

Office of Special Counsel

§ 1820.2

PART 1811—OUTSIDE INSPECTOR GENERAL

AUTHORITY: 5 U.S.C. 1212(i).

SOURCE: 87 FR 63407, Oct. 19, 2022, unless otherwise noted.

§ 1811.1 Requirement to contract with an outside inspector general.

The Special Counsel shall enter into at least one agreement with the Inspector General of an agency under which—

(1) the Inspector General shall—

(A) receive, review, and investigate allegations of prohibited personnel practices or wrongdoing filed by employees of the Office of Special Counsel; and

(B) develop a method for an employee of the Office of Special Counsel to communicate directly with the Inspector General; and

(2) the Special Counsel—

(A) may not require an employee of the Office of Special Counsel to seek authorization or approval before directly contacting the Inspector General in accordance with the agreement; and

(B) may reimburse the Inspector General for services provided under the agreement.

[87 FR 63407, Oct. 19, 2022]

PART 1820—FREEDOM OF INFORMATION ACT REQUESTS; PRODUCTION OF RECORDS OR TESTIMONY

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AUTHORITY: 5 U.S.C. 552, 301, and 1212(e).

SOURCE: 87 FR 63407, Oct. 19, 2022, unless otherwise noted.

§ 1820.1 General provisions.

This part contains rules and procedures followed by the U.S. Office of Special Counsel (OSC) in processing requests for records under the Freedom of Information Act (FOIA), codified at 5 U.S.C. 552. These rules and procedures should be read together with the FOIA and the FOIA page of OSC's website (<https://osc.gov/FOIA>), which set forth additional information about access to agency records and information routinely provided to the public as part of a regular OSC activity. For example, forms, press releases, records published on OSC's website, or public lists maintained at OSC headquarter offices pursuant to 5 U.S.C. 1219, may be requested and provided to the public without following this part. This part also addresses responses to demands by a court or other authority to an OSC employee or former employee for production of official records or testimony in legal proceedings.

Subpart A—FOIA Regulations

§ 1820.2 Requirements for making FOIA requests.

(a) *Submission of requests.* (1) A request for OSC records under the FOIA must be made in writing. The request must be sent:

(i) *By email to:* foiarequest@osc.gov or other electronic means described on the FOIA page of OSC's website (<https://osc.gov/FOIA>);

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(ii) *Electronically to:* The National FOIA Portal for the entire federal government at *www.foia.gov*; or

(iii) *By mail to:* U.S. Office of Special Counsel, FOIA Officer, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(2) Both the request letter and envelope or email subject line should be clearly marked "FOIA Request."

(3) A FOIA request will not be considered to have been received by OSC until it reaches the FOIA Officer.

(b) *Description of records sought.* Requests must state in the letter, email, or other prescribed electronic method the words "FOIA Request" or "FOIA/Privacy Request." The request must also describe the records sought in enough detail for them to be located with a reasonable amount of effort. When requesting records about an OSC case file, the case file number, name, and type (for example, prohibited personnel practice (PPP), Hatch Act, USERRA, Hatch Act advisory opinion, or whistleblower disclosure) should be provided, if known. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter. OSC requires proof of identification from requestors seeking their own case files. OSC requires a signed release of information from requestors seeking another individual's case file.

(c) *Agreement to pay fees.* By making a FOIA request the requestor agrees to pay all applicable fees chargeable under §1820.7 unless the Special Counsel waives fees, the requestor is exempt, or the requestor otherwise qualifies for a waiver of fees.

§ 1820.3 Consultations and referrals.

When OSC receives a FOIA request for a record in its possession, it may determine that another Federal agency or entity is better able to decide whether the record is exempt from disclosure under the FOIA. If so, OSC will either respond to the request for the record after consulting with the other Federal agency or entity or refer the responsibility for responding to the request to the other Federal agency or entity deemed better able to determine whether to release it. OSC will ordinarily respond promptly to consulta-

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tions and referrals from other Federal agencies or entities.

§ 1820.4 Timing of responses to requests.

(a) *In general.* OSC ordinarily will respond to FOIA requests in order of receipt. In determining which records are responsive to a request, OSC ordinarily will include only records in its possession on the date that it begins its search. OSC will inform the requestor if it uses any other date.

(b) *Multitrack processing.* (1) OSC may use two or more processing tracks to distinguish between simple and more complex requests based on the amount of work and/or time estimated to process the request.

(2) When using multitrack processing, OSC may provide requestors in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the faster track(s).

(c) *Expedited processing.* (1) OSC will take requests and appeals out of order and provide expedited treatment whenever OSC has established to its satisfaction that:

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

(ii) An urgency exists to inform the public about an actual or alleged federal government activity and the requestor is primarily engaged in disseminating information; or

(iii) The requestor with a personal interest in a case for which they face an imminent filing deadline with the Merit Systems Protection Board or other administrative tribunal or court of law in an individual right of action, or in a USERRA case referred to OSC under title 38 of the U.S. Code. Expedited status granted under this provision will apply only to the following requested records: PPP case closure and notice of appeal rights letters sent to the complainant by OSC and the official complaint form submitted to OSC by a USERRA complainant or the original referred USERRA complaint if referred to OSC under title 38 of the U.S. Code.

(2) A request for expedited processing must be made in writing and sent to OSC's FOIA Officer. The expedited request is deemed received when it reaches the FOIA Officer.

(3) A requestor who seeks expedited processing must submit a statement, certified to be true and correct to the best of that individual's knowledge and belief, explaining in detail the basis for requesting expedited processing. OSC may waive a certification as a matter of administrative discretion.

(4) OSC shall decide whether to grant a request for expedited processing and notify the requestor of its decision within ten (10) calendar days of the FOIA Officer's receipt of the request. If OSC grants the request for expedited processing, it will process the request as soon as practicable. If OSC denies the request for expedited processing, OSC shall rule expeditiously on any administrative appeal of that decision.

(d) *Aggregated requests.* OSC may aggregate multiple requests by the same requestor, or by a group of requestors acting in concert, if it reasonably believes that such requests actually constitute a single request that would otherwise create "unusual circumstances" as defined in §1820.5, and that the requests involve clearly related matters.

§ 1820.5 Responses to requests.

(a) *General.* Ordinarily, OSC has twenty (20) business days from receipt to determine whether to grant or deny a FOIA request.

(1) In unusual circumstances, OSC may extend the twenty (20) business-day deadline by written notice to the requestor setting forth the unusual circumstances justifying the extension. OSC shall notify the requestor if OSC cannot process the request in 20 days and provide the requestor an opportunity to modify the request so that OSC can process the request within the 20-day time limit. OSC and the requestor can also negotiate an alternative time frame for processing the request or modified request. OSC's FOIA Public Liaison is available to assist in the resolution of any disputes between the requestor and OSC. OSC must also advise the requestor of the requestor's right to seek dispute resolution services from the National Ar-

chives and Records Administration's (NARA) Office of Government Information Services (OGIS). OSC may consider a requestor's refusal to reasonably modify the request or to negotiate an alternative time frame as a factor in determining whether unusual and/or exceptional circumstances exist.

(2) *Unusual circumstances* means—

(i) The need to search for and collect the requested records from OSC field offices, NARA storage facilities, or other locations away from OSC's FOIA office;

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

(iii) The need for consultation and/or referral with another OSC unit where the information concerns two or more components of OSC or with a Federal entity that has an interest in the information requested.

(3) *Exceptional circumstances* means—

(i) OSC has a backlog of pending requests and is making reasonable progress in reducing the backlog; and

(ii) OSC estimates a search yield of more than 5000 pages.

(b) OSC will notify the requestor in writing of its determination to grant or deny in full or in part a FOIA request.

(c) *Adverse determinations.* Adverse determinations, or denials of requests, consist of: A determination to withhold any requested record in whole or in part; that a requested record does not exist or cannot be located; that a record is not readily reproducible in the form or format sought by the requestor; that the request does not seek a record subject to the FOIA; a determination on any disputed fee matter; or a denial of a request for expedited treatment. A notification to a requestor of an adverse determination on a request shall include:

(1) A brief statement of the reason(s) for the denial of the request, including any FOIA exemption applied by OSC in denying the request; and

(2) A statement that the denial may be appealed under §1820.6(a), with a description of the requirements of that subsection.

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(d) *Dispute resolution program.* OSC shall inform FOIA requestors at all stages of the FOIA process of the availability of dispute resolution services provided by the FOIA Public Liaison or by NARA's OGIS.

§ 1820.6 Appeals.

(a) *Appeals of adverse determinations.* A requestor may appeal an adverse determination to OSC's Office of General Counsel. The appeal must be in writing, and must be submitted either:

(1) *By email to:* foiaappeal@osc.gov, or other electronic means as described on the FOIA page of OSC's website (<https://osc.gov/FOIA>); or

(2) *By mail to:* U.S. Office of Special Counsel, Office of General Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(b) *Submission and content.* The Office of General Counsel must receive the appeal within ninety (90) calendar days of the date of the adverse determination letter. The appeal letter and envelope or email subject line should be clearly marked "FOIA Appeal." The appeal must clearly identify the OSC determination (including the assigned FOIA request number, if known) being appealed. OSC will not ordinarily act on a FOIA appeal if the request becomes a matter of FOIA litigation.

(c) *Responses to appeals.* Ordinarily, OSC must issue a written appeal decision within twenty (20) business days from receipt of the appeal. A decision affirming a denial in whole or in part shall inform the requestor of the provisions for judicial review of that decision, and of the availability of dispute resolution services. If OSC's appeal decision reverses or modifies its denial, OSC's notice will state that OSC will reprocess the request in accordance with that appeal decision.

§ 1820.7 Fees.

(a) *In general.* OSC provides the first two hours of search time and the first 100 pages of duplication free of charge to all requestors. In exceptional circumstances, OSC may charge fees. At the discretion of the Special Counsel, OSC may exempt certain requestors from search and duplication fees, including PPP complainants and subjects; Hatch Act complainants and sub-

jects; Hatch Act advisory opinion requestors; whistleblowers; and USERRA complainants. OSC charges commercial users for search, review, and duplication fees under the FOIA in accordance with paragraph (c) of this section, except where a waiver or reduction of fees is granted under paragraph (h) of this section. OSC charges duplication fees, but not search fees, to educational or non-commercial scientific institutions; and to representative of the news media or news media requestors. OSC charges both search fees and duplication fees to all other requestors. If an exempted requestor abuses its exempt fee status to file numerous, duplicative, and/or voluminous FOIA requests, OSC may suspend the requestor's exempt status and charge search and duplication fees. OSC may require upfront payment of fees before sending copies of requested records to a requestor. Requestors must pay fees by submitting to OSC's FOIA Officer a check or money order made payable to the Treasury of the United States. See generally *Uniform Freedom of Information Act Fee Schedule and Guidelines* (hereinafter *OMB Fee Guidelines*), 52 FR 10,012, 10,017–18 (Mar. 27, 1987).

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

All other requestors means all requestors who do not fall into the categories of commercial use, educational institution, noncommercial scientific institution, and representatives of the news media.

Commercial use request means a request from or on behalf of an individual who seeks information for a use or purpose that furthers commercial, trade, or profit interests, which can include furthering those interests through litigation. If OSC determines that the requestor seeks to put the records to a commercial use, either because of the nature of the request or because OSC has reasonable cause to doubt a requestor's stated use, OSC shall provide the requestor with a reasonable opportunity to clarify.

Direct costs mean those expenses that OSC incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the

employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating equipment. Direct costs do not include overhead expenses such as rent, heating, or lighting the record storage facility.

Duplication means the reasonable direct cost of making copies of documents.

Educational institution means any school that operates a program of scholarly research. See OMB Fee Guidelines, 52 FR at 10,019. To be in this category, a requestor must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

Non-commercial scientific institution means an entity that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry and are not for commercial use.

Representative of the news media or news media requestor means any individual 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. A non-exhaustive list of news media entities includes print newspapers, electronic outlets for print newspapers, broadcast and cable television networks and stations, broadcast and satellite radio networks and stations, internet-only outlets, and other alternative media as methods of news delivery evolve. For “freelance” journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization, whether print or electronic. A requestor seeking to qualify as a news media requestor must not be seeking the requested records for a commercial use. The requestor’s news-dissemination function is not considered to be a commercial use.

Review means the process of examining a record located in response to a request in order to determine whether any portion of the record is exempt

from release. Review includes redacting exempt material, and otherwise evaluating and preparing the records for release. Review includes time spent obtaining and considering any formal objection to release made by a business submitter under § 1820.8(f). Review does not include time spent resolving general legal or policy issues about the application of exemptions. OSC may charge for review costs in connection with commercial use requests even if a record ultimately is not released.

Search means the process of looking for and retrieving records or information responsive to a FOIA request, as well as page-by-page or line-by-line identification of responsive information within records.

(c) *Fees.* OSC charges the following fees for responding to FOIA requests:

(1) *Search.* (i) The first two hours of search are free. OSC may charge for time spent searching even if it fails to locate responsive records, or even if OSC determines that located records are exempt from release.

(ii) OSC charges \$5.50 per quarter hour spent by clerical personnel in searching for and retrieving a requested record; \$9.00 per quarter hour of search time spent by professional personnel; and \$17.50 per quarter hour for search assistance from managerial personnel.

(iii) OSC charges the direct costs of conducting electronic searches, including the costs of operator or programmer staff time apportionable to the search.

(iv) OSC may charge additional costs in accordance with the applicable billing schedule established by NARA for requests requiring the retrieval of records from any Federal Records Center.

(2) *Duplication.* OSC charges all non-exempt requestors duplication fees after the first 100 pages. OSC’s duplication fee for a standard paper photocopy of a record will be 25 cents per page. For copies produced by computer, such as discs or printouts, OSC will charge the direct costs, including staff time, of producing the copy. For other forms of duplication, OSC will charge the direct costs of that duplication.

(3) *Review.* OSC charges review fees to commercial use requestors. OSC will

not charge for review at the administrative appeal level.

(d) *Notice of anticipated fees in excess of \$25.00.* OSC shall notify the requestor of the actual or estimated fees when OSC determines or estimates that fees charged under this section would exceed \$25.00, unless the requestor has indicated a willingness to pay fees at that level or if OSC waived fees before undertaking the search. OSC will not conduct a search or process responsive records until OSC and the requestor reach an agreement on the fees. If a requestor wants to pay a lower amount than \$25.00, the fee notice will offer the requestor an opportunity to work with OSC to reformulate or narrow the request to try to lower the anticipated fees.

(e) *Charges for other services.* OSC will notify requestors in advance if OSC intends to charge additional fees to provide special services, such as shipping records by other than ordinary mail.

(f) *Aggregating separate requests.* OSC may aggregate requests and charge appropriate fees where OSC reasonably believes that a requestor or a group of requestors seek to avoid fees by dividing a request into a series of requests. OSC may presume that multiple such requests made within a 30-day period were divided in order to avoid fees. OSC will aggregate requests separated by more than 30 days only where a reasonable basis exists for determining that aggregation is warranted under the circumstances involved.

(g) *Advance payments.* (1) For requests other than those described in paragraphs (g)(2) and (3) of this section, OSC will not require the requestor to make an advance payment before work is begun or continued on a request. Payment owed for work already completed (that is, pre-payment after processing a request but before copies are sent to the requestor) is not an advance payment.

(2) OSC may require advance payment up to the amount of the entire anticipated fee before beginning to process the request if OSC determines or estimates that a total fee to be charged under this section will exceed \$250.00.

(3) OSC may require the requestor to make an advance payment in full of

the anticipated fee where a requestor has previously failed to pay a properly charged FOIA fee within 30 business days of the date of billing.

(h) *Requirements for waiver or reduction of fees.* (1) OSC will furnish records responsive to a request without charge or at a charge reduced below that established under paragraph (c) of this section where OSC determines, based on all available information, that the requestor has demonstrated that:

(i) Release of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(ii) Release of the records is not primarily in the commercial interest of the requestor.

(2) To determine whether the first fee waiver requirement is met, OSC will consider the following factors:

(i) Whether the subject of the requested records concerns a direct and clear connection to “the operations or activities of the government,” not remote or attenuated.

(ii) Whether the release is “likely to contribute” to an understanding of government operations or activities. The requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The release of records already in the public domain is unlikely to contribute to such understanding.

(iii) Whether release of the requested records will contribute to “public understanding.” The release must contribute to the understanding of a reasonably broad audience of individuals interested in the subject. OSC shall consider a requestor’s expertise in the subject area and ability and intention to effectively convey information to the public. A representative of the news media presumptively satisfies this consideration.

(iv) Whether the release is likely to contribute “significantly” to public understanding of government operations or activities. The requestor must demonstrate that the release would significantly enhance the

public's understanding of the subject in question.

(3) To determine whether the second fee waiver requirement is met, OSC will consider the following factors:

(i) Whether the requestor has a commercial interest that would be furthered by the requested release. OSC shall consider any commercial interest of the requestor (with reference to the definition of "commercial use" in paragraph (b)(1) of this section), or of any individual on whose behalf the requestor may be acting, that would be furthered by the requested release. Requestors shall be given an opportunity to provide explanatory information about this consideration.

(ii) Whether any identified commercial interest in the disclosure, is equal to or less than that of any identified public interest. OSC ordinarily shall presume that a news media requestor has satisfied the public interest standard. Release to data brokers or others who primarily compile and market government information for direct economic return shall be presumed not to primarily serve the public interest.

(4) Where only a portion of the records to be released satisfies the requirements for a waiver of fees, a waiver shall be granted for that portion.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (h)(1), (2), and (3) of this section, insofar as they apply to each request. OSC fee reduction or waiver decisions may consider the cost-effectiveness of its allocation of administrative resources.

(i) *No assessment of fees.* OSC may not assess any search fees if it misses the statutory 20-business-day deadline to respond to the request, except under paragraphs (i)(1) and (2) of this section.

(1) If OSC determined that unusual circumstances apply and OSC provided a timely written notice to the requestor, OSC may extend the 20-day deadline by 10 business days. OSC may not assess any search fees, however, if it misses the extended deadline.

(2) OSC may charge search fees if the search yield would exceed 5,000 pages, and if OSC provides a timely written notice to the requestor.

(ii) [Reserved]

§ 1820.8 Business information.

(a) *In general.* Business information obtained by OSC from a submitter may be released only pursuant to this section.

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

Business information means trade secrets and commercial or financial information obtained by OSC from a submitter that may be protected from release under FOIA Exemption 4, 5 U.S.C. 552(b)(4).

Submitter means any individual or entity from whom OSC obtains business information, directly or indirectly.

(c) *Designation of business information.* A submitter of business information must use good-faith efforts to designate, by appropriate markings, any portion of its submission that it considers to be protected from release under FOIA Exemption 4.

(d) *Notice to submitters.* OSC shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that appears to seek confidential business information whenever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to release of any specified portion of those records under paragraph (f) of this section. The notice shall either describe the confidential business information requested or include copies of the requested records or record portions containing the information.

(e) *When notice is required.* Notice shall be given to a submitter whenever:

(1) The submitter designated the records in good faith as considered protected from release under FOIA Exemption 4; or

(2) OSC has reason to believe that the records or portions of records may be protected from release under FOIA Exemption 4.

(f) *Opportunity to object to release.* OSC will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. The submitter must submit any objections to release in a detailed written statement. The statement must specify all grounds for withholding any

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portion of the records under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information contained in the record is privileged or confidential. Submitters who fail to respond timely to the notice are deemed to have consented to release of the records. Information provided by a submitter under this paragraph may itself be subject to release under FOIA.

(1) *Notice of intent to release.* OSC shall consider a submitter's objections and specific grounds for non-release in deciding whether to release business information. If OSC decides to release business information over the objection of a submitter, OSC shall provide written notice including the reason(s) why OSC overruled the submitter's objections; a description of the business information to be released; and a reasonable specified release date.

(2) [Reserved]

(g) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (e) of this section shall not apply if:

(1) OSC determines that the information should not be released;

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

(3) Release of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, OSC shall, within a reasonable time prior to a specified release date, give the submitter written notice of any final decision to release the information.

(h) *Notice of FOIA lawsuit.* OSC shall promptly notify a submitter if a requestor files a lawsuit seeking to compel the release of the submitter's business information.

(i) *Corresponding notice to requestors.* OSC shall notify requestor(s) that it provided submitters the opportunity to object to release under paragraph (d) of this section; if OSC subsequently releases the requested records under paragraph (g) of this section; and whenever a submitter files a lawsuit seeking

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to prevent OSC's release of business information.

§ 1820.9 Other rights and services.

This subpart does not create a right or entitlement for any individual to any service or to the release of any record other than those available under FOIA.

Subpart B—Production of Records or Testimony

§ 1820.10 Scope and purpose.

(a) This part establishes policy, assigns responsibilities, and prescribes procedures with respect to the production of official information, records, or testimony by current and former OSC employees, contractors, advisors, and consultants in connection with federal or state litigation or administrative proceedings in which OSC is not a party.

(b) OSC intends this part to:

(1) Conserve OSC employee time for conducting official business;

(2) Minimize OSC employee involvement in issues unrelated to OSC's mission;

(3) Maintain OSC employee impartiality in disputes between non-OSC litigants; and

(4) Protect OSC's sensitive, confidential information and deliberative processes.

(c) OSC does not waive the sovereign immunity of the United States when allowing OSC employees to provide testimony or records under this part.

§ 1820.11 Applicability.

This part applies to demands and requests from non-OSC litigants for testimony from current and former OSC employees, contractors, advisors, and consultants relating to official OSC information and/or for production of official OSC records or information in legal proceedings in which OSC is not a party.

§ 1820.12 Definitions.

The following definitions apply to this part.

Demand means an order, subpoena, or other command of a court or other

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competent authority for OSC's production or release of records or for an OSC employee's appearance and testimony in a legal proceeding.

General Counsel means OSC's General Counsel or an individual to whom the General Counsel has delegated authority under this part.

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

OSC employee or *employee* means any current or former OSC employee or contractor, including but not limited to OSC: temporary employees, interns, volunteers, consultants, and/or other advisors.

Records or *official records and information* means all information in OSC's custody and control, relating to information in OSC's custody and control, or acquired by an OSC employee in the performance of official duties.

Request means any 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, and interviews made by an individual in connection with a legal proceeding.

§ 1820.13 General prohibition.

No OSC employee may testify or produce official records or information in response to a demand or request without the General Counsel's prior written approval.

§ 1820.14 Factors OSC will consider.

The General Counsel has discretion to grant an employee permission to testify on matters relating to official information or produce official records and information, in response to a demand or request, with the general proviso that OSC's release of information is subject to the Privacy Act, 5 U.S.C. 552a, and applicable privileges including but not limited to the attorney work product and deliberative process privileges. See especially §§1830.1(e)(2)(ii) and 1830.10(a) below.

The General Counsel may also consider whether:

- (a) The purposes of this part are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice; would assist or hinder OSC in performing its statutory duties; or would be in the best interest of OSC or the United States;
- (c) The records or testimony can be obtained from other sources;
- (d) 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;
- (e) Release would violate a statute, Executive Order, or regulation; would reveal trade secrets, confidential, sensitive, or privileged information, or information that would otherwise be inappropriate for release; or would impede or interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;
- (f) Allowing such testimony or production of records would result in OSC appearing to favor one litigant over another;
- (g) A substantial government interest is implicated;
- (h) The demand or request is within the authority of the party making it; and/or
- (i) The demand or request is sufficiently specific to be answered.

§ 1820.15 Service of requests or demands.

Requests or demands for official records or information or testimony under this subpart must be served by mail to the U.S. Office of Special Counsel, Office of General Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505; or by email to ogc@osc.gov. The subject line should read "Touhy Request."

§ 1820.16 Requirements for litigants seeking documents or testimony.

A litigant must comply with the following requirements when submitting a request for testimony or official records and information under this

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part. A request should be submitted before a demand is issued.

(a) The request must be in writing (email suffices) and must be submitted to the General Counsel.

(b) The written request must contain the following information:

(1) The caption of the legal or administrative proceeding, docket number, and name and address of the court or other administrative or regulatory 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 list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal or administrative proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement addressing the factors set out in § 1820.14;

(5) A statement indicating that the information sought is not available from another source;

(6) If testimony is requested, the intended use of the testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or 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 requestor and other parties will require of each OSC employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) OSC reserves the right to require additional information to complete the request where appropriate.

(d) The request should be submitted at least 14 days before the date that records or testimony is required.

(e) The General Counsel may deny a request for records or testimony based on a requestor's failure to cooperate in good faith to enable the General Counsel to make an informed decision.

(f) The request should state that the requestor will provide a copy of the

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OSC employee's testimony free of charge and that the requestor will permit OSC to have a representative present during the employee's testimony.

§ 1820.17 Processing requests or demands.

(a) Absent exigent circumstances, OSC will issue a determination within 10 business days after the General Counsel received the request or demand.

(b) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of OSC or the United States, or for other good cause.

(c) On request, OSC may certify that records are true copies in order to facilitate their use as evidence.

§ 1820.18 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on OSC employee testimony including, for example:

(1) Limiting the areas of testimony;

(2) Requiring the requestor and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal;

(3) Requiring that the transcript will be used or made available only in the particular legal proceeding for which testimony was requested.

(b) OSC may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify under this part, employees may testify as to facts within their personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Reveal confidential or privileged information; or

(2) For a current OSC employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of OSC unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made

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available for testimony, will be subject to OSC's approval.

§ 1820.19 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official OSC records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure.

(b) If the General Counsel so determines, original OSC records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official OSC records, nor may they be marked or altered.

§ 1820.20 Procedure in the event a decision is not made prior to the time a response is required.

If a requestor needs a response to a demand or request before the General Counsel makes a determination whether to grant the demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents at this time, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 1820.21 Fees.

(a) *Witness fees.* OSC may assess fees for attendance by a witness. Such fees will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based on 28 U.S.C. 1821, and upon the rule of the federal district closest to the location where the witness will appear. Such fees will include the costs of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding, plus travel costs.

(b) *Payment of fees.* A requestor must pay witness fees for current OSC employees and any record certification

fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the United States Department of Treasury.

§ 1820.22 Final determination.

The General Counsel will notify the requestor and, when appropriate, the court or other body of the final determination, the reasons for the response to the request or demand, and any conditions that the General Counsel may impose on the testimony of an OSC employee or the release of OSC records or information. The General Counsel has the sole discretion to make the final determination regarding requests to employees for testimony or production of official records and information in litigation in which OSC is not a party. The General Counsel's decision exhausts administrative remedies for purposes of release of the information.

§ 1820.23 Penalties.

(a) An employee who releases official records or information or gives testimony relating to official information, except as expressly authorized by OSC, or as ordered by a court after OSC has had the opportunity to be heard, may face the penalties provided under applicable laws. Additionally, former OSC employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OSC employee who testifies or produces official records and information in violation of this part may be subject to disciplinary action.

§ 1820.24 Conformity with other laws and regulations; other rights.

This regulation is not intended to conflict with 5 U.S.C. 2302(b)(13) or with any statutory or common law privilege against the release of protected information. This part does not create any right, entitlement, or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

PART 1830—PRIVACY ACT REGULATIONS

Sec.
1830.1 Scope and purpose.