

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF SPECIAL COUNSEL

### 5 CFR Part 1820

#### Freedom of Information Act; Implementation

**AGENCY:** U.S. Office of Special Counsel.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Special Counsel (OSC) proposes to revise its regulations dealing primarily with the agency's implementation of the Freedom of Information Act (FOIA). The regulation, as revised, would implement provisions of the FOIA as amended, update information in the current regulation, and contain new and expanded information about the agency's processing of FOIA requests and appeals. Included in the revised regulation, as proposed, are provisions containing updated, revised, or new information about: publicly available records and information; requirements for making FOIA requests, including updated contact information; consultations with and referrals to other agencies; responses to requests, including information about multitrack and expedited processing; requirements for appealing initial decisions on requests, including updated contact information; fees, including new and revised cost information; and business information. Finally, the regulation, as revised, would address responses to demands by courts or other authorities to an OSC employee for production of official records or testimony in legal proceedings.

**DATES:** Comments on the proposed rule must be received by May 14, 2007.

**FOR FURTHER INFORMATION CONTACT:** Christopher Kurt, FOIA Officer, in writing at: U.S. Office of Special Counsel, Legal Counsel and Policy Division, 1730 M Street, NW., Suite 218, Washington, DC 20036-4505; by telephone at (202) 254-3600; or by facsimile at (202) 653-5151.

**SUPPLEMENTARY INFORMATION:** OSC proposes to revise its regulations at 5

C.F.R. Part 1820, dealing primarily with the agency's implementation of the FOIA. The regulation, as revised, would implement provisions of the FOIA, at 5 U.S.C. 552, as amended, update information in the current regulation, and contain new and expanded information about the agency's processing of FOIA requests and appeals. A description of proposed changes follows.

The title of part 1820 would be changed to reflect its primary focus on the agency's implementation of the FOIA, and its coverage of responses to certain demands for production of official records and testimony. Section 1820.1 would be substantially revised and updated to: outline the scope of part 1820; make clear that the part should be read together with provisions of the FOIA; provide readers with the address for the FOIA page of OSC's web site; and describe information publicly available without a FOIA request.

Section 1820.2 would be revised and enlarged to: describe requirements for FOIA requests; provide updated OSC contact information for such requests; and describe the agreement to pay fees implicit in FOIA requests, unless waived or specified otherwise.

Sections 1820.3-1820.7 of the current regulation, dealing with FOIA fees, would be consolidated into a new section 1820.7, to be described later in this notice. A new section 1820.3 would address consultations with and referrals to other agencies, describing circumstances in which OSC may consult with other agencies about a FOIA request and refer records to another agency for a disclosure decision.

A new section 1820.4 would deal with the timing of responses to FOIA requests, and incorporate including new regulatory provisions on multitrack and expedited processing of requests and appeals.

A new section 1820.5 would describe the types of responses to FOIA requests, including adverse determinations.

The current section of part 1820 dealing with appeals (1820.8), would be re-numbered as section 1820.6. The new section 1820.6 would: contain an expanded discussion of requirements for filing appeals of adverse FOIA determinations; provide updated OSC contact information for such appeals; extend the time for filing an appeal from

30 to 45 days from the date of the determination; and describe the nature of responses to appeals.

A new section 1820.7, as noted before, would incorporate updated and expanded provisions on fees associated with the processing of FOIA requests, including: a provision specifying that if a fee incurred for responding to a FOIA request is \$20.00 or less, no fee will be charged to the requester; revision of labor rates for search and review time for clerical and professional personnel, reflecting current costs, and addition of a labor category for managerial personnel; inclusion of the cost of retrieving records from a Federal Records Center and expanded discussion of requirements and criteria for fee waiver or fee reduction requests.

A new section 1820.8 would implement the provisions of Executive Order No. 12600, and outline procedures to be followed in case OSC were to receive a FOIA request for business information.

A new section 1820.9 would provide that part 1820 should not be construed as entitling any person to any service or the disclosure of any record to which such person is not entitled under the FOIA.

Finally, section 1820.9 in the current regulation has been re-numbered as section 1820.10 and re-titled to clarify the scope of that section.

#### Procedural Determinations

*Congressional Review Act:* OSC has determined that these proposed revisions are non-major under the Congressional Review Act, and will submit a report on this final rule to Congress and the Government Accountability Office pursuant to the act.

*Regulatory Flexibility Act Certification (5 U.S.C. 605):* I certify that this regulation will not have a significant economic impact on a substantial number of small entities. OSC primarily handles matters involving individuals who are current or former Federal government employees, applicants for federal employment, certain state or local government employees, and representatives of these individuals. These regulations, as revised, would affect only the implementation of the Freedom of Information Act at OSC, and responses by OSC to certain demands for production of records or testimony.

These proposed revisions will not cause significant additional impact.

*Unfunded Mandates Reform Act (UMRA):* This proposed revision does not impose any Federal mandates on state, local, or tribal governments, or on the private sector within the meaning of the UMRA.

*Paperwork Reduction Act:* This revision does not impose any new recordkeeping, reporting or other information collection requirements on the public.

*Executive Order 12866 (Regulatory Planning and Review):* While not required to do so, OSC has reviewed this revision under Executive Order 12866 and anticipates that the economic impact of this revision will be insignificant. Thus, this proposed revision is not a significant regulatory action under §3(f) of Executive Order 12866, and does not require an assessment of potential costs and benefits under §6(a)(3) of the order.

*Executive Order 13132 (Federalism):* This proposed revision does not have new federalism implications under Executive Order 13132. The Hatch Act, at title 5 of the U.S. Code, chapter 15, prohibits certain political activities of covered state and local government employees. OSC has jurisdiction to issue advisory opinions on political activity by those employees, and to bring enforcement action before the Merit Systems Protection Board for prohibited activity by a covered state or local government employee. These revised regulations affect only the implementation of the Freedom of Information Act at OSC, and responses by OSC to certain demands for production of records or testimony, and do not significantly change the rights of state and local government employees.

*Executive Order 12988 (Civil Justice Reform):* This proposed rule meets applicable standards of §§ 3(a) and 3(b)(2) of Executive Order 12988.

#### List of Subjects in 5 CFR Part 1820

Administrative practice and procedure, Government employees, Freedom of Information.

For the reasons stated in the preamble, OSC proposes to revise 5 CFR Part 1820 to read as follows:

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

Sec.

- 1820.1 General provisions.
- 1820.2 Requirements for making FOIA requests.
- 1820.3 Consultations and referrals.
- 1820.4 Timing of responses to requests.

- 1820.5 Responses to requests.
- 1820.6 Appeals.
- 1820.7 Fees.
- 1820.8 Business information.
- 1820.9 Other rights and services.
- 1820.10 Production of official records or testimony in legal proceedings.

**Authority:** 5 U.S.C. 552 and 1212(e); Executive Order No. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

#### § 1820.1 General provisions.

This part contains rules and procedures followed by the Office of Special Counsel (OSC) in processing requests for records under the Freedom of Information Act (FOIA), as amended, at 5 U.S.C. 552. These rules and procedures should be read together with the FOIA, which provides additional information about access to agency records. Further information about the FOIA and access to OSC records is available on the FOIA page of OSC's web site ([www.osc.gov/foia.htm](http://www.osc.gov/foia.htm)). Information routinely provided to the public as part of a regular OSC activity—for example, forms, press releases issued by the public affairs officer, records published on the agency's web site ([www.osc.gov](http://www.osc.gov)), or public lists maintained at OSC headquarters 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 employee for production of official records or testimony in legal proceedings.

#### § 1820.2 Requirements for making FOIA requests.

(a) *How made and addressed.* A request for OSC records under the FOIA should be made by writing to the agency. The request should be sent by regular mail addressed to: FOIA Officer, U.S. Office of Special Counsel, 1730 M Street, NW. (Suite 218), Washington, DC 20036-4505. Such requests may also be faxed to the FOIA Officer at the number provided on the FOIA page of OSC's web site (see section 1820.1). For the quickest handling, both the request letter and envelope or any fax cover sheet should be clearly marked "FOIA Request." Whether sent by mail or by fax, a FOIA request will not be considered to have been received by OSC until it reaches the FOIA Officer.

(b) *Description of records sought.* Requesters must 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, Hatch Act, USERRA or other complaint; 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.

(c) *Agreement to pay fees.* Making a FOIA request shall be considered an agreement by the requester to pay all applicable fees chargeable under section 1820.7, up to and including the amount of \$25.00, unless the requester asks for a waiver of fees. When making a request, a requester may specify a willingness to pay a greater or lesser amount.

#### § 1820.3 Consultations and referrals.

When OSC receives a FOIA request for a record in the agency's possession, it may determine that another Federal agency is better able to decide whether or not the record is exempt from disclosure under the FOIA. If so, OSC will either: (1) respond to the request for the record after consulting with the other agency and with any other agency that has a substantial interest in the record; or (2) refer the responsibility for responding to the request to the other agency deemed better able to determine whether to disclose it. Consultations and referrals will be handled according to the date that the FOIA request was initially received by the first agency.

#### § 1820.4 Timing of responses to requests.

(a) *In general.* OSC ordinarily will respond to FOIA requests according to their order of receipt. In determining which records are responsive to a request, OSC ordinarily will include only records in its possession as of the date on which it begins its search for them. If any other date is used, OSC will inform the requester of that date.

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

(2) When using multitrack processing, OSC may provide requesters 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) Requests and appeals will be taken out of order and given 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) with respect to a request made by a person primarily engaged in disseminating information,

an urgency exists to inform the public about an actual or alleged federal government activity; or (iii) records requested relate to an appeal that is pending before, or that the requester faces an imminent deadline for filing with, the Merit Systems Protection Board or other administrative tribunal or a court of law, seeking personal relief pursuant to a complaint filed by the requester with OSC, or referred to OSC pursuant to 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. Such a request will not be considered to have been received until it reaches the FOIA Officer.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. For example, a requester within the category described in paragraph (c)(1)(ii) of this section, if not a full-time member of the news media, must establish that he or she is a person whose main professional activity or occupation is information dissemination, though it need not be his or her sole occupation. The formality of certification may be waived as a matter of OSC's administrative discretion.

(4) OSC shall decide whether to grant a request for expedited processing and notify the requester of its decision within 10 calendar days of the FOIA Officer's receipt of the request. If the request for expedited processing is granted, the request for records shall be processed as soon as practicable. If a request for expedited processing is denied, any administrative appeal of that decision shall be acted on expeditiously.

(d) *Aggregated requests.* OSC may aggregate multiple requests by the same requester, or by a group of requesters acting in concert, if it reasonably believes that such requests actually constitute a single request involving unusual circumstances, as defined by the FOIA, supporting an extension of time to respond, and the requests involve clearly related matters.

#### **§ 1820.5 Responses to requests.**

(a) *General.* Once OSC makes a determination to grant a FOIA request for records, or makes an adverse determination denying a request in any respect, it will notify the requester in writing. Adverse determinations, or denials of requests, consist of: a determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not

readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited treatment.

(b) *Adverse determinations.* A notification to a requester 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 section 1820.6(a), with a description of the requirements of that subsection.

#### **§ 1820.6 Appeals.**

(a) *Appeals of adverse determinations.* A requester may appeal an adverse determination denying a FOIA request in any respect to the Legal Counsel and Policy Division, U.S. Office of Special Counsel, 1730 M Street, NW, (Suite 218), Washington, DC 20036-4505. The appeal must be in writing, and sent by regular mail or by fax. The appeal must be received by the Legal Counsel and Policy Division within 45 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet should be clearly marked "FOIA Appeal." The appeal letter may include as much or as little related information as the requester wishes, as long as it clearly identifies the OSC determination (including the assigned FOIA request number, if known) being appealed. An appeal ordinarily will not be acted on if the request becomes a matter of FOIA litigation.

(b) *Responses to appeals.* The agency decision on an appeal will be made in writing. A decision affirming an adverse determination in whole or in part shall inform the requester of the provisions for judicial review of that decision. If the adverse determination is reversed or modified on appeal, in whole or in part, the requester will be notified in a written decision and the request will be reprocessed in accordance with that appeal decision.

#### **§ 1820.7 Fees.**

(a) *In general.* OSC shall charge for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (k) of this section. OSC may collect all applicable fees before sending copies of requested

records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

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

(1) "Commercial use" request" means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. OSC shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because OSC has reasonable cause to doubt a requester's stated use, OSC shall provide the requester with a reasonable opportunity to submit further clarification.

(2) "Direct costs" means 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 the costs of space, and heating or lighting the facility in which the records are kept.

(3) "Duplication" means the process of making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, on digital data storage discs), among others.

(4) "Educational institution" means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester 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.

(5) "Non-commercial scientific institution" means an institution that is not operated on a "commercial" basis, as that term is referenced in paragraph (b)(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. To be in this category, a requester 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 scientific research.

(6) "Representative of the news media" or "news media requester" means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that 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 where they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSC may also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. However, a request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

(7) "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 disclosure. It includes processing any record for disclosure - for example, doing all that is necessary to redact it and otherwise prepare it for disclosure. Review time also includes time spent obtaining and considering any formal objection to disclosure made by a business submitter under section 1820.8(f). It does not include time spent resolving general legal or policy issues about the application of exemptions. Review costs are properly charged in connection with commercial use requests even if a record ultimately is not disclosed.

(8) "Search" means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records when undertaken, and reasonable efforts to locate and retrieve information from records maintained in electronic form or format, to the extent

that such efforts would not significantly interfere with the operation of an automatic information system.

(c) *Fees.* In responding to FOIA requests, OSC shall charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section:

(1) Search. (i) Search fees will be charged for all requests - other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media - subject to the limitations of paragraph (d) of this section. OSC may charge for time spent searching even if it fails to locate responsive records, or records located after a search are determined to be exempt from disclosure.

(ii) For each quarter hour spent by clerical personnel in searching for and retrieving a requested record, the fee will be \$5.50. Where a search and retrieval cannot be performed entirely by clerical personnel - for example, where the identification of records within the scope of a request requires the use of professional personnel - the fee will be \$9.00 for each quarter hour of search time spent by professional personnel. Where the time of managerial personnel is required, the fee will be \$17.50 for each quarter hour of time spent by those personnel.

(iii) For electronic searches of records, requesters will be charged the direct costs of conducting the search, including the costs of operator/programmer staff time apportionable to the search.

(iv) For requests requiring the retrieval of records from any Federal Records Center, additional costs may be charged in accordance with the applicable billing schedule established by the National Archives and Records Administration.

(2) Duplication. Duplication fees will be charged to all requesters, subject to the limitations of paragraph (d) of this section. For a standard paper photocopy of a record (no more than one copy of which need be supplied), the fee 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. Review fees will be charged to requesters who make a commercial use request. Review fees will be charged for only initial record review - in other words, the review done when OSC analyzes whether an exemption applies to a particular record or record portion at the initial request

level. No charge will be made for review at the administrative appeal level for an exemption already applied. However, records or record portions withheld under an exemption that is subsequently determined not to apply may be reviewed again to determine whether any other exemption not previously considered applies; the costs of that review are chargeable where it is made necessary by such a change of circumstances. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Limitations on charging fees.* (1) No search fee will be charged for requests by educational institutions, noncommercial scientific institutions, or representatives of the news media.

(2) No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(3) Except for requesters seeking records for a commercial use, OSC will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent); and

(ii) The first two hours of search (or the cost equivalent).

(4) Whenever a total fee calculated under paragraph (c) of this section is \$20.00 or less for any request, no fee will be charged.

(5) The provisions of paragraphs (d)(3) and (d)(4) of this section work together. This means that for requesters other than those seeking records for a commercial use, no fee will be charged unless the cost of search in excess of two hours plus the cost of duplication in excess of 100 pages totals more than \$20.00.

(e) *Notice of anticipated fees in excess of \$25.00.* When OSC determines or estimates that the fees to be charged under this section will amount to more than \$25.00, OSC shall notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, OSC will advise the requester that the estimated fee may be only a portion of the total fee. In cases in which a requester has been notified that actual or estimated fees amount to more than \$25.00, the request shall not be considered received and further work will not be done on it until the requester agrees to pay the anticipated total fee. A notice under this paragraph will offer the requester an opportunity to discuss the matter with OSC in order to reformulate the request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Apart from the other provisions of this section, when OSC chooses as a matter of administrative discretion to provide a special service—such as sending records by other than ordinary mail—the direct costs of providing the service ordinarily will be charged.

(g) *Charging interest.* OSC may charge interest on any unpaid fee starting on the 31st day after the date of on which the billing was sent to the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of billing until payment is received by OSC. OSC will follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended by the Debt Collection Act of 1996 (Public Law 104-134, 110 Stat. 1321-358), and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(h) *Aggregating requests.* Where OSC reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests that otherwise could have been submitted as a single request, for the purpose of avoiding fees, OSC may aggregate those requests and charge accordingly. OSC may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. Where requests are separated by a longer period, OSC will aggregate them only where a reasonable basis exists for determining that aggregation is warranted under all of the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) and (i)(3) of this section, OSC will not require the requester 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 requester) is not an advance payment.

(2) Where OSC determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester who has a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 days of the date of billing, OSC may require the

requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before OSC begins to process a new request or continues to process a pending request from that requester.

(4) In cases in which OSC requires advance payment or payment due under paragraph (i)(2) or (3) of this section, the request shall not be considered received and further work will not be done on the request until the required payment is received.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. Where records responsive to requests are maintained for distribution by agencies operating such statutorily based fee schedule programs, OSC will provide contact information for use by requesters in obtaining records from those sources.

(k) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request shall be furnished 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 requester has demonstrated that:

(i) Disclosure of the requested information 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) Disclosure of the information is not primarily in the commercial interest of the requester.

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

(i) *The subject of the request:* Whether the subject of the requested records concerns “the operations or activities of the government.” The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed:* Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions of 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 disclosure of information that already is in the public domain, in either a duplicative or

a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public’s understanding.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media satisfies this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. OSC shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.

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

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. OSC shall consider any commercial interest of the requester (with reference to the definition of “commercial use” in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information about this consideration.

(ii) The primary interest in disclosure: Whether any 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.” A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. OSC ordinarily shall presume that where a news media requester has satisfied the public

interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

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

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (3) of this section, insofar as they apply to each request. OSC will exercise its discretion to consider the cost-effectiveness of its investment of administrative resources in this decision making process, however, in deciding to grant waivers or reductions of fees.

#### § 1820.8 Business information.

(a) *In general.* Business information obtained by OSC from a submitter will be disclosed under the FOIA only under this section.

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

(1) "Business information" means commercial or financial information obtained by OSC from a submitter that may be protected from disclosure under exemption 4 of the FOIA.

(2) "Submitter" means any person or entity from whom the OSC obtains business information, directly or indirectly. The term includes corporations, and state, local, tribal and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* OSC shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever 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 disclosure of any specified portion of that information under paragraph (f) of this section. The notice shall either describe the business information requested or include copies of the requested records or record portions

containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

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

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under exemption 4; or

(2) OSC has reason to believe that the information may be protected from disclosure under exemption 4.

(f) *Opportunity to object to disclosure.* 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. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. If a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information.

Information provided by the submitter that is not received by OSC until after its disclosure decision has been made shall not be considered by OSC. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* OSC shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSC decides to disclose business information over the objection of a submitter, OSC shall give the submitter written notice, which shall include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

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

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

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

(3) Disclosure 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 disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSC shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever OSC provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSC shall also notify the requester(s). Whenever OSC notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSC shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSC shall notify the requester(s).

#### § 1820.9 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

#### § 1820.10 Production of official records or testimony in legal proceedings.

No employee or former employee of the Office of Special Counsel shall, in response to a demand of a court or other authority, produce or disclose any information or records acquired as part of the performance of his official duties or because of his official status without the prior approval of the Special Counsel or the Special Counsel's duly authorized designee.

Dated: April 3, 2007

**Scott J. Bloch,**

*Special Counsel.*

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