

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release Nos. 34-82373; FOIA-192; File No. S7-09-17]

RIN 3235-AM25

Amendments to the Commission’s Freedom of Information Act Regulations

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is publishing for comment proposed amendments to the Commission’s regulations under the Freedom of Information Act (“FOIA”). This rule proposes revisions to the Commission’s regulations under the FOIA to (1) reflect changes required by the FOIA Improvement Act of 2016 (“Improvement Act”); and (2) clarify, update, and streamline the language of several procedural provisions.

DATES: Comments should be received by February 2, 2018.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form located at <http://www.sec.gov/rules/proposed.shtml>;
- Send an email to rule-comments@sec.gov, including File Number S7-09-17 on the subject line;
or
- Use the Federal eRulemaking Portal located at <http://www.regulations.gov>, following the instructions for submitting comments.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-09-17. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington DC 20549, on official working days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by e-mail.

FOR FURTHER INFORMATION CONTACT: Mark Tallarico, Senior Counsel, Office of the General Counsel, (202) 551-5132; Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission is proposing revisions to its regulations under the FOIA, 5 U.S.C. 552. As required by the Improvement Act, Public Law 114-185, 130 Stat. 538, the Commission has reviewed its FOIA regulations to identify any changes that are necessary to conform its regulations to the Improvement Act. In connection with that review, the Commission has identified both changes necessitated by the Improvement Act and other areas where it would be beneficial to clarify, update, and

streamline the language of several procedural provisions. Due to the scope of the proposed revisions, the proposed rule would replace the Commission's current FOIA regulations in their entirety (17 CFR 200.80 through 200.80f).

II. Discussion of the Proposed Rule

A. Changes to Conform to the Improvement Act

The Commission is proposing four changes to the Commission's FOIA regulations to conform them to the Improvement Act. First, the proposed rule revises Section 200.80(a) to provide that records the FOIA requires to be made available for public inspection will be available in electronic format. Second, the proposed rule revises Section 200.80(c) to provide that a request for records may be denied to the extent the exemptions in 5 U.S.C. 552(b) apply to the requested records and Commission staff reasonably foresees that disclosure would harm an interest protected by the applicable exemption, the disclosure of the requested records is prohibited by law, or the requested records are otherwise exempted from disclosure under 5 U.S.C. 552(b)(3). Third, the proposed rule revises the regulations to state that FOIA requesters may seek assistance from the Office of FOIA Services' FOIA Public Liaisons (Sections 200.80(b), (d), and (e)) and to advise FOIA requesters of their right to seek dispute resolution services offered by the Office of Government Information Services in the case of a denied request (Section 200.80(e)). Fourth, the proposed rule revises Section 200.80(g) to incorporate the amendments to the FOIA requiring agencies to waive fees, under certain circumstances, if they do not comply with the time limits under the FOIA.

B. Proposed Amendments to Update, Clarify, and Streamline the FOIA Regulations

The remaining proposed changes are to certain procedural provisions. Those changes clarify, update, and streamline the Commission's regulations, and most of the changes make the regulations consistent with existing practices. The proposed regulations, among other things, update the various methods for submitting FOIA requests and administrative appeals (Sections 200.80(b) and (f)); describe certain information that is required when submitting requests for records about oneself or another

individual (Section 200.80(b)); explain the situations in which the Office of FOIA Services staff will work with other Federal agencies that have an interest in agency records that may be responsive to a request (Section 200.80(c)); incorporate language that allows the Office of FOIA Services to seek a one-time clarification of an ambiguous request and toll the time period for responding to the request until the requester clarifies the request (Section 200.80(c)); clarify when the 20-day statutory time limit for responding to requests begins (i.e., when requests are received by the Office of FOIA Services and when requests are modified so that they reasonably describe the records sought) (Section 200.80(d)); clarify the Office of FOIA Services' system for multi-track processing of requests (Section 200.80(d)); and enable the Office of FOIA Services to aggregate requests involving related matters where it appears that multiple requests together constitute a single request that would involve unusual circumstances (Section 200.80(d)).

Two of the procedural changes impose possible burdens on requesters. First, requesters must include their full names and return addresses in their request (Section 200.80(b)). Second, the Office of FOIA Services may aggregate related requests from one requester (or a group of requesters), and that aggregation may permit the Office of FOIA Services to extend deadlines for processing the request or place the request in a queue for complex requests. Other procedural changes provide more flexibility to requesters. For example, the proposed rule provides that administrative appeals need only be sent to the Office of FOIA Services (no longer requiring appeals to be sent to both the Office of FOIA Services and the Office of the General Counsel) (Section 200.80(f)).

The proposed rule also clarifies, consistent with existing practice, that the Office of FOIA Services will close requests if requesters do not take certain steps within set time periods. For example, requesters must respond to the Office of FOIA Services' one-time clarification request within 30 calendar days (Section 200.80(d)); agree to pay anticipated fees within 30 calendar days of the Office of FOIA Services' fee estimate (Section 200.80(g)); and, when required to do so, make an advance payment within 30 calendar days of the Office of FOIA Services' fee notice (Section 200.80(g)).

C. Proposed Revisions to Fee Provisions

The proposed rule also revises the Office of FOIA Services' fee procedures and fee schedule in Section 200.80(g). Two of the revisions could change current practices. First, the proposed rule allows the Office of FOIA Services to collect fees before sending records to a requester instead of seeking payment when the records are sent. Second, the proposed rule removes from the rule the set duplication fee of 24 cents per page and instead refers requesters to the FOIA fee page on the Commission's website, where the current fee will be posted.¹ The duplication fee posted on the website will reflect the direct costs of photocopying or producing a printout, taking into account various factors including the salary of the employee(s) performing the work and the cost of materials. The duplication fee posted on the Commission's website will be adjusted as appropriate to reflect current costs. Eliminating the set duplication fee will allow the Office of FOIA Services to align its photocopying and printout fees with the actual costs of duplicating records for production to requesters (in paper format) without having to amend the regulations.

The proposed rule also codifies several existing practices. For example, it states that fees for duplicating records onto electronic medium (including the costs associated with scanning materials, where applicable) will be the direct costs of duplicating records for requesters; clarifies that the Office of FOIA Services will not process any requests once it determines that a fee may be charged unless the requester commits to pay the estimated fees; adds and clarifies fee-related definitions; clarifies the direct costs that can be charged by the Office of FOIA Services as part of search, review, and duplication fees; and sets forth the various methods by which FOIA processing fees can be paid.

D. Proposed Elimination of Certain Provisions

The proposed rule eliminates certain provisions in the Commission's current FOIA regulations that repeat information contained in the FOIA statute and do not need to be in the Commission's regulations. Among the provisions that the Commission is proposing to remove are: (1) the list of

¹ The Commission anticipates that the initial posted fee will be 15 cents per page, and the Commission is already charging this lower cost.

information the FOIA requires the Commission to publish in the Federal Register (Section 200.80(a)(1) of the current regulations), (2) the categories of records the FOIA requires the Commission to make available for public inspection (Section 200.80(a)(2) of the current regulations), and (3) the nine categories of records that are exempt from disclosure under 5 U.S.C. 552(b) (Section 200.80(b) of the current regulations). Finally, the Commission is proposing to eliminate Appendices A through F. Appendices A through D and F provide general information that is available on the Commission's website to the extent it is relevant to the public. The information in Appendix E is revised and updated and moved to Section 200.80(g) (Fees) of the proposed regulations.

E. Structure of the Proposed Rule

The structure of the regulations will be revised accordingly: Section 200.80(a) (General provisions); Section 200.80(b) (Requirements for making requests); Section 200.80(c) (Processing requests); Section 200.80(d) (Time limits and expedited processing); Section 200.80(e) (Responses to requests); Section 200.80(f) (Administrative appeals); and Section 200.80(g) (Fees).

III. General Request for Comments

We request and encourage any interested person to submit comments on any aspect of the proposals, other matters that might have an impact on the proposals, and suggestions for additional changes. We note that comments are of particular assistance to us if accompanied by analysis of the issues addressed in those comments and any data that may support the analysis. We urge commenters to be as specific as possible.

IV. Economic Analysis

The Commission is sensitive to the economic effects, including the costs and benefits, that result from its rules. Section 23(a)(2) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition and prohibits any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange

Act.² Further, Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.³ As discussed further below, the Commission preliminarily believes that the economic effects of the proposed amendments would be limited. The Commission notes that, where possible, it has attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from the proposed amendments. In some cases, however, the Commission is unable to quantify the economic effects because it lacks the information necessary to provide a reasonable estimate. Additionally, some of the potential benefits of the amendments are inherently difficult to quantify.

The proposed revisions fall into four categories. First, as discussed in more detail above, the Commission is proposing amendments to its regulations to conform the regulations to the Improvement Act. Consistent with the Improvement Act, the proposed rule provides: (1) records required to be made available pursuant to the FOIA will be made available in electronic format; (2) records will be withheld under the exemptions in 5 U.S.C. 552(b) only if Commission staff reasonably foresees that disclosure would harm an interest protected by the applicable exemption or disclosure is prohibited by law; (3) FOIA requesters may seek assistance from the Office of FOIA Services' FOIA Public Liaisons and will be advised that they have the right to seek dispute resolution services from the Office of Government Information Services if their request is denied; and (4) the Office of FOIA Services is required to waive fees, in certain circumstances, if it does not comply with the time limits under the FOIA. The Commission believes that these changes would have minimal impact on FOIA requesters because they largely codify the Commission's existing practices. To the extent the amendments result in these practices being followed more consistently, they could benefit the public by increasing the amount of information

² 15 U.S.C. 78w(a).

³ 15 U.S.C. 78c(f).

available, making more information available in an electronic format, and ensuring that requesters know of their right to seek alternative dispute resolution. The Commission also believes that the public could benefit from the increased transparency regarding these practices. The Commission does not expect these proposed amendments to result in additional costs to any member of the public.

Second, the Commission is proposing amendments to procedural provisions, which are intended to better reflect and improve existing practice. Most of these changes codify existing Office of FOIA Services practice, including: (1) adding to the regulation additional methods for submitting FOIA requests and administrative appeals; (2) clarifying the existing procedures for submitting requests for records about oneself or another individual; (3) clarifying the existing procedures for submitting a proper FOIA request and seeking clarification of a request; (4) clarifying existing procedures for submitting an administrative appeal; and (5) clarifying the existing practice that limits administrative appeals to written filings (i.e., there is no opportunity for personal appearance, oral argument, or hearing on appeal). The Commission does not expect these changes to result in additional costs to any member of the public. The Commission also expects that there would be some benefit to FOIA requesters from the increased transparency regarding these practices.

Two proposed procedural changes could affect members of the public. First, FOIA requesters will be required to include their full names and addresses in their requests. Providing a full name and address is not itself burdensome, but some requesters may prefer to remain anonymous and could be deterred from submitting FOIA requests by this requirement. However, because nearly all FOIA requesters provide this information already, the Commission expects that the economic impact of the amendment will be minimal. Second, the Office of FOIA Services will be able to aggregate related requests from one requester (or a group of requesters). The Office of FOIA Services could aggregate requests that on their own do not involve “unusual circumstances,” as defined in the proposed regulations, or warrant placement in a track for complex requests, so aggregation may lead to extended deadlines for processing a request or cause a request to be handled after other complex requests. Based on past experience, the Commission expects that few requests will be aggregated. In addition, if the aggregation of requests

results in the requests being placed in a track for complex requests that could extend the processing time, the requester could modify the request so that it can be processed more quickly. Thus, the Commission expects that the impact of this amendment also will be minimal.

Third, the Commission is proposing to revise the Office of FOIA Services' fee procedures and fee schedule in several ways, including: (1) eliminating from the rule the per page duplication fee for copying or printing requested records, and instead referring requesters to the FOIA fee page on the Commission's website; (2) allowing the Office of FOIA Services to collect fees before sending records to a requester instead of seeking payment when the records are sent; (3) clarifying the direct costs that can be charged by the Office of FOIA Services as part of its search, review, and duplication fees; and (4) codifying the existing Office of FOIA Services practice of charging requesters the actual cost of production for materials produced in an electronic format. In general, lowering fees associated with FOIA requests could encourage additional FOIA submissions, while raising fees could deter them. However, as discussed below, the Commission does not anticipate that any of its proposed changes to the Office of FOIA Services' fee procedures would impose significant new costs on FOIA requesters.

With respect to the elimination of the set per page duplication fee, the Commission anticipates that the initial posted fee will be 15 cents per page, and the Office of FOIA Services has already lowered its per page duplication fee from 24 cents to 15 cents to reflect its actual duplication costs. Even if the Office of FOIA Services were to increase the per page duplication fee in the future, the impact of any increase would likely be minimal. Information about the fees the Commission has collected for FOIA requests for the past six years serves as a baseline from which the Commission can estimate the economic effects of this proposed change. Table 1 shows the number of requests received and processed by the Commission during fiscal years 2011 through 2016 and the fees the Commission collected. The fees collected by the Commission for processing FOIA requests include charges for staff time associated with locating, reviewing, and copying responsive documents. The Commission collects fees for duplication of 24 cents per page for paper copies and the costs of production for other types of media. The fee schedule for FOIA requests is available on the Commission's website.

Table 1: FOIA requests in fiscal years 2011 to 2016			
Fiscal Year	Requests Received	Requests Processed	Fees Collected for Processing Requests
2011	11,555	11,562	\$78,005.94
2012	11,292	11,302	\$27,577.00
2013	12,275	12,167	\$35,954.30
2014	14,862	14,757	\$22,670.81
2015	16,898	16,207	\$19,890.07
2016	14,458	15,196	\$41,029.68

As shown in Table 1, from fiscal year 2011-2016, the Office of FOIA Services collected an average of \$37,521.30 per year in fees for processing an average of 13,532 requests. These amounts correspond to an average fee of \$2.77 collected per request processed.⁴ Even if all of those fees were for duplication (which they were not), a one cent per page increase in duplication fees would result in an increase in total fees collected of approximately \$1,563.39,⁵ corresponding to an average fee of \$2.89 collected per request processed.⁶

With respect to the amendment providing that the FOIA Office can collect fees before sending records to a requester (instead of seeking payment when the records are sent), the Commission expects that any additional cost will be limited to a slight delay in receiving documents. The timing of the collection would not itself impose any additional costs on FOIA requesters because the timing would not alter the amount of fees charged. Any delay in receiving the documents would not be significant because a FOIA requester could make an electronic payment upon receipt of the request for payment, and the Office of FOIA Services would then provide the documents. The Commission notes that some requesters may choose to forego receiving the records in question if the fees are substantial, though even this impact

⁴ Calculated as $\$37,521.30 / 13,532 = \2.77 .

⁵ To arrive at this estimated increase, we divide \$37,521.30 in duplication fees by a cost of \$0.24 per page to derive an estimate of approximately 156,339 pages of copies on average per fiscal year. 156,339 pages x \$0.01 increase in per-page duplication fees = \$1,563.39 in additional total processing fees.

⁶ Calculated as $(\$37,521.30 + \$1,563.39) / 13,532 = \$2.89$.

may be muted because requesters would have been advised of and approved potential charges before requests are processed by the FOIA Office.

The proposed clarification regarding direct costs and codification of existing practice with respect to fees for materials produced in an electronic format are consistent with existing practice, and the Commission therefore does not expect these amendments to impose any additional burden on the public. The other proposed changes to the Office of FOIA Services' fee procedures also codify existing processes and will therefore not impose any additional burden on requesters. These proposed changes include: (1) clarifying that the Office of FOIA Services will not process any requests once it determines that a fee may be charged unless the requester commits to pay the estimated fees; and (2) adding and clarifying certain fee-related definitions. The Commission does not expect these amendments to result in additional costs to any member of the public. To the contrary, the Commission believes that the public could benefit from the increased transparency regarding these practices.

Finally, the Commission is proposing to eliminate certain provisions in its FOIA regulations that are restatements of provisions in the FOIA statute. The Commission does not expect these amendments to result in any economic effects, as the elimination of these redundant provisions would not have any substantive consequence.

The Commission believes that the proposed amendments would not have any significant impact on efficiency, competition, or capital formation. The Commission requests comment on all aspects of the benefits and costs of the proposal, including any anticipated impacts on efficiency, competition, or capital formation.

V. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980 ("RFA") requires the Commission to undertake an initial regulatory flexibility analysis of the effect of the proposed rule amendments on small entities unless the Commission certifies that the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. As discussed above, most of the proposed changes are procedural. Many of the changes codify existing practices and are therefore unlikely to have

any economic impact on requesters. With respect to the changes to the fee schedule, under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. These fees are typically nominal, and the proposed changes to the fees are therefore similarly nominal and would not have a significant economic impact on a FOIA requester, even a small entity. In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Commission certifies that the proposed amendments to the FOIA regulations, if adopted, would not have a significant economic impact on a substantial number of small entities. The Commission requests comment regarding the appropriateness of its certification.

VI. Paperwork Reduction Act

The proposed rule would not impose any new “collection of information” requirement as defined by the Paperwork Reduction Act of 1995 (“PRA”), 44 U.S.C. 3501 *et seq.*; nor would it create any new filing, reporting, recordkeeping, or disclosure reporting requirements. Accordingly, we are not submitting the proposed rule to the Office of Management and Budget for review under the PRA.⁷ We request comment on whether our conclusion that there are no new collections of information is correct.

VII. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996, a rule is considered “major” where, if adopted, it results or is likely to result in: (i) an annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); (ii) a major increase in costs or prices for consumers or individual industries; or (iii) significant adverse effect on competition, investment, or innovation.⁸ We request comment on the potential impact of the proposed rule on the economy on an annual basis, any potential increase in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

⁷ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

⁸ Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

VIII. Statutory Authority and Text of Proposed Rule Amendments

The amendments contained herein are being proposed under the authority set forth in Public Law 114-185 §3(a), 130 Stat. 538; 5 U.S.C. 552; 15 U.S.C. 77f(d), 77s, 77ggg(a), 78d-1, 78w(a), 80a-37(a), 80a-44(b), 80b-10(a), and 80b-11(a).

List of Subjects in 17 CFR Part 200

Administrative practice and procedure; Freedom of information.

Text of Proposed Amendments

For the reasons stated in the preamble, the Commission proposes to revise 17 CFR part 200, subpart D, as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart D—Information and Requests

1. The authority citation for subpart D, is revised to read as follows:

Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a-37, 80a-44(a), 80a-44(b), 80b-10(a), and 80b-11, unless otherwise noted.

Section 200.80 also issued under Public Law 114-185 § 3(a), 130 Stat. 538; 5 U.S.C. 552; 15 U.S.C. 77f(d), 77s, 77ggg(a), 78d-1, 78w(a), 80a-37(a), 80a-44(b), 80b-10(a), and 80b-11(a), unless otherwise noted.

Section 200.82 also issued under 15 U.S.C. 78n.

Section 200.83 also issued under Exec. Order 12,600, 3 CFR, 1987 Comp., p. 235.

2. Revise §200.80 to read as follows:

§200.80 Securities and Exchange Commission records and information.

(a) General provisions.

(1) This section contains the rules that the U.S. Securities and Exchange Commission follows in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552, as amended. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom

of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the Commission’s Privacy Act regulations at subpart H, as well as this section.

(2) *Proactive disclosure of Agency records.* (i) Records that the FOIA requires to be made available for public inspection in an electronic format (pursuant to 5 U.S.C. 552(a)(2)) are accessible through the Commission’s website, <http://www.sec.gov>. Each division and office of the Commission is responsible for determining which of its records are required to be made publicly available in an electronic format, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each division and office shall ensure that its posted records and indexes are reviewed and updated on an ongoing basis.

(ii) Those who do not have access to the Internet may obtain these records by contacting the Commission’s Office of FOIA Services by telephone at 202-551-7900, by e-mail at foiapa@sec.gov, or by visiting the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549-2736, on official working days between the hours of 10:00 am and 3:00 pm.

(b) Requirements for making requests for records.

(1) *How made and addressed.* The Commission has a centralized system for responding to FOIA requests, with all requests processed by the Office of FOIA Services. Requests for agency records must be in writing and include the requester’s full name and a legible return address. Requesters may also include other contact information, such as an e-mail address and a telephone number. Requests may be submitted by U.S. mail or delivery service and addressed to the Freedom of Information Act Officer, SEC, 100 F Street, NE, Washington, DC 20549. Requests may also be made by facsimile (202-772-9337), e-mail (foiapa@sec.gov), or online at the Commission’s website (<http://www.sec.gov>). The request (and envelope, if the request is mailed or hand-delivered) should be marked “Freedom of Information Act Request.”

(2) *Requests for records about oneself or another individual.* (i) A requester who is making a request for records about himself or herself must comply with the verification of identity provisions set forth in subpart H of this part to obtain any documents that would not be available to the public under the FOIA.

(ii) For requests for records about another individual, a requester may receive greater access by submitting either a notarized authorization signed by the individual permitting disclosure of his or her records or proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). The Office of FOIA Services can require a requester to supply additional information if necessary to verify that a particular individual has consented to disclosure.

(3) *Description of records sought.* A FOIA request must reasonably describe the agency records sought with sufficient specificity with respect to names, dates, and subject matter to enable personnel within the divisions and offices of the Commission to locate them with a reasonable effort. Before submitting a request, a requester may contact the Office of FOIA Services' FOIA Public Liaisons to discuss the records they are seeking and to receive assistance in describing the records (contact information for these individuals is on the Commission's website, <http://www.sec.gov>). If the Office of FOIA Services determines that a request does not reasonably describe the records sought, it shall inform the requester what additional information is needed or how the request is insufficient. A requester who is attempting to reformulate or modify such a request may discuss the request with the Office of FOIA Services' designated FOIA contact, its FOIA Public Liaisons, or a representative of the Office of FOIA Services, each of whom is available to assist the requester in reasonably describing the records sought. When a requester fails to provide sufficient information within 30 calendar days after having been asked to reasonably describe the records sought, the Office of FOIA Services shall notify the requester in writing that the request has not been properly made, that no further action will be taken, and that the FOIA request is closed. Such a notice constitutes an adverse determination under paragraph (e)(2) of this section for which the Office of FOIA Services shall follow the procedures for a denial letter under paragraph (e)(2) of this section. In cases where a requester has modified his or her request so that it reasonably

describes the requested records, the date of receipt for purposes of the 20-day time limit of paragraph (d) of this section shall be the date of receipt of the modified request.

(c) Processing requests.

(1) *In general.* (i) A request for records may be denied to the extent the exemptions in 5 U.S.C. 552(b) apply to the requested records and (A) Commission staff reasonably foresees that disclosure would harm an interest protected by the applicable exemption or (B) the disclosure of the requested records is prohibited by law or is exempt from disclosure under 5 U.S.C. 552(b)(3).

(ii) In determining which records are responsive to a request, the Office of FOIA Services ordinarily will include only records in the agency's possession as of the date that it begins its search.

(2) *Re-routing of misdirected requests.* Any division or office within the Commission that receives a written request for records should promptly forward the request to the Office of FOIA Services for processing.

(3) *Consultation, referral, and coordination.* When reviewing records located in response to a request, the Office of FOIA Services will determine whether another Federal agency is better able to determine if the record is exempt from disclosure under the FOIA. As to any such record, the Office of FOIA Services will proceed in one of the following ways:

(i) *Consultation.* In instances where a record is requested that originated within a division or office within the Commission and another Federal agency has a significant interest in the record (or a portion thereof), the Office of FOIA Services will consult with that Federal agency before responding to a requester. When the Office of FOIA Services receives a request for a record (or a portion thereof) in its possession that originated with another entity within the Federal Government that is not subject to the FOIA, the Office of FOIA Services will typically consult with that entity prior to making a release determination.

(ii) *Referral.* When the Office of FOIA Services receives a request for a record (or a portion thereof) in its possession that originated with another Federal agency subject to the FOIA, the Office of FOIA Services will typically refer the record to that agency for direct response to the requester. Ordinarily, the

agency that originated the record will be presumed to be best able to make the disclosure determination. However, if the Office of FOIA Services and the originating agency jointly agree that the Office of FOIA Services is in the best position to make a disclosure determination regarding the record, then the record may be handled as a consultation and processed by the Office of FOIA Services. Whenever the Office of FOIA Services refers a record to another Federal agency for direct response to the requester, the Office of FOIA Services shall notify the requester in writing of the referral and inform the requester of the name of the agency to which the record was referred.

(iii) *Coordination.* If disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an exemption, the Office of FOIA Services generally will coordinate with the originating agency to seek its views as to disclosure of the record and then advise the requester of the release determination for the record that is the subject of the coordination.

(iv) *Classified information.* On receipt of any request involving classified information, the Commission staff in possession of the information shall determine whether the information is currently and properly classified and take appropriate action to ensure compliance with subpart J of this part. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another Federal agency under an executive order concerning the classification of records, the Office of FOIA Services shall refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification.

Whenever agency records contain information that has been classified by another Federal agency, the Office of FOIA Services shall refer the responsibility for responding to that portion of the request to the agency that classified the underlying information except in circumstances that come within paragraph (c)(3)(iii) of this section.

(d) Time limits and expedited processing.

(1) *In general.* The Office of FOIA Services will seek to respond to requests according to their order of receipt within each track of the Office of FOIA Services' multitrack processing system as described in paragraph (d)(4) of this section.

(2) *Initial response.* A determination whether to comply with a FOIA request shall be made within 20 days (excepting Saturdays, Sundays, and legal public holidays) from the date the Office of FOIA Services receives a request for a record under this part, except when the circumstances described in paragraphs (d)(3), (5), or (7) of this section are applicable. In instances where a FOIA requester has misdirected a request that is re-routed pursuant to paragraph (c)(2) of this section, the response time shall commence on the date that the request is first received by the Office of FOIA Services, but in any event not later than 10 working days after the request is first received by any division or office of the Commission.

(3) *Clarification of request.* The Office of FOIA Services may seek clarification of a request (or a portion of a request) for records. The request for clarification generally should be in writing. The first time the Office of FOIA Services seeks clarification, the time for responding to the entire request (set forth in paragraph (d)(2) of this section) is tolled until the requester responds to the clarification request. The tolled period will end when the Office of FOIA Services receives a response from the requester that reasonably describes the requested records. If the Office of FOIA Services asks for clarification and does not receive a written response from the requester within 30 calendar days from the date of the clarification request, the Office of FOIA Services will presume that the requester is no longer interested in the record(s) sought and notify the requester that any portion of the request as to which clarification was sought has been closed.

(4) *Multitrack processing.* The Office of FOIA Services shall use a multitrack system for processing FOIA requests. The Office of FOIA Services shall designate one track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (d)(7) of this section. The Office of FOIA Services shall use two or more additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work and/or time needed to process the request. Among the factors the Office of FOIA Services may consider are the time to perform a search, the number of pages that must be reviewed in processing the request, and the need for consultations or referrals. The Office of FOIA Services shall advise requesters of the track into which

their request falls and, when appropriate, shall offer the requesters an opportunity to narrow the scope of their request so that it can be placed in a different processing track.

(5) *Unusual circumstances.* The Office of FOIA Services may extend the time period for processing a FOIA request in “unusual circumstances.” To extend the time, the Office of FOIA Services shall notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request is expected to be completed. If the extension exceeds 10 working days, the Office of FOIA Services shall provide the requester, in writing, with an opportunity to modify the request or arrange an alternative time frame for processing the request or a modified request. The Office of FOIA Services shall also make available its FOIA Public Liaisons to assist in the resolution of any disputes and notify the requester of the right to seek dispute resolution services from the Office of Government Information Services. For purposes of this section, “unusual circumstances” include:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request.

(iii) The need to consult with another Federal agency having a substantial interest in the determination of the FOIA request or among two or more divisions or offices within the Commission having substantial subject-matter interest therein.

(6) *Aggregating requests.* The Office of FOIA Services may aggregate requests in cases where it reasonably believes that multiple requests, submitted either by a requester or by a group of requesters acting in concert, together constitute a single request that would involve unusual circumstances, as defined in paragraph (d)(5) of this section. Multiple requests involving unrelated matters shall not be aggregated. The Office of FOIA Services shall advise requesters, in writing, when it determines to aggregate multiple requests and comply with paragraph (d)(5) of this section. Aggregation of requests for this purpose will be conducted independent of aggregation requests for fee purposes under paragraph (g)(8) of this section.

(7) *Expedited processing.* The Office of FOIA Services shall grant a request for expedited processing if the requester demonstrates a “compelling need” for the records. “Compelling need” means that a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to an individual’s life or physical safety or, if the requester is primarily engaged in disseminating information, an urgency to inform the public about an actual or alleged Federal Government activity.

(i) A request for expedited processing may be made at the time of the initial request for records or at any later time.

(ii) 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 why there is a “compelling need” for the records.

(iii) The Office of FOIA Services shall determine whether to grant or deny a request for expedited processing and provide notice of that determination within 10 calendar days of receipt of the request by the Office of FOIA Services. A request for records that has been granted expedited processing shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that determination shall be decided expeditiously.

(8) *Appeals.* An administrative appeal shall be decided within 20 days (excepting Saturdays, Sundays, and legal public holidays) from the date the Office of FOIA Services receives such appeal except in the unusual circumstances specified in paragraph (d)(5) of this section. In those unusual circumstances, the 20-day time limit may be extended by written notice to the person making the appeal setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension of more than 10 working days.

(e) Responses to requests for records.

(1) *Acknowledgment of requests.* Upon receipt of a request for records, the Office of FOIA Services ordinarily will send the requester an acknowledgment letter that provides an assigned request number for further reference and, if necessary, confirms whether the requester is willing to pay fees.

(2) *Responses to requests.* (i) Any letter determining whether to comply with a request will inform the requester of the right to seek assistance from the Office of FOIA Services' FOIA Public Liaisons.

(ii) If the Office of FOIA Services makes a determination to grant a request in whole or in part, it shall notify the requester in writing of such determination, disclose records to the requester, and collect any applicable fees.

(iii) If the Office of FOIA Services makes an adverse determination regarding a request, it shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the requested record does not exist (or is not subject to the FOIA), cannot be located, or has previously been destroyed; or the requested record is not readily producible in the form or format sought by the requester. Adverse determinations also include designations of requesters' fee category, denials of fee waiver requests, or denials of requests for expedited processing.

(iv) An adverse determination letter shall be signed and include:

(A) the names and titles or positions of each person responsible for the adverse determination;

(B) a brief statement of the reasons for the adverse determination, including any FOIA exemption applied by the official denying the request;

(C) for records disclosed in part, markings or annotations to show the applicable FOIA exemption(s) and the amount of information deleted, unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted shall also be indicated on the record, if feasible;

(D) an estimate of the volume of any records or information withheld by providing the number of pages withheld in their entirety or some other reasonable form of estimation. This estimate is not required if the volume is otherwise indicated by deletions marked on the records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable FOIA exemption;

(E) a statement that the adverse determination may be appealed under paragraph (f) of this section, and a description of the requirements for filing an administrative appeal set forth in that paragraph; and

(F) a statement of the right of the requester to seek dispute resolution services from the Office of FOIA Services' FOIA Public Liaisons or the Office of Government Information Services ("OGIS").

(3) *Mediation services.* OGIS offers mediation services to resolve disputes between requesters and the Office of FOIA Services as a non-exclusive alternative to litigation. Requesters with concerns about the handling of their requests may contact OGIS.

(f) Administrative appeals.

(1) *Administrative review.* If a requester receives an adverse determination as described in paragraph (e)(2)(iii) of this section, or the request has not been timely determined within the time period prescribed in §200.80(d)(2) or within an extended period permitted under paragraph (d)(5) of this section, the requester may file an appeal to the Office of the General Counsel consistent with the procedures described in paragraphs (f)(2) through (4) of this section. A requester generally must submit a timely administrative appeal before seeking review by a court of an adverse determination.

(2) *Time limits.* Appeals can be submitted in writing or electronically, as described in paragraph (f)(3) of this section. The appeal must be received within 90 calendar days of the date of the written denial of the adverse determination and must be received no later than 11:59 pm, Eastern Time, on the 90th day. If the Office of FOIA Services has not issued a determination on a request, an appeal may be submitted any time after the statutory time period for responding to a request ends.

(3) *Contents of appeal.* Appeals should be clearly and prominently identified at the top of the first page as "Freedom of Information Act Appeal" and should provide the assigned FOIA request number. The appeal should include a copy of the original request and adverse determination. Appeals should include a statement of the requester's arguments as to why the records requested should be made available and why the adverse determination was in error. If only a portion of the adverse determination is appealed, the requester must specify which part is being appealed.

(4) *How to file and address an appeal.* If submitted by U.S. mail or delivery service, the appeal must be sent to the Office of FOIA Services at 100 F Street, NE, Washington, DC 20549. Appeals may also be made by facsimile at 202-772-9337, email (foiapa@sec.gov), or online at the Commission's website

(<http://www.sec.gov>). A legible return address must be included with the FOIA appeal. The requester may also include other contact information, such as a telephone number and/or email address.

(5) *Adjudication of appeals.* The Office of the General Counsel has the authority to grant or deny all appeals, in whole or in part. In appropriate cases the Office of the General Counsel may refer appeals to the Commission for determination. No opportunity for personal appearance, oral argument, or hearing on appeal is provided. Upon receipt of an appeal, the Office of FOIA Services ordinarily will send the requester an acknowledgment letter that confirms receipt of the requester's appeal.

(6) *Determinations on appeals.* A determination on an appeal must be made in writing. A determination that denies an appeal, in whole or in part, shall include a brief explanation of the basis for the denial, identify the applicable FOIA exemptions asserted, and describe why the exemptions apply. As applicable, the determination will provide the requester with notification of the statutory right to file a lawsuit in accordance with 5 U.S.C. 552(a)(4), and will inform the requester of the mediation services offered by the Office of Government Information Services as a non-exclusive alternative to litigation. If the Office of FOIA Services' determination is remanded or modified on appeal, the Office of the General Counsel will notify the requester of that determination in writing.

(g) Fees.

(1) *In general.* The Office of FOIA Services shall charge fees for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines, except where fees are limited under paragraph (g)(4) of this section or when a waiver or reduction is granted under paragraph (g)(12) of this section. To resolve any fee issues that arise under this section, the Office of FOIA Services may contact a requester for additional information. The Office of FOIA Services shall ensure that searches, review, and duplication are conducted in an efficient manner. The Office of FOIA Services ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check, certified check, or money order, or where possible, by electronic payment.

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

(i) “Commercial use request” is 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. The Office of FOIA Services will determine whether to place a requester in the commercial use category on a case-by-case basis based on the requester’s intended use of the information.

(ii) “Direct costs” are those expenses the Office of FOIA Services and any staff within the divisions and offices of the Commission incur in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include the salary of the employee(s) performing the work (*i.e.*, the basic rate of pay for the employee(s), plus 16% of that rate to cover benefits), the cost of materials, and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space and of heating or lighting a facility in which the service is performed.

(iii) “Duplication” is reproducing a record, or the information contained in it, to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others. The Office of FOIA Services shall honor a requester’s specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

(iv) “Educational institution” is any school that operates a program of scholarly research. A requester in this fee category must show that the request is authorized by, and is made under the auspices of, an educational institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research.

(v) “Noncommercial scientific institution” is an institution that is not operated to further a commercial, trade, or profit interest and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(vi) “Representative of the news media” or “news media requester” is any person or entity that is organized and operated to publish or broadcast news to the public and that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. The Office of FOIA Services will determine whether to grant a requester news media status on a case-by-case basis based upon the requester’s intended use of the requested material.

(vii) “Review” is the examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure. Review time includes doing all that is necessary to prepare the record for disclosure, such as redacting the record and marking any applicable exemptions. Review time also includes time spent obtaining and considering formal objections to disclosure made by a submitter under §200.83, but it does not include time spent resolving legal or policy issues regarding the application of exemptions.

(viii) “Search” is the review, manually or by automated means, of agency records for the purpose of locating those records that are responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(3) *Charging fees.* In responding to FOIA requests, the Office of FOIA Services shall charge the fees summarized in chart form in paragraph (g)(3)(i) of this section and explained in paragraphs (g)(3)(ii) through (v) of this section, unless fees are limited under paragraph (g)(4) of this section or a waiver or reduction of fees has been granted under paragraph (g)(12) of this section.

(i) The four categories of requesters and the chargeable fees for each are:

Requester Category	Search fees	Review fees	Duplication fees
Commercial use requesters	Yes	Yes	Yes
Educational and noncommercial scientific institutions	No	No	Yes (first 100 pages, or equivalent volume, free).
Representatives of the news media	No	No	Yes (first 100 pages, or equivalent volume, free).
All other requesters	Yes (first 2 hours free)	No	Yes (first 100 pages, or equivalent volume, free).

(ii) Search fees. (A) Search fees shall 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 (g)(4) of this section. The Office of FOIA Services may charge for time spent searching even if no responsive records are located or it is determined that the records are entirely exempt from disclosure. Search fees shall be the direct costs of conducting the search by agency employees.

(B) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall be notified of the costs associated with creating and implementing such a program and must agree to pay the associated costs before the costs may be incurred.

(C) For requests that require the retrieval of agency records stored at a Federal records center operated by the National Archives and Records Administration (“NARA”), additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(iii) Review fees. Review fees shall be charged to requesters who make commercial use requests. Review fees shall be assessed in connection with the initial review of the record, *i.e.*, the review agency employees conduct to determine whether an exemption applies to a particular record or portion of a record. Also, if an exemption asserted to withhold a record (or a portion thereof) is deemed to no longer apply, any costs associated with the re-review of the records to consider the use of other exemptions may be assessed as review fees. Review fees shall be the direct costs of conducting the review by the involved employees. Review fees can be charged even if the records reviewed ultimately are not disclosed.

(iv) Search and review services (review applies to commercial-use requesters only): (A) The Office of FOIA Services will establish and charge average rates for the groups of employees' salary grades typically involved in the search and review of records. Those groups will consist of employees at:

(1) Grades SK-8 or below;

(2) Grades SK-9 to SK-13; and

(3) Grades SK-14 or above.

(B) The average rates will be based on the hourly salary (*i.e.*, basic salary plus locality payment), plus 16 percent for benefits, of employees who routinely perform search and review services. The average hourly rates are listed on the FOIA webpage of the Commission's website at <http://www.sec.gov> and will be updated as salaries change. Fees will be charged in quarter-hour increments. 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.

(v) Duplication fees. Duplication fees shall be charged to all requesters, subject to the limitations of paragraph (g)(4) of this section. Fees for either a photocopy or printout of a record (no more than one copy of which need be supplied) are identified on the FOIA webpage of the Commission's website at www.sec.gov. For copies of records produced on tapes, disks, or other media, the Office of FOIA Services shall charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For all other forms of duplication, the Office of FOIA Services shall also charge the direct costs.

(4) *Limitations on charging fees.* (i) No search or review fees will be charged for requests by educational institutions (unless the requests are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(ii) Except for requesters seeking records for a commercial use, the Office of FOIA Services shall provide without charge the first 100 pages of duplication (or the cost equivalent for other media) and the first two hours of search.

(iii) Fees will not be charged where the costs of collecting and processing the fee are likely to equal or exceed the amount of the fee.

(iv) The Office of FOIA Services will not assess search fees (or, in the case of requests from representatives of the news media or educational or noncommercial scientific institutions, duplication fees) when 5 U.S.C. 552(a)(4)(A)(viii) prohibits the assessment of those fees.

(5) *Notice of anticipated fees.* (i) When the Office of FOIA Services determines or estimates that the fees to be assessed in accordance with this section will exceed the amount it would cost the Office of FOIA Services to collect and process the fees, the Office of FOIA Services shall notify the requester of the actual or estimated amount of fees, unless the requester has indicated a willingness to pay fees as high as the estimated fees. If only a portion of the fee can be estimated readily, the Office of FOIA Services shall advise the requester accordingly. If the requester is not a commercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge.

(ii) In cases in which a requester has been notified that the actual or estimated fees will amount to more than it would cost the Office of FOIA Services to collect and process the fees, or amount to more than the amount the requester indicated a willingness to pay, the Office of FOIA Services will do no further work on the request until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a requester who is not a commercial use requester designates that the requester seeks only that which can be provided by the statutory entitlements. The Office of FOIA Services will toll the response period while it notifies the requester of the actual or estimated amount of fees and this time will be excluded from the 20 working day time limit (as specified in paragraph (d)(2) of this section). The requester's agreement to pay fees must be made in writing, must designate an exact dollar amount the requester is willing to pay, and must be received within 30 calendar days from the date of the notification of the fee estimate. If the requester fails to submit an agreement to pay the anticipated fees within 30 calendar days from the date of the Office of

FOIA Services' fee notice, the Office of FOIA Services will presume that the requester is no longer interested in the records and notify the requester that the request has been closed.

(iii) The Office of FOIA Services shall make available their FOIA Public Liaisons or other FOIA professionals to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(6) *Charges for other services.* Although not required to provide special services, if the Office of FOIA Services chooses to do so as a matter of administrative discretion, the direct costs of providing the service shall be charged. Examples of such special services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail. The cost for the attestation of records with the Commission seal (*i.e.*, certifying records as true copies) is \$4.00 per record, which may be waived for records certified electronically. Requests for certified copies of records or documents shall ordinarily be serviced within 20 working days. Requests will be processed in the order in which they are received.

(7) *Charging interest.* The Office of FOIA Services may begin to charge interest on any unpaid bill starting on the 31st calendar day following the date of billing the requester. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and accrue from the date of the billing until the payment is received. The Office of FOIA Services shall take all steps authorized by the Debt Collection Act of 1982, as amended, and the Commission's Rules Relating to Debt Collection to effect payment, including offset, disclosure to consumer reporting agencies, and use of collection agencies.

(8) *Aggregating requests.* If the Office of FOIA Services reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Office of FOIA Services may aggregate those requests and charge accordingly. Among the factors the Office of FOIA Services shall consider in deciding whether to aggregate are whether the requests were submitted close in time and whether the requests seek documents about related matters. The Office of FOIA Services may presume that multiple requests that involve related matters made by the same requester or a group of requesters within a 30 calendar day period have been made to avoid fees. For

requests separated by a longer period, the Office of FOIA Services will aggregate them only where it determines that aggregation is warranted in view of all the circumstances involved.

(9) *Advance payments.* (i) For requests other than those described in paragraphs (g)(9)(ii) and (iii) of this section, the Office of FOIA Services shall not require a requester to make advance payment (*i.e.*, payment made before the Office of FOIA Services begins to process or continues to work on a request). Payment owed for work already completed (*i.e.*, payment before copies are sent to a requester) is not an advance payment.

(ii) When the Office of FOIA Services determines or estimates that a total fee to be charged under this section will exceed \$250.00, it shall notify the requester of the actual or estimated fee and may require the requester to make an advance payment of the entire anticipated fee before beginning to process the request. A notice under this paragraph shall offer the requester an opportunity to discuss the matter with the Office of FOIA Services' FOIA Public Liaisons or other FOIA professionals to modify the request in an effort to meet the requester's needs at a lower cost.

(iii) When a requester has previously failed to pay a properly charged FOIA fee to the Office of FOIA Services or other Federal agency within 30 calendar days of the date of billing, the Office of FOIA Services shall notify the requester that he or she is required 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 the Office of FOIA Services begins to process a new request or continues processing a pending request from that requester. Where the Office of FOIA Services has a reasonable basis to believe that a requester has misrepresented the requester's identity to avoid paying outstanding fees, it may require that the requester provide proof of identity and pay in advance.

(iv) When the Office of FOIA Services requires advance payment or payment due under paragraphs (g)(9)(ii) and (iii) of this section, the Office of FOIA Services will not further process the request until the required payment is made. The Office of FOIA Services will toll the processing of the request while it notifies the requester of the advanced payment due and this time will be excluded from the 20 working day time limit (as specified in paragraph (d)(2) of this section). If the requester does not pay the advance

payment within 30 calendar days from the date of the Office of FOIA Services' fee notice, the Office of FOIA Services will presume that the requester is no longer interested in the records and notify the requester that the request has been closed.

(10) *Tolling*. When necessary for the Office of FOIA Services to clarify issues regarding fee assessment with the requester, the time limit for responding to a FOIA request is tolled until the Office of FOIA Services resolves such issues with the requester.

(11) *Other statutes specifically providing for fees*. The fee schedule of this section does not apply to fees charged under any statute (except the FOIA) that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Office of FOIA Services shall inform the requester how to obtain records from that program. Provision of such records is not handled under the FOIA.

(12) *Requirements for waiver or reduction of fees*. (i) Records responsive to a request will be furnished without charge, or at a charge reduced below that established under paragraph (g)(3) of this section, if the requester asks for such a waiver in writing and the Office of FOIA Services determines, after consideration of information provided by the requester, that the requester has demonstrated that:

(A) 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

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

(ii) In deciding whether disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, the Office of FOIA Services shall consider all four of the following factors:

(A) *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.

(B) *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 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 likely to contribute to such understanding.

(C) *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 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.

(D) *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 prior to the disclosure must be significantly enhanced by the disclosure.

(iii) In deciding whether disclosure of the requested information is primarily in the commercial interest of the requester, the Office of FOIA Services shall consider the following factors:

(A) *The existence and magnitude of a commercial interest:* whether the requester has a commercial interest that would be furthered by the requested disclosure. The Office of FOIA Services shall consider any commercial interest of the requester (with reference to the definition of "commercial use requester" in paragraph (g)(2)(i) 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 regarding this consideration.

(B) *The primary interest in disclosure:* whether the public interest is greater than any identified commercial interest in disclosure. The Office of FOIA Services 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.

(iv) If only a portion of the requested records satisfies both the requirements for a waiver or reduction of fees, a waiver or reduction of fees will be granted for only that portion.

(v) Requests for a waiver or reduction of fees should address all the factors identified in paragraphs (g)(12)(ii) and (iii) of this section.

(vi) Denials of requests for a waiver or reduction of fees are adverse determinations (as defined in paragraph (e)(2)(iii) of this section) and may be appealed to the General Counsel in accordance with the procedures set forth in paragraph (f) of this section.

3. Remove and reserve §200.80a.
4. Remove and reserve §200.80b.
5. Remove and reserve §200.80c.
6. Remove and reserve §200.80d.
7. Remove and reserve §200.80e.
8. Remove and reserve §200.80f.

By the Commission.

Dated: December 21, 2017

Brent J. Fields
Secretary