

## Merit Systems Protection Board

## § 1204.2

(1) Cancellation of any personnel action related to the prohibited personnel practice;

(2) Rescission of any action related to the cancelled personnel action;

(3) Removal of any reference, record, or document within an employee's official personnel folder that is related to the prohibited personnel practice;

(4) Award of back pay and benefits;

(5) Award of attorney fees;

(6) Other remedial measures to reverse the effects of a prohibited personnel practice; and

(7) The agency's submission of a verified report of its compliance with the Board's order.

### § 1203.22 Enforcement of order.

(a) Any party may ask the Board to enforce a final order it has issued under this part. The request may be made by filing a petition for enforcement with the Office of the Clerk of the Board and by serving a copy of the petition on each party to the regulation review. The petition must include specific reasons why the petitioning party believes that there has been a failure to comply with the Board's order.

(b) The Board will take all action necessary to determine whether there has been compliance with its final order. If it determines that there has been a failure to comply with the order, it will take actions necessary to obtain compliance.

(c) Where appropriate, the Board may initiate the enforcement procedures described in 5 CFR 1201.183(c).

## PART 1204—AVAILABILITY OF OFFICIAL INFORMATION

### Subpart A—Purpose and Scope

Sec.

1204.1 Purpose.

1204.2 Scope.

### Subpart B—Procedures for Disclosure of Records under the Freedom of Information Act

1204.11 Requests for access to Board records.

1204.12 Fees.

1204.13 Denials.

1204.14 Requests for access to confidential commercial information.

### Subpart C—Appeals

1204.21 Submission.

1204.22 Decisions on appeal.

AUTHORITY: 5 U.S.C. 552 and 1204, Pub. L. 99-570 and E.O. 12600.

SOURCE: 54 FR 28658, July 6, 1989, unless otherwise noted.

### Subpart A—Purpose and Scope

#### § 1204.1 Purpose.

This part implements the Freedom of Information Act (FOIA), 5 U.S.C. 552, by prescribing the procedures to follow when requesting information from the Board, and by stating the fees that will be charged for that information.

#### § 1204.2 Scope.

(a) For the purpose of this part, the term *information* has the same meaning as the term *records* in § 552 of title 5, United States Code. All written requests for information that are not processed under part 1205 of the Board's regulations will be processed under this part. The Board may continue, without complying with the provisions of this part, to furnish the public with the information it customarily has furnished in the regular course of performing its official duties, unless furnishing the information would violate the Privacy Act of 1974, 5 U.S.C. 552a, or another law.

(b) When the subject of the record, or the subject's authorized representative, requests a record from a Privacy Act system of records, as that term is defined by 5 U.S.C. 552a(a)(5), and the Board retrieves the record by the subject's name or other personal identifier, the Board will handle the request under the procedures and fees applicable in 5 CFR part 1205. When a third party makes a request for access to those records, without the express written consent of the subject of the record, the Board will handle the request under this part.

(c) When a party to an appeal requests a copy of a tape recording or transcript (if one has been prepared) of a hearing that the Board or a presiding official of the Board conducted under part 1201 or part 1209 of this chapter, the Board will handle the request under 5 CFR 1201.53. When someone

other than a party to the appeal makes this request, the Board will handle the request under this part.

(d) In accordance with 5 U.S.C. 552(a)(2), the Board's final opinions and orders (including concurring and dissenting opinions), those statements of policy and interpretations adopted by the Board and that are not published in the Federal Register, and administrative staff manuals and instructions to staff that affect a member of the public are available for public inspection and copying in the Board's Headquarters Library, Room 828, 1120 Vermont Avenue NW., Washington, DC 20419.

### Subpart B—Procedures for Disclosure of Records Under the Freedom of Information Act

#### § 1204.11 Requests for access to Board records.

(a) *Submission of a request.* A person may request a record of the Board under this part by writing to the office that maintains the record. If the requester has reason to believe that the records in question are located in a regional office, the request must be submitted to that office. A list of the addresses of the Board's 11 regional offices appears in appendix II of 5 CFR part 1201. Other requests must be addressed to the Clerk of the Board, 1120 Vermont Avenue NW., Washington, DC 20419. Requests submitted under this part must be clearly marked "Freedom of Information Act Request" on both the envelope and the request.

(b) *Form.* A request must describe the records sought in enough detail to enable Board personnel to locate the records with no more than a reasonable effort. Wherever possible, a request must include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. In addition, if the request seeks records pertaining to cases decided by the Board, it must indicate the title of the case, the MSPB docket number, and the date of the decision.

(c) *Time limits and decisions.* The Board will make a decision on a request within 10 workdays after the regional office or the Office of the Clerk receives it, except under "unusual cir-

cumstances" as that term is defined at 5 U.S.C. 552(a)(6)(B). Where "unusual circumstances" exist, the Board may extend the time period for making a decision on the request by no more than 10 additional working days. When it does so, it will provide written notification of the extension to the requester. If a request or an appeal is not properly labeled or is submitted to the wrong office, the time for processing the request will begin when the proper office receives it. The Clerk of the Board or the Director of any of the Board's regional offices may make a decision on a request.

#### § 1204.12 Fees.

(a) *General.* The Board will charge the requester fees for services provided in responding to and processing requests for information. Those fees will be charged according to the schedule contained in paragraph (d) of this section, and will recover the full allowable direct costs that the Board incurs. Fees may be charged for time spent searching for information, even if the Board fails to locate responsive records, and even if it determines that the information is exempt from disclosure. It will not charge the requester, however, if the fee for any request is less than \$25 (the cost to the Board of processing and collecting the fee).

(b) *Definitions.* (1) The term *direct costs* means those costs that an agency actually incurs in searching for and duplicating (and in the case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Overhead expenses, such as costs of space and of heating or lighting the facility in which the records are stored, are not included in direct costs.

(2) The term *search* includes all time spent looking for material in response to a request, including page-by-page or line-by-line identification of material within documents. Searches will be done in the most efficient and least expensive manner in order to minimize

costs for both the Board and the requester. Searches may be done manually or by computer using existing programming.

(3) The term *duplication* means the process of making a copy of a document necessary to respond to a FOIA request. Those copies can take the form of paper, microform, audio-visual materials, or machine-readable documentation (e.g., magnetic tape or disk), among others. The copy provided will be in a form that is reasonably usable by requesters.

(4) The term *review* includes the process of examining documents to determine whether any portion of them may be exempt from disclosure under the FOIA, when the documents have been located in response to a request that is for a commercial use. The term also includes processing any documents for disclosure, e.g., doing all that is necessary to edit them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding whether exemptions apply.

(5) The term *commercial use request* means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the Board will determine the use the requester will make of the documents requested. Moreover, where the Board has reasonable cause to doubt the use a requester will make of the records sought, or where that use is not clear from the request itself, the Board will seek additional clarification before assigning the request to a specific category.

(6) The term *educational institution* means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education that operates a program or programs of scholarly research.

(7) The term *noncommercial scientific institution* means an institution that is not operated on a "commercial" basis

as that term is used above, and that is operated solely for the purpose of conducting scientific research whose results are not intended to promote any particular product or industry.

(8) The term *representative of the news media* 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 concerns current events or that would be of current interest to the public.

(c) *Categories of requesters.* There are four categories of FOIA requesters: Commercial use requesters; educational and noncommercial scientific institutions; representatives of the news media; and all other requesters. To be included in the category of educational and noncommercial scientific institutions, requesters must show that the request is authorized by a qualifying institution and that they are seeking the records not for a commercial use, but in furtherance of scholarly or scientific research. To be included in the news media category, a requester must meet the definition in paragraph (b)(8) of this section and the request must not be made for a commercial use. To avoid commercial use charges, requesters must show that they should be included in a category or categories other than that of commercial use requesters. The board will determine the categories in which to place requesters for fee purposes. It will make these determinations based on information provided by the requesters and information otherwise known to the Board.

(d) *Charges.* The Board will provide all requesters, except commercial use requesters as that term is defined above, the first 100 pages (paper copies of standard agency size) of duplication and the first two hours of search time without charge.

(1) When the Board receives a request:

(i) From a commercial use requester, it will assess charges that recover the full direct costs for searching for the information requested, reviewing it for release at the initial request stage, reviewing it after an appeal to determine whether other exemptions not considered prior to the appeal apply to it, and duplicating it;

(ii) From an educational and non-commercial scientific institution or, to the extent duplication exceeds 100 pages, from a representative of the news media, it will assess only charges for the cost of duplication of the requested information;

(iii) From all other requesters, to the extent reproduction exceeds 100 pages and search time exceeds 2 hours, it will assess fees to recover the full direct cost of searching for and duplicating requested records.

(2) When the Board reasonably believes that a requester or group of requesters is attempting to divide a request into a series of requests in order to evade the assessment of fees, the Board will combine the requests and charge fees accordingly. The Board will not combine multiple requests on unrelated subjects from one requester.

(3) When the Board determines that charges for a request are likely to exceed \$250, the Board will require the requester to provide an advance payment of the entire fee before continuing to process the request.

(4) When a requester has an outstanding fee charge or has failed previously to pay a fee on time, the Board will require the requester to pay any outstanding amount owed, and to make an advance payment of the full amount of the estimated fee before the Board begins to process a new or pending request from that requester, and before it applies administrative time limits for making a determination on the new or pending request.

(e) *Fee schedule.* (1) Fees for document searches for records will be charged at a rate of \$3.75 for each quarter of an hour.

(2) Fees for computer searches for records will be charged at a rate of 90 cents for each computer minute.

(3) Fees for review at the initial administrative level to determine whether records or portions of records are exempt from disclosure, and for review after an appeal to determine whether the records are exempt on other legal grounds, will be assessed, for commercial use requests, at the rate of \$8.50 an hour.

(4) Fees for paper copy duplication will represent the reasonable direct costs to the Board of making copies,

taking into account the salary of the operator, as well as the cost of the reproduction machinery. Based on these criteria, the Board has determined that the fee for photocopying records is 10 cents a page, the fee for duplicating audio tapes is \$5.75 a cassette tape, the fee for computer printouts is 10 cents a page, the fee for records produced on magnetic computer tapes is \$21 a tape, and the fee for records produced on computer diskettes is \$2.70 a diskette. When the Board estimates that duplication costs will exceed \$25, it will notify the requester of the estimated amount unless the requester has indicated in advance a willingness to pay an equal or higher amount.

(f) *Fee waivers.* (1) Upon request, the Clerk of the Board or regional director, as appropriate, will furnish information without charge or at reduced charges if it is established that disclosure “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” Factors on which this decision will be based include:

(i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(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;

(iii) Whether disclosure of the requested information is likely to contribute to public understanding of the subject of the disclosure; and

(iv) The significance of the contribution the disclosure would make to public understanding of government operations or activities.

(2) If information is to be furnished without charge or at reduced rates, the requester must also establish that disclosure of the information is not primarily in the commercial interest of the requester. Factors on which this decision will be based include:

(i) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so,

(ii) Whether the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(3) The requester has the burden of establishing eligibility for a waiver of fees or for reduced fees. The denial of a request for waiver of fees may be appealed under subpart C of this part.

**§ 1204.13 Denials.**

A denial of a request for reduced fees or of a request for waiver of fees, or denial of a request for a record, in whole or in part, will be made in writing, will state the reasons for the denial, and will notify the requester of the right to appeal the denial.

**§ 1204.14 Requests for access to confidential commercial information.**

(a) *General.* Confidential commercial information provided to the Board by a business submitter will not be disclosed in response to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* (1) The term *confidential commercial information* means records provided to the government by a submitter that arguably contain material exempt from release under Exemption 4 of the Freedom of Information Act, 5 U.S.C. 552(b)(4), because disclosure could reasonably be expected to cause substantial competitive harm.

(2) The term *submitter* means any person or entity who provides confidential commercial information to the government. The term "submitter" includes, but is not limited to corporations, state governments, and foreign governments.

(c) *Notice to business submitters.* The Board will provide a business submitter with prompt written notice of a request encompassing its confidential commercial information whenever that action is required under paragraph (d) of this section, and except as provided in paragraph (h) of this section. This written notice will either describe the exact nature of the confidential information requested or will provide copies of the records or portions of records containing the commercial information.

(d) *When initial notice is required.* (1) With respect to confidential commercial information submitted to the Board before January 1, 1988, the Board will give the business submitter notice of a request whenever:

(i) The information is less than 10 years old; or

(ii) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(2) With respect to confidential commercial information submitted to the Board on or after January 1, 1988, the Board will give notice to the business submitter whenever:

(i) The business submitter has designated the information in good faith as commercially or financially sensitive information; or

(ii) The Board has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(3) Notice of a request for commercially confidential information submitted before January 1, 1988, is required for a period of not more than 10 years after the date on which the information is submitted unless the business submitter requests, and provides justification for, a longer specific notice period. Whenever possible, the submitter's claim of confidentiality must be supported by a statement or certification, by an officer or authorized representative of the company, that the information in question is in fact confidential commercial information and has not been disclosed to the public.

(e) *Opportunity to object to disclosure.* Through the notice described in paragraph (c) of this section, the Board will afford a business submitter a reasonable period within which to provide a detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act. In addition, in the case of Exemption 4, the statement must demonstrate why the information is alleged to be a trade secret, or to be commercial or financial information that is privileged or confidential. Information a business submitter provides under this paragraph

may itself be subject to disclosure under the Freedom of Information Act.

(f) *Notice of intent to disclose information.* The Board will consider carefully a business submitter's objections and specific grounds for claiming that the information should not be disclosed before determining whether to disclose confidential commercial information. Whenever the Board decides to disclose confidential commercial information over the objection of a business submitter, it will forward to the business submitter a written notice that includes:

(1) A statement of the reasons for which the business submitter's disclosure objections were not sufficient;

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

(3) A specified disclosure date. The Board will forward the notice of intent to disclose the information a reasonable number of days, as circumstances permit, before the specified date upon which disclosure is expected. It will forward a copy of the disclosure notice to the requester at the same time.

(g) *Notice of Freedom of Information Act lawsuit.* Whenever a requester files a lawsuit seeking to compel disclosure of business information covered by paragraph (d) of this section, the Board will notify the business submitter promptly.

(h) *Exceptions to notice requirements.* The notice requirements of this section do not apply when:

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

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

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The disclosure is required by an agency rule that:

(i) Was adopted pursuant to notice and public comment;

(ii) Specifies narrow classes of records submitted to the agency that are to be released under the Freedom of Information Act; or

(iii) Provides in exceptional circumstances for notice when the submitter provides written justification,

at the time the information is submitted or a reasonable time thereafter, that disclosure of the information could reasonably be expected to cause substantial competitive harm.

(5) The information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to this section, when the submitter has an opportunity to do so at the time of submission of the information or a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(6) The designation made by the submitter in accordance with Board regulations appears obviously frivolous; except that, in such case, the Board must provide the submitter with written notice of any final administrative disclosure determination within a reasonable period prior to the specified disclosure date.

### Subpart C—Appeals

#### § 1204.21 Submission.

A person may appeal a denial by the Clerk of the Board, or by any regional director, of access to agency records, waiver of fees, or reduction of fees. The appeal must be filed with the Chairman, Merit Systems Protection Board, 1120 Vermont Avenue NW., Washington, DC 20419. Any appeal must include a copy of the initial request, a copy of the letter denying the request, and a statement of the reasons why the appellant believes the denying official erred.

[55 FR 39911, Oct. 1, 1990, as amended at 59 FR 65243, Dec. 19, 1994]

#### § 1204.22 Decisions on appeal.

Decisions on an appeal will be made within 20 workdays after the appeal is received. Each decision will be in writing and, if the denial of access to records is upheld, will contain the reasons for the decision, as well as information about the appellant's right to seek judicial review of the denial.