

CODE OF FEDERAL REGULATIONS
TITLE 10 -- ENERGY
CHAPTER XVII -- DEFENSE NUCLEAR FACILITIES SAFETY BOARD

PART 1703 -- PUBLIC INFORMATION AND REQUESTS

Sec.

- 1703.101 Scope.
- 1703.102 Definitions; words denoting number, gender and tense.
- 1703.103 Requests for board records available through the public reading room.
- 1703.104 Board records exempt from public disclosure.
- 1703.105 Requests for board records not available through the public reading room (FOIA requests).
- 1703.106 Requests for waiver or reduction of fees.
- 1703.107 Fees for record requests.
- 1703.108 Processing of FOIA requests.
- 1703.109 Procedure for appeal of denial of requests for board records and denial of requests for fee waiver or reduction.
- 1703.110 Requests for classified records.
- 1703.111 Requests for privileged treatment of documents submitted to the board.
- 1703.112 Computation of time.

AUTHORITY: 5 U.S.C. 552; Executive Order 12600, 3 CFR, 1987 Comp., p. 235; 42 U.S.C. 2286, 2286b(c).

SOURCE: 56 FR 21261, May 8, 1991, unless otherwise noted.

§ 1703.101 Scope.

This part contains the Board's regulations implementing the Freedom of Information Act, 5 U.S.C. 552.

§ 1703.102 Definitions; words denoting number, gender and tense.

Agency record is a record in the possession and control of the Board that is associated with Board business. Agency records do not include records such as:

(1) Publicly available books, periodicals, or other publications that are owned or copyrighted by non-federal sources;

(2) Records solely in the possession and control of Board contractors;

(3) Personal records in the possession of Board personnel that have not been circulated, were not required by the Board to be created or retained, and may be retained or discarded at the author's sole discretion. In determining whether such records are agency records the Board shall consider whether, and to what extent, the records were used in agency business;

(4) Records of a personal nature that are not associated with any Board business; or

(5) Non-substantive information in the calendar or schedule books of the Chairman or Members, uncirculated except for typing or recording purposes.

Board means the Defense Nuclear Facilities Safety Board.

Chairman means the Chairman of the Board.

Designated FOIA Officer means the person designated by the Board to administer the Board's activities pursuant to the regulations in this part. The Designated FOIA Officer shall also be the Board officer having custody of or responsibility for agency records in the possession of the Board and shall be the Board officer responsible for authorizing or denying production of records upon requests filed pursuant to § 1703.105.

General Counsel means the chief legal officer of the Board.

General Manager means the chief administrative officer of the Board.

Member means a Member of the Board.

In determining the meaning of any provision of this part, unless the context indicates otherwise: the singular includes the plural; the plural includes the singular; the present tense includes the future tense; and words of one gender include the other gender.

§ 1703.103 Requests for board records available through the public reading room.

(a) A Public Reading Room will be maintained at the Board's headquarters and will be open between 8:30 a.m. and 4:30 p.m. Mondays through Fridays, with the exception of legal holidays. Documents may be obtained in person or by written or telephonic request from the Public Reading Room by reasonably describing the records sought. The purpose of the Public Reading Room is to provide easy accessibility to a substantial portion of the Board's records. The Board considers that documents available through the Public Reading Room have been placed in the public domain.

(b) The public records of the Board that are available for inspection and copying upon request in the Public Reading Room include:

(1) The Board's rules and regulations;

(2) Statements of policy adopted by the Board.

(3) Board recommendations; the Secretary of Energy's response, any final decision, and implementation plans regarding Board recommendations; and interested person's comments, data, views, or arguments to the Board concerning its recommendations and the Secretary of Energy's response and final decision;

(4) Transcripts of public hearings and any Board correspondence related thereto;

(5) Recordings or transcripts of Board meetings that were closed under 10 CFR part 1704, where the Board subsequently determines under 10 CFR 1704.9 that the recordings or transcripts may be made publicly available;

(6) Board orders, decisions, notices, and other actions in a public hearing;

(7) Board correspondence, except that which is exempt from mandatory public disclosure under § 1703.104;

(8) Copies of the filings, certifications, pleadings, records, briefs, orders, judgments, decrees, and mandates in court proceedings to which the Board is a party and the correspondence with the courts or clerks of court;

(9) Those of the Board's Administrative Directives that affect members of the public;

(10) Index of the documents identified in this section, but not including drafts thereof; and

(11) Annual reports to Congress in which the Board's operations during a past fiscal year are described.

(12) Copies of records released pursuant to FOIA requests, along with an index to these records. The format will generally be the same as the format of the released records.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66815, Dec. 22, 1997]

EFFECTIVE DATE NOTE: At 62 FR 66815, Dec. 22, 1997, § 1703.103 was amended by adding paragraph (b)(12), effective Jan. 21, 1998.

§ 1703.104 Board records exempt from public disclosure.

The following records are exempt from public disclosure:

(a)(1) Records specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and

(2) Which are in fact properly classified pursuant to such Executive Order;

(b) Records related solely to the internal personnel rules and practices of an agency;

(c) Records specifically exempted from disclosure by statute, provided that such statute:

(1) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(2) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Interagency or intraagency memoranda or letters which would not be available by law to a party other than an agency in litigation with the Board;

(f) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(g) Records of information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(1) Could reasonably be expected to interfere with enforcement proceedings,

(2) Would deprive a person of a right to a fair trial or an impartial adjudication,

(3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy,

(4) Could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,

(5) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or

(6) Could reasonably be expected to endanger the life or physical safety of any individual;

§ 1703.105 Requests for board records not available through the public reading room

(FOIA Requests).

(a) Upon the request of any person, the Board shall make available for public inspection and copying any reasonably described agency record in the possession and control of the Board, but not available through the Public Reading Room, subject to the provisions of this part. If a member of the public files a request with the Board under the FOIA for records that the Board determines are available through the Public Reading Room, the Board will treat the request under the simplified procedures of § 1703.103.

(b)(1) A person may request access to Board records that are not available through the Public Reading Room by using the following procedures:

(i) The request must be in writing and must describe the records requested to enable Board personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester, including the names and titles of any Board personnel who have been contacted regarding the request prior to the submission of the written request.

(ii) A request for all records falling within a reasonably specific and well-defined category shall be regarded as conforming to the statutory requirement that records be reasonably described. The request must enable the Board to identify and locate the records by a process that is not unreasonably burdensome or disruptive of Board operations.

(2) The request should be addressed to the Designated FOIA Officer and clearly marked "Freedom of Information Act Request." The address for such requests is: Designated FOIA Officer, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., suite 700, Washington, DC 20004. For purposes of calculating the time for response to the request under § 1703.108, the request shall not be deemed to have been received until it is in the possession of the Designated FOIA Officer or his designee.

(3) The request must include:

(i) A statement by the requester of a willingness to pay the fee applicable under § 1703.107(b), or to pay that fee not to exceed a specific amount, or

(ii) A request for waiver or reduction of fees.

(4) No request shall be deemed to have been received until the Board has:

(i) Received a statement of willingness to pay, as indicated in § 1703.105(b)(3)(i), or

(ii) Received and approved a request for waiver or reduction of fees. However, the FOIA request shall be deemed to have been received if the request for waiver or reduction of fees includes a statement of willingness to pay the fee anticipated to be incurred in processing the request under this section, or to pay that fee not to exceed a specific amount, should the request for fee waiver or reduction be denied.

(c) with respect to records in the files of the Board that have been obtained from other federal agencies:

(1) Where the record originated in another federal agency, the Designated FOIA Officer shall refer the request to that agency and so inform the requester, unless the originating agency agrees to direct release by the Board.

(2) Requests for Board records containing information received from another agency, or records prepared jointly by the Board and other agencies, shall be treated as requests for Board records. The Designated FOIA Officer shall, however, coordinate with the appropriate official of the other agency. The notice of determination to the requester, in the event part or all of the

record is recommended for denial by the other agency, shall cite the other agency Denying Official as well as the Designated FOIA Officer if a denial by the Board is also involved.

(d) If a request does not reasonably describe the records sought, as provided in paragraph (b) of this section, the Board response shall specify the reasons why the request failed to meet those requirements and shall offer the requester the opportunity to confer with knowledgeable Board personnel in an attempt to restate the request. If additional information is needed from the requester to render records reasonably described, any restated request submitted by the requester shall be treated as an initial request for purposes of calculating the time for response under § 1703.108.

(e)(1) *Expedited processing.* A person may request expedited processing of a FOIA request when a compelling need for the requested records has been shown. “Compelling need” means:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if the request is made by a person primarily engaged in disseminating information; or

(iii) The records pertain to an immediate source of risk to the public health and safety or worker safety at a defense nuclear facility under the Board’s jurisdiction.

(2) A requester seeking expedited processing should so indicate in the initial request, and should state all facts supporting the need to obtain the requested records rapidly. The requester must also state that these facts are true and correct to the best of the requester’s knowledge and belief.

(3) When a request for expedited processing is received, the Board will respond within ten calendar days from the date of receipt of the request, stating whether or not the request has been granted. If the request for expedited processing is denied, any appeal of that decision will be acted upon expeditiously.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66815, Dec. 22, 1997]

EFFECTIVE DATE NOTE: At 62 FR 66815, Dec. 22, 1997, § 1703.105 was amended by adding paragraph (3), effective Jan. 21, 1998.

§ 1703.106 Requests for waiver or reduction of fees.

(a) The Board shall collect fees for record requests made under § 1703.105, as provided in § 1703.107(b), unless a requester submits a request in writing for a waiver or reduction of fees. The Designated FOIA Officer shall make a determination on a fee waiver or reduction request within five working days of the request coming into his possession. No determination shall be made that a fee waiver or reduction request should be denied, until the Designated FOIA Officer has consulted with the General Counsel's Office. If the determination is made that the written request for a waiver or reduction of fees does not meet the requirements of this section, the Designated FOIA Officer shall inform the requester that the request for waiver or reduction of fees is being denied and set forth his appeal rights under § 1703.109.

(b) A person requesting the board to waive or reduce search, review, or duplication fees shall:

(1) Describe the purpose for which the requester intends to use the requested information;

(2) Explain the extent to which the requester will extract and analyze the substantive content of

the agency record;

(3) Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to public understanding;

(4) Describe the likely impact of disclosure of the requested records on the public's understanding of the subject as compared to the level of understanding of the subject existing prior to disclosure;

(5) Describe the size and nature of the public to whose understanding a contribution will be made;

(6) Describe the intended means of dissemination to the general public;

(7) Indicate if public access to information will be provided free of charge or provided for an access or publication fee; and

(8) Describe any commercial or private interest the requester or any other party has in the agency records sought.

(c) The Board shall waive or reduce fees, without further specific information from the requester if, from information provided with the request for agency records made under § 1703.105, it can determine that disclosure of the information in the agency 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 is not primarily in the commercial interest of the requester.

(d) In making a determination regarding a request for a waiver or reduction of fees, the Board shall consider the following factors:

(1) Whether the subject of the requested agency records concerns the operations or activities of the Government;

(2) Whether disclosure of the information is likely to contribute significantly to public understanding of Government operations or activities;

(3) Whether, and the extent to which, the requester has a commercial interest that would be furthered by the disclosure of the requested agency records; and

(4) 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.

§ 1703.107 Fees for record requests.

(a) Fees for records available through the Public Reading Room.

(1) With the exception of copies of transcripts of Board public hearings addressed in paragraph (a)(2) of this section, the fees charged shall be limited to costs of duplication of the requested records. The Board shall either duplicate the requested records or have them duplicated by a commercial contractor. If the Board duplicates the records, it shall not charge the requester for the associated labor costs. A schedule of fees for this duplication service shall be prescribed in accordance with paragraph (b)(6) of this section. A person may obtain a copy of the schedule of fees in person or by mail from the Public Reading Room. There shall be no charge for responses consisting of ten or fewer pages.

(2) Transcripts of Board public hearings are made by private contractors. Interested persons may obtain copies of public hearing transcripts from the contractor at prices set in the contract, or through the duplication service noted in paragraph (a) of this section, if the particular contract so

permits. Copies of the contracts shall be available for public inspection in the Public Reading Room.

(3) Requests for certification of copies of official Board records must be accompanied by a fee of \$ 5.00 per document. Inquiries and orders may be made to the Public Reading Room in person or by mail.

(b) Fees for records not available through the Public Reading Room (FOIA requests).

(1) *Definitions.* For the purpose of paragraph (b) of this section:

Commercial use request means a request from or on behalf of one who seeks information for a use or purpose that furthers commercial, trade, or profit interests as these phrases are commonly known or have been interpreted by the courts in the context of the FOIA;

Direct costs means those expenditures which the Board incurs in search, review and duplication, as applicable to different categories of requesters, to respond to requests under § 1703.105. Direct costs include, for example, the average hourly salary and projected benefits costs of Board employees applied to time spent in responding to the request and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as cost of space, and heating or lighting the facility in which the Board records are stored.

Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program of scholarly research;

Noncommercial scientific institution refers to an institution that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry;

Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when the periodicals can qualify as disseminations of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media may be included in this category. A "freelance" journalist may be regarded as working for a news organization if the journalist can demonstrate a solid basis for expecting publication through that organization, even though the journalist is not actually employed by the news organization. A publication contract would be the clearest proof, but the Board may also look to the past publication record of a requester in making this determination.

(2) *Fees.* (i) If documents are requested for commercial use, the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time and for document review time, and the costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section.

(ii) If documents 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, or a representative of the news media, the Board's charges shall be limited to the direct costs of

duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for the first 100 pages of duplication.

(iii) For a request not described in paragraphs (b)(2) (i) or (ii) of this section the Board shall charge the average hourly pay rate for Board employees, plus the average hourly projected benefits cost, for document search time, and the direct costs of duplication as established in the schedule of fees referenced in paragraph (b)(6) of this section. There shall be no charge for document review time and the first 100 pages of reproduction and the first two hours of search time will be furnished without charge.

(iv) The Board, or its designee, may establish minimum fees below which no charges will be collected, if it determines that the costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fees. If total fees determined by the Board for a FOIA request would be less than the appropriate threshold, the Board shall not charge the requesters.

(v) Payment of fees must be by check or money order made payable to the U.S. Treasury.

(vi) Requesters 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 reasonably believes that a requester, or a group of requesters acting in concert, is attempting to break a request down into a series of requests for the purpose of evading assessment of fees, the Board may aggregate any such requests and charge the requester accordingly. The Board shall not, however, aggregate multiple requests on unrelated subjects from a requester.

(vii) Whenever the Board estimates that duplication or search costs are likely to exceed \$ 25, it shall notify the requester of the estimated costs, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester an opportunity to confer with the Board personnel with the object of reformulating the request to meet the requester's needs at a lower cost.

(3) *Fees for unsuccessful search.* The Board may assess charges for time spent searching, even if it fails to locate the records, or if records located are determined to be exempt from disclosure.

(4) *Advance payments.* (i) If the Board estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$ 250, the Board shall notify such requester of the estimated cost and either require satisfactory assurance of full payment where the requester has a history of prompt payment of fees, or require advance payment of the charges if a requester has no payment history.

(ii) If a requester has previously failed to pay a fee charged in a timely fashion, the Board shall require the requester to pay the full amount owed plus any applicable interest, and to make an advance payment of the full amount of the estimated fee before the Board will begin to process a new request or a pending request from that requester.

(iii) When the Board requires advance payment under this paragraph, the administrative time limits prescribed in § 1703.108(b) will begin only after the Board has received the fee payments.

(5) *Debt collection.* The Board itself may endeavor to collect unpaid FOIA fees, or may refer unpaid FOIA invoices to the General Services Administration, or other federal agency performing financial management services for the Board, for collection.

(6) *Annual adjustment of fees.* -- (i) *Update and publication.* The Board, by its designee, the General Manager, shall promulgate a schedule of fees and the average hourly pay rates and average hourly projected benefits cost and will update that schedule once every twelve months. The General Manager shall publish the schedule for public comment in the FEDERAL REGISTER.

(ii) *Payment of updated fees.* The fee applicable to a particular FOIA request will be the fee in effect on the date that the request is received.

EFFECTIVE DATE NOTE: At 62 FR 66816, Dec. 22, 1997, § 1703.107 was amended by removing and reserving paragraph (b)(2)(iv), effective Jan. 21, 1998.

§ 1703.108 Processing of FOIA requests.

(a) Where a request complies with § 1703.105 as to specificity and statement of willingness to pay or request for fee waiver or reduction, the Designated FOIA Officer shall acknowledge receipt of the request and commence processing of the request. The Designated FOIA Officer shall prepare a written response:

- (1) Granting the request,
- (2) Denying the request,
- (3) Granting or denying it in part,
- (4) Stating that the request has been referred to another agency under § 1703.105, or
- (5) Informing the requester that responsive records cannot be located or do not exist.

(b) Action pursuant to this section to provide access to requested records shall be taken within twenty working days. This time period may be extended up to ten additional working days, in unusual circumstances, by written notice to the requester. If the Board will be unable to satisfy the request in this additional period of time, the requester will be so notified and given the opportunity to:

- (1) Limit the scope of the request so that it can be processed within the time limit, or
- (2) Arrange with the Designated FOIA Officer an alternative time frame for processing the original request or a modified request.

(c) For purposes of this section and § 1703.109, the term *unusual circumstances* may include but is not limited to the following:

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the Board's Washington, DC offices;
- (2) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which may be responsive to a single request; or
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency pursuant to § 1703.105(d).

(d) If no determination has been made at the end of the ten day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. 552(a)(4). When no determination can be made within the applicable time limit, the Board will nevertheless continue to process the request. If the Board is unable to provide a response within the statutory period, the Designated FOIA Officer shall inform the requester of the reason for the delay; the date on which a determination may be expected to be made; and that the requester can seek remedy through the courts, but shall ask the requester to forgo such action until a determination is made.

(e) Nothing in this part shall preclude the Designated FOIA Officer and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement shall be confirmed in writing and shall clearly specify the total time agreed upon.

(f) The procedure for appeal of denial of a request for Board records is set forth in § 1703.109.

[56 FR 21261, May 8, 1991, as amended at 62 FR 66816, Dec. 22, 1997]

EFFECTIVE DATE NOTE: At 62 FR 66816, Dec. 22, 1997, § 1703.108(b) was revised, effective Jan. 21, 1998.

§ 1703.109 Procedure for appeal of denial of requests for board records and denial of requests for fee waiver or reduction.

(a)(1) A person whose request for access to records or request for fee waiver or reduction is denied in whole or in part may appeal that determination to the General Counsel within 30 days of the determination. Appeals filed pursuant to this section must be in writing, directed to the General Counsel at the address indicated in § 1703.105(b)(2) and clearly marked "Freedom of Information Act Appeal." Such an appeal received by the Board not addressed and marked as indicated in this paragraph will be so addressed and marked by Board personnel as soon as it is properly identified and then will be forwarded to the General Counsel. Appeals taken pursuant to this paragraph will be considered to be received upon actual receipt by the General Counsel.

(2) The General Counsel shall make a determination with respect to any appeal within 20 working days after the receipt of such appeal. If, on appeal, the denial of the request for records or fee reduction is in whole or in part upheld, the General Counsel shall notify the person making such request of the provisions for judicial review of that determination.

(b) In unusual circumstances, as defined in § 1703.108(c), the time limits prescribed for deciding an appeal pursuant to this section may be extended by up to ten working days, by the General Counsel, who will send written notice to the requester setting forth the reasons for such extension and the expected determination date.

§ 1703.110 Requests for classified records.

The Board may at any time be in possession of classified records and Unclassified Controlled Nuclear Information (UCNI) received from the Department of Energy or other federal agencies. The Board shall refer requests under § 1703.105 for such records or information to the Department of Energy or other originating agency without making an independent determination as to the releasability of such documents. The Board shall refer requests for classified records in a manner consistent with Executive Order 12356, "National Security Information," 3 CFR, 1982 Comp., p. 166, or any superseding Executive Order. The Board shall refer requests for UCNI in a manner consistent with 42 U.S.C. 2168 and the Department of Energy's implementing regulations in 10 CFR part 1017 or any successor regulations.

§ 1703.111 Requests for privileged treatment of documents submitted to the board.

(a) **Scope.** Any person submitting a document to the Board may request privileged treatment by claiming that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of FOIA and should otherwise be withheld from public disclosure.

(b) *Procedures.* A person claiming that information is privileged under paragraph (a) of this section must file:

(1) An application, accompanied by an affidavit, requesting privileged treatment for some or all of the information in a document, and stating the justification for nondisclosure of the information and addressing the factors set forth in paragraph (e) of this section;

(2) The original document, boldly indicating on the front page "Contains Privileged Information--Do Not Release" and identifying within the document the information for which the privileged treatment is sought;

(3) Three copies of the redacted document (i.e., without the information for which privileged treatment is sought) and with a statement indicating that information has been removed for privileged treatment; and

(4) The name, title, address, telephone number, and telecopy information of the person or persons to be contacted regarding the request for privileged treatment of documents submitted to the Board.

(c) *Effect of privilege claim.* (1) The Designated FOIA Officer shall place documents for which privileged treatment is sought in accordance with paragraph (b) of this section in a nonpublic file, while the request for confidential treatment is pending. By placing documents in a nonpublic file, the Board is not making a determination on any claim for privilege. The Board retains the right to make determinations with regard to any claim of privilege, and the discretion to release information as necessary to carry out its responsibilities.

(2) The Designated FOIA Officer shall place the request for privileged treatment described in paragraph (b)(1) of this section and a copy of the redacted document described in paragraph (b)(3) of this section in a public file while the request for privileged treatment is pending.

(d) *Notification of request and opportunity to comment.* When a FOIA requester seeks a document for which privilege is claimed, the Designated FOIA Officer shall so notify the person who submitted the document and give that person an opportunity (at least five days) in which to comment in writing on the request. A copy of this notice shall be sent to the FOIA requester.

(e) *Factors to be considered by Board.* In determining whether to grant the document privileged status and to deny the request for the document the Board shall consider:

(1) Whether the information has been held in confidence by its owner;

(2) Whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor;

(3) Whether the information was transmitted to and received by the Board in confidence;

(4) Whether the information is available in public sources; and

(5) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

(f) *Notification before release.* Notice of a decision by the Designated FOIA Officer to deny a claim of privilege, in whole or in part, shall be given to any person claiming that information is privileged no less than five days before public disclosure. The decision shall be made only after consultation with the General Counsel's Office. The notice shall briefly explain why the person's objections to disclosure were not sustained. A copy of this notice shall be sent to the FOIA requester.

(g) *Notification of suit in Federal courts.* When a FOIA requester brings suit to compel disclosure of confidential commercial information, the Board shall notify the person who submitted documents containing such confidential commercial information of the suit.

§ 1703.112 Computation of time.

In computing any period of time under this part, the day of the Board's action is not included. The last day of the period is included unless it is a Saturday, Sunday or legal holiday, in which case the period runs until the end of the next working day. Whenever a person has the right or is required to take some action within a prescribed period after notification by the Board and the notification is made by mail, five days shall be added to the prescribed period. Only two days shall be added when a notification is made by express mail.