which are Board records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in Board files; and

(3) All other information or materials acquired by a Board 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, for the production of records and information or for testimony which 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, recorded interviews, and statements made by an individual in connection with a legal proceeding.

§ 1631.32 General prohibition.

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

§ 1631.33 Factors the General Counsel will consider.

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

(1) Allowing such testimony or production of records would assist or hinder the Board in performing its statutory duties or use Board resources in a way that will interfere with the ability of Board employees to do their regular work;

(2) Allowing such testimony or production of records would be in the best interest of Thrift Savings Plan participants and beneficiaries;

(3) The records or testimony can be obtained from other sources;

(4) The Board has an interest in the decision that may be rendered in the legal proceeding;

(5) The demand improperly seeks to compel a Board employee to serve as an expert witness for a private interest;

(6) The demand improperly seeks to compel a Board employee to testify as to a matter of law;

(7) Disclosure would result in the Board appearing to favor one private litigant over another private litigant;

(8) Disclosure relates to documents that were produced by another government agency; and

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

(b) The factors listed in paragraph (a) of this section are illustrative and not exhaustive.

§ 1631.34 Filing requirements for demands or requests for testimony.

You must comply with the following requirements whenever you send a demand or request for testimony to the Board or a Board employee. If you serve a subpoena on the Board or a Board employee that is not accompanied by a written request that com-

plies with the requirements in this section, the General Counsel may oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(a) Your request must be in writing and must contain the following information:

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

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

(3) A specific description of the substance of the testimony sought;

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

(5) An explanation as to why no document could be provided and used in lieu of testimony;

(6) If oral testimony is sought, an explanation as to why a written declaration or affidavit cannot be used in lieu of oral testimony;

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

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

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

(b) The Board reserves the right to require additional information to complete your request where appropriate.

(c) Your request should be submitted at least 45 days before the date that the testimony is required. Requests submitted in less than 45 days before testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for requesting expedited processing.

(d) Failure to cooperate in good faith to enable the General Counsel to make

an informed decision may serve as the basis for a determination not to comply with your request.

§ 1631.35 Certification (authentication) of copies of records.

The Board may certify that copies of records are true copies in order to facilitate their use as evidence. The records custodian or other qualified individual shall certify copies of books, records, papers, writings, and documents by attaching a written declaration that complies with current Federal Rules of Evidence. No seal or notarization shall be required.

§ 1631.36 Fees.

(a) *Generally.* The Board may condition the production, disclosure, or release of records or the appearance and testimony of a Board employee upon advance payment of a reasonable estimate of the costs to the Board.

(b) *Fees for records.* Fees for the production, disclosure, or release of records are the same as those charged by the Board in its Freedom of Information Act regulations in subpart A of this part.

(c) *Fees for oral testimony.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Fees for written testimony.* For time spent by each employee preparing affidavits or declarations (including declarations to authenticate records), the Board may assess charges at the rate described in § 1631.14(a).

Subpart C—Administrative Subpoenas

AUTHORITY: 5 U.S.C. 8480.

SOURCE: 75 FR 8796, Feb. 26, 2010, unless otherwise noted.

§ 1631.40 Subpoena authority.

The Executive Director or General Counsel may issue subpoenas pursuant to 5 U.S.C. 8480. The General Counsel may delegate this authority to a Deputy General Counsel, Associate General Counsel, or Assistant General Counsel.

§ 1631.41 Production of records.

A subpoena may require the production of designated books, documents, records, electronically stored information, or tangible materials in the possession or control of the subpoenaed party when the individual signing the subpoena has determined that production is necessary to carry out any of the Agency's functions.

§ 1631.42 Service.

(a) *Return of service.* Each subpoena shall be accompanied by a Return of Service certificate stating the date and manner of service and the names of the persons served.

(b) *Methods of service.* Subpoenas shall be served by one of the following methods:

(1) Certified or registered mail, return receipt requested to the principal place of business or the last known residential address of the subpoenaed party.

(2) Fax or electronic transmission to the subpoenaed party or the subpoenaed party's counsel, provided the subpoenaed party gives prior approval.

(3) Personal delivery at the principal place of business or residence of the subpoenaed party during normal business hours.

§ 1631.43 Enforcement.

Upon the failure of any party to comply with a subpoena, the General Counsel shall request that the Attorney General seek enforcement of the subpoena in the appropriate United States district court.

PART 1632—RULES REGARDING PUBLIC OBSERVATION OF MEETINGS

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