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(2) In consultation with the Foreign Service Personnel Division (M/PF or VOA/PF) and officials from the pertinent Board elements, the Overseas Specialist applicant's total qualifications and experience will be evaluated based on the application and an interview. On the basis of this review and the recommendations of the appropriate officials, the personnel office will determine whether the application should be continued and, if so, will recommend the appointment class.

(d) *Medical examination and security investigation.* Qualified applicants and their dependents who will accompany them overseas will be given a physical examination. A security investigation will also be conducted. The reappointment action is subject to completion of a satisfactory security investigation and satisfactory medical examination of the applicant and his/her dependents.

(e) *Selection for reappointment.* The Director, Office of Personnel (M/P or VOA/P), taking into consideration (1) the qualifications and experience of each applicant as outlined in the qualifications evaluation performed by the Board of Examiners for the Foreign Service or the personnel office, (2) future placement and growth potential, and (3) the needs of the Service for the applicant's skills determines which applicant, or applicants, are qualified for reappointment and the appointment class that is considered to be appropriate. An Overseas Specialist may not be reappointed until and unless an overseas assignment has been identified. The Director, Office of Personnel (M/P or VOA/P) is responsible for initiating appointment action. Any voluntary applicant who refuses an offer of reappointment will not be considered for reappointment again.

### **§ 501.9 Interchange of FSOs between Broadcasting Board of Governors and other Foreign Affairs Agencies.**

Foreign Service Officers (FSOs) desiring transfer from one agency to another may apply under the following provisions:

(a) *Applications.* Applications for interchange appointments should be sent to the Board of Examiners for the

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Foreign Service, Department of State, Washington, DC 20520.

(b) *Certification and approval.* (1) When a Foreign Service Officer of another Foreign Affairs Agency wishes to transfer to the Broadcasting Board of Governors, a certification of need is required from the Director, Office of Personnel, Broadcasting Board of Governors, and approval is required by the Director of Personnel for the other agency for the officer's release to Broadcasting Board of Governors.

(2) When a Broadcasting Board of Governors FSO wishes to transfer to another Foreign Affairs Agency, a certification of need is required from the Director of Personnel of the other Agency, and approval is required by the Director, Office of Personnel, Broadcasting Board of Governors, for the officer's release to that Agency.

(3) A review by the Board of Examiners for the Foreign Service will certify the eligibility of candidates for exchange. BEX will notify the Office of Personnel, Broadcasting Board of Governors when a Foreign Service Officer of another Agency has been approved for transfer and Broadcasting Board of Governors will process the necessary employment papers.

(4) A new FSO appointment for officers transferring between another Foreign Affairs Agency and Broadcasting Board of Governors is not required.

## **PART 503—AVAILABILITY OF RECORDS**

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AUTHORITY: 5 U.S.C. 301, 552; 13 U.S.C. 8; 22 U.S.C. 503, 2658; E.O. 10477, 18 FR 4540, 3 CFR, 1949-1953 Comp., p. 958; E.O. 10822, 24 FR 4159, 3 CFR, 1959-1963 Comp., p. 355; E.O. 12292, 46 FR 13967, 3 CFR, 1981 Comp., p. 134; E.O. 12356, 47 FR 14874 and 15557, 3 CFR, 1982 Comp., p. 166; E.O. 12958, 60 FR 19825, 3 CFR, 1995 Comp., p. 333.

**§ 503.1 Introduction and definitions.**

(a) Introduction. The FOIA and this part apply to all records of the Broadcasting Board of Governors including all of its foreign posts. As a general policy, Broadcasting Board of Governors follows a balanced approach in administering the FOIA. We recognize the right of public access to information in the possession of the Department, but we also protect the integrity of the Department's internal processes. This policy calls for the fullest possible disclosure of records consistent with those requirements of administrative necessity and confidentiality which are recognized by the Freedom of Information Act.

(b) Definitions—*Access Appeal Committee* or *Committee*, means the Committee delegated by the Department Director for making final Department determinations regarding appeals from the initial denial of records under the FOIA. This Committee also reviews final appeal denials of documents made by the National Endowment for Democracy (NED) for its records.

*Department* or *Broadcasting Board of Governors* means the Broadcasting Board of Governors. It includes all components of Broadcasting Board of Governors in the U.S. and all foreign posts abroad (known as the U.S. Information Service or USIS). (See 22 CFR part 504, chapter V—Organization.)

*Commercial use*, when referring to a request, means that the request is 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 of a person on whose behalf the request is made. Whether a request is for a commercial use depends on the purpose of the request and the use to which the records will be put. The identity of the requester (individual, non-profit corporation, for-profit corporation), or the nature of the records, while in some cases indicative of that purpose or use, is not necessarily determinative. When a request is from a representative of the news media, the request shall be deemed not to be for commercial use.

*Department* means any executive department, military department, government corporation, government controlled corporation, any independent

regulatory agency, or other establishment in the executive branch of the Federal Government. A private organization is not a department even if it is performing work under contract with the Government or is receiving Federal financial assistance. Grantee and contractor records are not subject to the FOIA unless they are in the possession and control of Broadcasting Board of Governors.

*Duplication* means the process making a copy of a record and sending it to the requester, to the extent necessary to respond to the request. Such copies include paper copy, microform, audiovisual materials, and magnetic tapes, cards and discs.

*Educational institution* means a pre-school, elementary or secondary school, institution of undergraduate or graduate higher education, or institution of professional or vocational education.

*FOIA* means section 552 of title 5, United States Code, as amended.

*Freedom of Information Officer* means the Broadcasting Board of Governors official who has been delegated the authority to release or withhold records and assess, waive, or reduce fees in response to FOIA requests.

*Non-commercial scientific institution* means an institution that is not operated substantially for purposes of furthering its own or someone else's business, trade, or profit interests, and that is operated for purposes of conducting scientific research whose results are not intended to promote any particular product or industry.

*Post* or *USIS* means all overseas offices of the Broadcasting Board of Governors.

*Records* (and any other term used in this section in reference to information) includes any information that would be a Department record subject to the requirements of this section when maintained by the Department in any format, including an electronic format. Records also include any handwritten, typed or printed documents (such as memoranda, books, brochures, studies, writings, drafts, letters, transcripts, and minutes) and documentary material in other forms (such as punchcards; magnetic tapes, cards, or discs; paper tapes; audio or video recordings;

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maps; photographs; slides; microfilm; and motion pictures). It does not include objects or articles such as exhibits, models; equipment, and duplication machines or audiovisual processing materials. Nor does it include books, magazines, pamphlets, or other reference material in formally organized and officially designated Broadcasting Board of Governors libraries, where such materials are available under the rules of the particular library.

*Representative of the news media* means a person actively gathering news for an entity organized and operated to publish or broadcast news to the public. "News" means information that is about current events or that would be of current interest to the public. News media entities include television and radio broadcasters, publishers of periodicals (to the extent they publish "news") who make their products available for purchase or subscription by the general public, and entities that may disseminate news through other media (e.g., electronic dissemination of text). Freelance journalists shall be considered representatives of a news media entity if they can show a solid basis for expecting publication through such an entity. A publication contract or a requester's past publication record may show such a basis.

*Request* means asking in writing for records whether or not the request refers specifically to the Freedom of Information Act.

*Review* means examining the records to determine which portions, if any, may be released, and any other processing that is necessary to prepare the records for release. It includes only the first examination and processing of the requested documents for purposes of determining whether a specific exemption applies to a particular record or portion of a record.

*Search* means looking for records or portions of records responsive to a request. It includes reading and interpreting a request, and also page-by-page and line-by-line examination to identify responsive portions of a document. However, it does not include line-by-line examination where merely duplicating the entire page would be a

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less expensive and a quicker way to comply with the request.

[59 FR 5706, Feb. 8, 1994, as amended at 63 FR 67576, Dec. 8, 1998]

### § 503.2 Making a request.

(a) *How to request records.* All requests for documents shall be made in writing. Requests should be addressed to the Broadcast Board of Governors, Freedom of Information Officer, GC/FOI, room M-301 4th Street SW., Washington, DC 20547. Write the words "Freedom of Information Act Request" on the envelope and letter.

(b) *Details in your letter.* Your request for documents should provide as many details as possible that will help us find the records you are requesting. If there is insufficient information, we will ask you for more. Include your telephone number(s) to help us reach you if we have questions. If you are not sure how to write your request or what details to include, you may call the FOIA Office to request a copy of the Department's booklet "Guide and Index of Records," or access the same information via the Internet on Broadcasting Board of Governors' World Wide Web site (<http://www.usia.gov>). The more specific the request for documents, the faster the Department will be able to respond to your request(s).

(c) *Requests not handled under FOIA.* We will not provide documents requested under the FOIA and this part if the records are currently available in the National Archives, subject to release through the Archives, or commonly sold to the public by it or another agency pursuant to statutory authority (for example, records currently available from the Government Printing Office or the National Technical Information Service). Department records that are normally freely available to the general public, such as Broadcasting Board of Governors World, are not covered by the FOIA. Also requests from Federal departments and court orders for documents are not FOIA requests, nor are requests from Chairmen of Congressional committees or subcommittees.

(d) *Referral of requests outside the Department.* If you request records that were created by or provided to us by another Federal department, we may

refer your request to or consult with that department. We may also refer requests for classified records to the department that classified them. In cases of referral, the other department is responsible for processing and responding to your request under that department's regulation. When possible, we will notify you when we refer your request to another department.

(e) *Responding to your request*—(1) *Retrieving records.* The Department is required to furnish copies of records only when they are in our possession and control. If we have stored the records you want in a records retention center, we will retrieve and review them for possible disclosure. However, the Federal Government destroys many old records, so sometimes it is impossible to fill requests. The Department's record retention policies are set forth in the General Records Schedules of the National Archives and Records Administration and in Broadcasting Board of Governors' Records Disposition Schedule, which establish time periods for keeping records before they may be destroyed.

(2) *Furnishing records.* (i) The Department is only required to furnish copies of records which we have or can retrieve, we are not compelled to create new records. The Department will aid requesters by providing records and information in the form requested, including electronic format, if we can readily reproduce them in that form or format.

(ii) We may decide to conserve government resources and at the same time supply the records you need by consolidating information from various records, in paper form or electronically, rather than copying them all. If the effort to produce records in electronic format would significantly interfere with the operations of the Department, we will consider the effort to be an unreasonable search.

(iii) The Department is required to furnish only one copy of a record. If we are unable to make a legible copy of a record to be released, we will not attempt to reconstruct it. Rather we will furnish the best copy possible and note its poor quality in our reply or on the copy.

(iv) If we cannot accommodate the request for form or format, we will provide responsive, nonexempt information in a reasonably accessible form.

[59 FR 5707, Feb. 8, 1994, as amended at 63 FR 67577, Dec. 8, 1998]

### § 503.3 Availability of Department records.

(a) *Release of records.* If we have released a record or part of a record to others in the past, we will ordinarily release it to you also. This principle does not apply if the previous release was an unauthorized disclosure. However, we will not release it to you if a statute forbids this disclosure and we will not necessarily release it to you if an exemption applies in your situation and did not apply or applied differently in the previous situations.

(b) *Denial of requests.* All denials are in writing and describe in general terms the material withheld and state the reasons for the denial, including a reference to the specific exemption of the FOIA authorizing the withholding or deletion. The denial also explains your right to appeal the decision and it will identify the official to whom you should send the appeal. Denial letters are signed by the person who made the decision to deny all or part of the request, unless otherwise noted.

(c) *Unproductive searches.* We make a diligent search for records to satisfy your request. Nevertheless, we may not be able always to find the records you want using the information you provided, or they may not exist. If we advise you that we have been unable to find the records despite a diligent search, you will nevertheless be provided the opportunity to appeal the adequacy of the Department's search. However, if your request is for records that are obviously not connected with this Department or your request has been provided to us in error, a "no records" response will not be considered an adverse action and you will not be provided an opportunity to appeal.

(d) *Appeal of denials.* You have the right to appeal a partial or full denial of your FOIA request. To do so, you must put your appeal in writing and address it to the official identified in the denial letter. Your appeal letter must be dated and postmarked within

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30 calendar days from the date of the Department's denial letter. Because we have some discretionary authority in deciding whether to release or withhold records, you may strengthen your appeal by explaining your reasons for wanting the records. However, you are not required to give any explanation. Your appeal will be reviewed by the Department's Access Appeal Committee which consists of senior Department officials. When the Committee responds to your appeal, that constitutes the Department's final action on the request. If the Access Appeal Committee grants your appeal in part or in full, we will send the records to you promptly or set up an appointment for you to inspect them. If the decision is to deny your appeal in part or in full, the final letter will state the reasons for the decision, name the officials responsible for the decision, and inform you of the FOIA provisions for judicial review.

[59 FR 5707, Feb. 8, 1994, as amended at 63 FR 67577, Dec. 8, 1998]

### § 503.4 Time limits.

(a) *General.* The FOIA sets certain time limits for us to decide whether to disclose the records you requested, and to decide appeals. If we fail to meet the deadlines, you may proceed as if we had denied your request or your appeal. Since requests may be misaddressed or misrouted, you should call or write to confirm that we have the request and to learn its status if you have not heard from us in a reasonable time.

(b) *Time allowed.* (1) We will decide whether to release records within 20 working days after your request reaches the appropriate area office that maintains the records you are requesting. When we decide to release records, we will actually provide the records at that time, or as soon as possible after that decision, or let you inspect them as soon as possible thereafter.

(2) We will decide an appeal within 20 working days after the appeal reaches the appropriate reviewing official.

(3)(i) The FOI Officer or appeal official may extend the time limits in unusual circumstances for initial requests or appeals, up to 10 working days. We will notify you in writing of any extensions. "Unusual cir-

cumstances" include situations where we: Search for and collect records from field facilities, records centers or locations other than the office processing the records; search for, collect, or examine a great many records in response to a single request; consult with another office or department that has substantial interest in the determination of the request; and/or conduct negotiations with submitters and requesters of information to determine the nature and extent of non-disclosable proprietary materials.

(ii) If an extra ten days still does not provide sufficient time for the Department to deal with your request, we will inform you that the request cannot be processed within the statutory time limit and provide you with the opportunity to limit the scope of your request and/or arrange with us a negotiated deadline for processing your request.

(iii) If you refuse to reasonably limit the scope of your request or refuse to agree upon a time frame, the Department will process your case as it would have, had no modification been sought. We will make a diligent, good-faith effort to complete our review within the statutory time frame.

[59 FR 5708, Feb. 8, 1994, as amended at 63 FR 67577, Dec. 8, 1998]

### § 503.5 Records available for public inspection.

(a) To the extent that they exist, we will make the following records of general interest available for you in paper form or electronically for inspection or copying:

(1) Orders and final opinions, including concurring and dissenting opinions in adjudications. (See § 503.8(e) of this part for availability of internal memoranda, including attorney opinions and advice.)

(2) Statements of policy and interpretations that we have adopted but have not published in the FEDERAL REGISTER.

(3) Administrative staff manuals and instructions to staff that affect the public. (We will not make available, however, manuals or instructions that reveal investigative or audit procedures as described in § 503.8 (b) and (g) of this part.)

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(4) In addition to such records as those described in this paragraph (a), we will make available to any person a copy of all other Department records, in the format requested, if available, unless we determine that such records should be withheld from disclosure under subsection (b) of the Act and § 503.8 and § 503.9 of this part.

(b) Before releasing these records, however, we may delete the names of people, or information that would identify them, if release would invade their personal privacy to a clearly unwarranted degree. (See § 503.8(f).)

(c) The Department's FOIA Guide and Index will be available electronically via the Internet, or you may request a copy of it by mail.

[59 FR 5708, Feb. 8, 1994, as amended at 63 FR 67577, Dec. 8, 1998]

### § 503.6 Restriction on some Department records.

Under the U.S. Information and Educational Exchange Act of 1948 (22 U.S.C. 1461, as amended), the Broadcasting Board of Governors is prohibited from disseminating within the United States information about the U.S., its people, and its policies when such materials have been prepared by the Department for audiences abroad. This includes films, radio scripts and tapes, video tapes, books, and similar materials produced by the Department. However, this law does provide that upon request, such information shall be made available at Broadcasting Board of Governors for examination only by representatives of the press, magazines, radio systems and stations, research students or scholars and available for examination only to Members of Congress.

[59 FR 5708, Feb. 8, 1994]

### § 503.7 Fees.

(a) *Fees to be charged—categories of requests.* The paragraphs below state, for each category of request, the type of fees that we will generally charge. However, for each of these categories, the fees may be limited, waived, or reduced for the reasons given in paragraph (e) of this section. "Request" means asking for records, whether or not you refer specifically to the Free-

dom of Information Act. Requests from Federal agencies and court orders for documents are not included within this definition. "Review" means, when used in connection with processing records for a commercial use request, examining the records to determine what portions, if any, may be withheld, and any other processing that is necessary to prepare the records for release. It includes only the examining and processing that are done the first time we analyze whether a specific exemption applies to a particular record or portion of a record. It does not include the process of researching or resolving general legal or policy issues regarding exemptions. "Search" means looking for records or portions of records responsive to a request. It includes reading and interpreting a request, and also page-by-page and line-by-line examination to identify responsive portions of a document.

(1) *Commercial use request.* If your request is for a commercial use, Broadcasting Board of Governors will charge you the costs of search, review and duplication. "Commercial use" means that the request is 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 of a person on whose behalf the request is made. Whether a request is for a commercial use depends on the purpose of the request and the use to which the records will be put; the identity of the requester (individual, non-profit corporation, for-profit corporation), or the nature of the records, while in some cases indicative of that purpose or use, is not necessarily determinative. When a request is from a representative of the news media, a purpose of use supporting the requester's news dissemination function is not a commercial use.

(2) *Educational and scientific institutions and news media.* If you are an educational institution or a non-commercial scientific institution, operated primarily for scholarly or scientific research, or a representative of the news media, and your request is not for a commercial use, Broadcasting Board of Governors will charge you only for the duplication of documents. Also, Broadcasting Board of Governors will not

charge you the copying costs for the first 100 pages of duplication. "Educational institution" means a pre-school, elementary or secondary school, institution of undergraduate or graduate higher education, or institution of professional or vocational education. "Non-commercial scientific institution" means an institution that is not operated substantially for purposes of furthering its own or someone else's business, trade, or profit interests, and that is operated for purposes of conducting scientific research whose results are not intended to promote any particular product or industry. "Representative of the news media" means a person actively gathering news for an entity organized and operated to publish or broadcast news to the public. "News" means information that is about current events or that would be of current interest to the public. News media entities include television and radio broadcasters, publishers of periodicals (to the extent they publish "news") who make their products available for purchase or subscription by the general public, and entities that may disseminate news through other media (e.g., electronic dissemination of text). We will treat freelance journalists as representatives of a news media entity if they can show a solid basis for expecting publication through such an entity. A publication contract is such a basis, and the requester's past publication record may show such a basis.

(3) *Other requesters.* If your request is not the kind described by paragraph (a)(1) of this section or paragraph (a)(2) of this section, then Broadcasting Board of Governors will charge you only for the search and the duplication. Also, we will not charge you for the first two hours of search time or for the copying costs of the first 100 pages of duplication.

(b) *Fees to be charged—general provisions.* (1) We may charge search fees even if the records we find are exempt from disclosure, or even if we do not find any records at all.

(2) We will not charge you any fee at all if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. We have estimated that cost to be \$5.00.

(3) If we determine that you are (acting alone or with others) breaking down a single request into a series of requests in order to avoid or reduce the fees charged, we may aggregate all these requests for purposes of calculating the fees charged.

(4) We will charge interest on unpaid bills beginning on the 31st day following the day the bill was sent. The accrual of interest will be stayed upon receipt of the fee, rather than upon its processing by Broadcasting Board of Governors. Interest will be at the rate prescribed in section 3717 of title 32 U.S.C.

(c) *Fee schedule—Broadcasting Board of Governors will charge the following fees:* (1) Manual searching for or reviewing of records: (i) When performed by employees at grade GS-1 through GS-8 or FS-9 through FS-6—an hourly rate of \$10.00 will be charged;

(ii) When performed by employees at grade GS-9 through GS-13 or FS-5 through FS-2—an hourly rate of \$20.00 will be charged;

(iii) When performed by employees at grade GS-14 or above or FS-2 or above—an hourly rate of \$36.00 will be charged.

(iv) When a search involves employees at more than one of these levels, we will charge the appropriate rate for each.

(2) *Computer searching and printing.* Except in unusual cases, the cost of computer time will not be a factor in calculating the two free hours of search time. In those unusual cases, where the cost of conducting a computerized search significantly detracts from the Department's ordinary operations, no more than the dollar equivalent of two hours of manual search time shall be allowed. For searches conducted beyond the first two hours, the Department shall only charge the direct costs of conducting such searches.

(3) Photocopying standard size pages—\$0.15 per page.

(4) Photocopying odd-size documents (such as punchcards or blueprints) or reproducing other records (such as tapes)—the actual cost of operating the machine, plus the actual cost of the materials used, plus charges for the time spent by the operator, at the

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rates given in paragraph (c)(1) of this section.

(5) Certifying that records are true copies—this service is not required by the FOIA. If we agree to provide it, we will charge \$10.00 per certification.

(6) Sending records by express mail, certified mail, or other special methods. This service is not required by the FOIA. If we agree to provide it, we will charge our actual cost.

(7) Performing any other special service that you request and to which we agree—actual cost of operating any machinery, plus actual cost of any materials used, plus charges for the time of our employees, at the rates given in paragraph (c)(1) of this section.

(d) *Procedures for assessing and collecting fees*—(1) *Agreement to pay.* We generally assume that when you request records you are willing to pay the fees we charge for services associated with your request. You may specify a limit on the amount you are willing to spend. We will notify you if it appears that the fees will exceed the limit and ask whether you nevertheless want us to proceed with the search.

(2) *Advance payment.* If you have failed to pay previous bills in a timely manner, or if our initial review of your request indicates that we will charge you fees exceeding \$250.00, we will require you to pay your past due fees and/or the estimated fees, or a deposit, before we start searching for the records you want, or before we send them to you. In such cases, the administrative time limits as described in section 503.6(b) above, will begin only after we come to an agreement with you over payment of fees, or decide that fee waiver or reduction is appropriate.

(e) *Waiver or reduction of fees.* We will waive or reduce the fees we would otherwise charge if disclosure of the information meets both of the following tests (paragraphs (e)(1) and (e)(2) of this section):

(1) It is in the public interest because it is likely to contribute significantly to public understanding of government operations or activities, regardless of any other public interest it may further. In making this determination, we may consider:

(i) Whether the requester is in a position to contribute to public understanding;

(ii) Whether the requester has such knowledge or expertise as may be necessary to understand the information; and,

(iii) Whether the requester's intended use of the information would be likely to disseminate the information among the public, and

(2) It is not primarily in the commercial interest of the requester. Commercial interests include interests relating to business, trade, and profit. Not only profit-making corporations have commercial interests; so do nonprofit corporations, individuals, unions, and other associations.

(3) You must make your request for a waiver or reduction at the same time you make your request for records. Only the FOIA Officer may make the decision whether to waive or reduce the fees. If we do not completely grant your request for a waiver or reduction, the denial letter will designate the appeal official.

[54 FR 26733, June 26, 1989, as amended at 63 FR 67577, Dec. 8, 1998]

### § 503.8 Exemptions.

Section 552(b) of the Freedom of Information Act contains nine exemptions to the mandatory disclosure of records. These exemptions and their application by the Department are described below. In some cases, more than one exemption may apply to the same document. This section does not itself authorize the giving of any pledge of confidentiality by any officer or employee of the Department.

(a) *Exemption one—National defense and foreign policy.* We are not required to release records that are specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order. Executive Order No. 12356 (1982) provides for such classification. When the release of certain records may adversely affect U.S. relations with foreign countries, we usually consult with officials of those area offices and/or with officials of the Department of

State. We may also have in our possession records classified by another agency. If we do, we may consult with that agency or may refer your request to that agency for their direct response to you, in which case we will notify you that we have made such a referral.

(b) *Exemption two—Internal personnel rules and practices.* We are not required to release records that are related solely to the internal personnel rules and practices of an agency. We may withhold routine internal Department procedures such as guard schedules and luncheon periods. We may also withhold internal records the release of which would help some persons circumvent the law or Department regulations.

(c) *Exemption three—Records exempted by other statutes.* We are not required to release records if another statute specifically allows us to withhold them. Another statute may be used only if it absolutely prohibits disclosure or if it sets forth criteria identifying particular types of material to be withheld.

(d) *Exemption four—Trade secrets and confidential commercial or financial information.* We will withhold trade secrets and commercial or financial information that is obtained from a person and privileged or confidential.

(1) *Trade secrets.* A trade secret is a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. A direct relationship is necessary between the trade secret and the productive process.

(2) *Commercial or financial information, obtained from a person, and is privileged or confidential.*

(i) Information is “commercial or financial” if it relates to businesses, commerce, trade, employment, profits, or finances (including personal finances).

(ii) Information is obtained from someone outside the Federal Government or from someone within the Government who has a commercial or financial interest in the information. “Person” includes an individual, partnership, corporation, association, state

or foreign government, or other organization. Information is not “obtained from a person” if it is generated by the Broadcasting Board of Governors or another Federal agency.

(iii) Information is “privileged” if it would ordinarily be protected from disclosure in civil discovery by a recognized evidentiary privilege, such as the attorney-client privilege, or the work product privilege. Information may be privileged for this purpose under a privilege belonging to a person outside the Government, unless the providing of the information to the Government rendered the information no longer protectible in civil discovery.

(iv) Information is “confidential” if it meets one of the following tests:

(A) Disclosure may impair the Government’s ability to obtain necessary information in the future;

(B) Disclosure would substantially harm the competitive position of the person who submitted the information;

(C) Disclosure would impair other Government interests, such as program effectiveness and compliance; or

(D) Disclosure would impair other private interests, such as an interest in controlling availability of intrinsically valuable records, which are sold in the market by their owner.

(3) *Designation of certain confidential information.* A person who submits records to the Government may designate part or all of the information in such records as exempt from disclosure under Exemption four. The person may make this designation either at the time the records are submitted to the Government or within a reasonable time thereafter. The designation must be in writing. The legend prescribed by a request for proposal or request for quotations pursuant to any Department regulation establishing a substitute for the language is sufficient but not necessary for this purpose. Any such designation will expire ten years after the records were submitted to the Government.

(4) *Predisclosure notification.* The procedures in this paragraph apply to records that were submitted to the Government where we have substantial reason to believe that information in the records could reasonably be considered exempt under Exemption four.

Certain exceptions to these procedures are stated in paragraph (d)(5) of this section.

(i) When we receive a request for such records and we determine that we may be required to disclose them, we will make reasonable efforts to notify the submitter about these facts. The notice will inform the submitter about the procedures and time limits for submission and consideration of objections to disclosure. If we must notify a large number of submitters, we may do this by posting or publishing a notice in a place where the submitters are reasonably likely to become aware of it.

(ii) The submitter has five (5) working days from receipt of the notice to object to disclosure of any part of the records and to state all bases for its objections.

(iii) We will give consideration to all bases that have been timely stated by the submitter. If we decide to disclose the records and the submitter still does not agree, we will send a written notice to the submitter stating briefly why we did not sustain its objections and will provide a copy of the records as we intend to release them. The notice will state that we will disclose the records five (5) working days after the submitter receives the notice unless we are ordered by a United States District Court not to release them.

(iv) When a requester files suit under the FOIA to obtain records covered by this paragraph, we will promptly notify the submitter.

(v) Whenever we send a notice to a submitter under paragraph (d)(4)(i) of this section, we will notify the requester that we are giving the submitter a notice and an opportunity to object.

(5) *Exceptions to predisclosure notification.* The notice requirements in paragraph (d)(4) of this section do not apply in the following situations:

(i) We decide not to disclose the records;

(ii) The information has previously been published or made generally available;

(iii) We have already notified the submitter of previous requests for the same records and have come to an understanding with that submitter about the records;

(iv) Disclosure is required by a statute other than the FOIA;

(v) Disclosure is required by a regulation, issued after notice and opportunity for public comment, that specifies narrow categories of records that are to be disclosed under the FOIA, but in this case a submitter may still designate records as described in paragraph (d)(3) of this section and in exceptional cases, at our discretion, may follow the notice procedures in paragraph (d)(4) of this section;

(vi) The designation appears to be obviously frivolous, but in this case we will still give the submitter the written notice required by paragraph (d)(4)(iii) of this section (although this notice need not explain our decision or include a copy of the records);

(vii) We withhold the information because another statute requires its withholding.

(e) *Exemption five*—Internal memoranda. This exemption covers internal Government communications and notes that fall within a generally recognized evidentiary privilege. Internal Government communications include an agency's communications with an outside consultant or other outside person, with a court, or with Congress, when those communications are for a purpose similar to the purpose of privileged intra-agency communications. Some of the most common applicable privileges are:

(1) *The deliberative process privilege.* This privilege protects predecisional deliberative communications. A communication is protected under this privilege if it was made before a final decision was reached on some question of policy and if it expressed recommendations or opinions on that question. The purpose of this privilege is to prevent injury to the quality of the Department decisionmaking process by encouraging open and frank internal policy discussions, by avoiding premature disclosure of policies not yet adopted, and by avoiding the public confusion that might result from disclosing reasons that were not in fact the ultimate grounds for a Department's decision. This privilege continues to protect predecisional documents even after a decision is made. We will release purely factual material

in a deliberative document unless that material is otherwise exempt. However, purely factual material in a deliberative document is within this privilege if:

- (i) It is inextricably intertwined with the deliberative portions so that it cannot reasonably be segregated, or
- (ii) It would reveal the nature of the deliberative portions, or
- (iii) Its disclosure would in some other way make possible an intrusion into the decisionmaking process.

(2) *Attorney-client privilege.* This privilege protects confidential communications between a lawyer and an employee or agent of the Government where an attorney-client relationship exists (e.g., where the lawyer is acting as attorney for the Department and the employee is communicating on behalf of the Department) and where the employee has communicated information to the attorney in confidence in order to obtain legal advice or assistance, and/or where the attorney has given advice to the client.

(3) *Attorney work product privilege.* This privilege protects documents prepared by or for the Department, or by or for its representative (usually Broadcasting Board of Governors attorneys) in anticipation of litigation or for trial. It includes documents prepared for purposes of administrative adjudications as well as court litigation. It includes documents prepared by program offices as well as by attorneys. It includes factual material in such documents as well as material revealing opinions and tactics. The privilege continues to protect the documents even after the litigation is closed.

(f) *Exemption six—Clearly unwarranted invasion of personal privacy.* We may withhold personnel, medical, and similar files and personal information about individuals if disclosure would constitute a clearly unwarranted invasion of personal privacy.

(1) *Balancing test.* In deciding whether to release records that contain personal or private information about someone else to a requester, we weigh the foreseeable harm of invading that individual's privacy against the public benefit that would result from the release of the information. In our evalua-

tion of requests for records, we attempt to guard against the release of information that might involve a violation of personal privacy by a requester being able to "piece together items" or "read between the lines" information that would normally be exempt from mandatory disclosure.

(2) *Information frequently withheld.* We frequently withhold such information as home addresses, ages, minority group status, social security numbers, individual's benefits, earning records, leave records, etc.

(g) *Exemption seven—Law enforcement.* We are not required to release information or records that the Government has compiled for law enforcement purposes. The records may apply to actual or potential violations of either criminal or civil laws or regulations. We can withhold these records only to the extent that releasing them would cause harm in at least one of the following situations:

(1) *Enforcement proceedings.* We may withhold information when release could reasonably be expected to interfere with prospective or ongoing law enforcement proceedings. Investigations of fraud and mismanagement, employee misconduct, and civil rights violations may fall into this category. In certain cases, we may refuse to confirm or deny the existence of records that relate to violations in order not to disclose that an investigation is in progress or may be conducted.

(2) *Fair trial or impartial adjudication.* We may withhold records when release would deprive a person of a fair trial or an impartial adjudication because of prejudicial publicity.

(3) *Personal privacy.* We are careful not to disclose information that could reasonably be expected to constitute an unwarranted invasion of personal privacy. When a name surfaces in an investigation, that person is likely to be vulnerable to innuendo, rumor, harassment, or retaliation.

(4) *Confidential sources and information.* We may withhold records whose release could reasonably be expected to disclose the identity of a confidential source of information. A confidential source may be an individual; a state, local, or foreign Government agency;

or any private organization. The exemption applies whether the source provides information under an express promise of confidentiality or under circumstances from which such an assurance could be reasonably inferred. Also, where the record, or information in it, has been compiled by a criminal law enforcement authority conducting a criminal investigation, or by an agency conducting a lawful national security investigation, the exemption also protects all information supplied by a confidential source. Also protected from mandatory disclosure is any information which, if disclosed, could reasonably be expected to jeopardize the system of confidentiality that assures a flow of information from sources to investigatory agencies.

(5) *Techniques and procedures.* We may withhold records reflecting special techniques or procedures of investigation or prosecution not otherwise generally known to the public. In some cases, it is not possible to describe even in general terms those techniques without disclosing the very material to be withheld. We may also withhold records whose release would disclose guidelines for law enforcement investigations or prosecutions if this disclosure could reasonably be expected to create a risk that someone could circumvent requirements of law or of regulation.

(6) *Life and physical safety.* We may withhold records whose disclosure could reasonably be expected to endanger the life or physical safety of any individual. This protection extends to threats and harassment as well as to physical violence.

(h) *Exemptions eight and nine—records on financial institutions and records on wells.* (1) Exemption eight permits us to withhold records about regulation or supervision of financial institutions.

(2) Exemption nine permits the withholding of geological and geophysical information and data, including maps, concerning wells.

[54 FR 26734, June 26, 1989, as amended at 63 FR 67577, Dec. 8, 1998]

### § 503.9 Electronic Records Act of 1996.

(a) *Introduction.* This section applies to all records of the Broadcast Board of Governors, including all of its foreign

posts. Congress enacted the FOIA to require Federal agencies to make records available to the public through public inspections and at the request of any person for any public or private use. The increase in the Government's use of computers enhances the public's access to Government information. This section addresses and explains how records will be reviewed and released when the records are maintained in electronic format. Documentation not previously subject to the FOIA when maintained in a non-electronic format is not made subject to FOIA by this law.

(b) *Definitions—(1) Compelling need.* Obtaining records on an expedited basis because of an imminent threat to the life of physical safety of an individual, or urgently needed by an individual primarily engaged in disseminating information to the public concerning actual or alleged Federal Government activities.

(2) *Discretionary disclosure.* Records or information normally exempt from disclosure will be released whenever it is possible to do so without reasonably foreseeable harm to any interest protected by an FOIA exemption.

(3) *Electronic reading room.* The room provided which makes electronic records available.

(c) *Electronic format of records.* (1) Materials such as Department opinions and policy statements (available for public inspection and copying) will be available electronically by accessing Broadcasting Board of Governors' Home Page via the Internet at <http://www.usia.gov>. To set up an appointment to view such records in hard copy or to access the Internet via Broadcasting Board of Governors computer, please contact the FOIA/PA Unit on (202) 619-5499.

(2) The Department will make available for public inspection and copying, both electronically via the Internet and in hard copy, those records that have been previously released in response to FOIA requests, when the Department determines the records have been or are likely to be the subject of future requests.

(3) The Department will provide both electronically through its Internet address and in hard copy a "Guide" on

how to make an FOIA request, and an Index of all Department information systems and records that may be requested under the FOIA.

(4) The Department may delete identifying details when it publishes or makes available the index and copies of previously-released records to prevent a clearly unwarranted invasion of personal privacy.

(i) The Department will indicate the extent of any deletions made from where the deletion was made, if feasible.

(ii) The Department will not reveal information about deletions if such disclosure would harm an interest protected by an exemption.

(d) *Honoring form or format requests.* The Department will aid requesters by providing records and information in the form requested, including electronic format, if we can readily reproduce them in that form or format. However, if we cannot accommodate the requester, we will provide responsive, nonexempt information in a reasonably accessible form.

(1) The Department will make a reasonable effort to search for records kept in an electronic format. However, if the effort would significantly interfere with the operations of the Department or the Department's use of its computers, we will consider the effort to be unreasonable.

(2) The Department need not create documents that do not exist, but computer records found in a database rather than in a file cabinet may require the application of codes of some form of programming to retrieve the information. This application of codes of programming of records will not amount to the creation of records.

(3) Except in unusual cases, the cost of computer time will not be a factor in calculating the two free hours of search time available under § 503.7. In those unusual cases, where the cost of conducting a computerized search significantly detracts from the Department's ordinary operations, no more than the dollar equivalent of two hours of manual search time shall be allowed. For searches conducted beyond the first two hours, the Department shall only charge the direct costs of conducting such searches.

(e) *Technical feasibility of redacting non-releasable material.* The Department will make every effort to indicate the place on the record where a redaction of non-releasable material is made, and an FOIA citation noting the applicable exemption for the deletion will also be placed at the site. If unable to do so, we will notify you of that fact.

(f) *Ensuring timely response to request.* The Department will make every attempt to respond to FOIA requests within the prescribed 20 working-day time limit. However, processing some requests may require additional time in order to properly screen material against the inadvertent disclosure of material covered by the exemptions.

(1) *Multitrack first-in first-out processing.* (i) Because the Department has been able to process its requests without a backlog of cases, Broadcasting Board of Governors will not institute a multitrack system. Those cases that may be handled easily, because they require only a few documents or a simple answer, will be handled immediately by each specialist.

(ii) If you wish to qualify for processing under a faster track, you may limit the scope of your request so that we may respond more quickly.

(2) *Unusual circumstances.* (i) The Department may extend for a maximum of ten working days the statutory time limit for responding to an FOIA request by giving notice in writing as to the reason for such an extension. The reasons for such an extension may include: the need to search for and collect requested records from multiple offices; the volume of records requested; and, the need for consultation with other components within the Department.

(ii) If an extra ten days still does not provide sufficient time for the Department to deal with your request, we will inform you that the request cannot be processed within the statutory time limit and provide you with the opportunity to limit the scope of your request and/or arrange with us a negotiated deadline for processing your request.

(iii) If you refuse to reasonable limit the scope of your request or refuse to agree upon a time frame, the Department will process your case as it would

have, had no modification been sought. We will make a diligent, good-faith effort to complete our review within the statutory time frame.

(3) *Aggregation of requests.* The Department will aggregate requests that clearly involve related material that should be considered as a single request.

(i) If you make multiple or related requests for similar material for the purpose of avoiding costs, the Department will notify you that we are aggregating your requests, and the reasons why.

(ii) Multiple or related requests may also be aggregated, such as those involving requests and schedule, but you will be notified in advance if we intend to do so.

(g) *Time periods for Department consideration of requests—(1) Expedited access.* The Department will authorize expedited access to requesters who show a compelling need for access, but the burden is on the requester to prove that expedition is appropriate. The Department will determine within ten days whether or not to grant a request for expedited access and will notify the requester of its decision.

(2) *Compelling need for expedited access.* Failure to obtain the records within an expedited deadline must pose an imminent threat to an individual's life or physical safety; or the request must be made by someone primarily engaged in disseminating information, and who has an urgency to inform the public about actual or alleged Federal Government activity.

(3) *How to request expedited access.* We will be required to make factual and subjective judgments about the circumstances cited by requesters to qualify them for expedited processing. To request expedited access, your request must be in writing and it must explain in detail your basis for seeking expedited access. The categories for compelling need are intended to be narrowly applied:

(i) *A threat to an individual's life or physical safety.* A threat to an individual's life or physical safety should be imminent to qualify for expedited access to the records. You must include the reason why a delay in obtaining the information could reasonably be

foreseen to cause significant adverse consequences to a recognized interest.

(ii) *Urgency to inform.* The information requested should pertain to a matter of a current exigency to the American public, where delay in response would compromise a significant recognized interest. The person requesting expedited access under an "urgency to inform," must be primarily engaged in the dissemination of information. This does not include individuals who are engaged only incidentally in the dissemination of information. "Primarily engaged" requires that information dissemination be the main activity of the requester. A requester only incidentally engaged in information dissemination, besides other activities, would not satisfy this requirement. The public's right to know, although a significant and important value, would not by itself be sufficient to satisfy this standard.

(4) *Expansion of Department response time.* The new law provides that agencies now have 20 working-days to respond to all FOIA requests. However, when possible, we will continue to respond to requests within the former 10 working-day time frame.

(5) *Estimation of matter denied.* The Department will try to estimate the volume of any denied material and provide the estimate to the requester, unless doing so would harm an interest protected by an exemption.

(h) *Computer redaction.* The Department will identify the location of deletions in the released portion of the records, and where technologically feasible, will show the deletion at the place on the record where the deletion was made, unless including that indication would harm an interest protected by an exemption.

(i) *Report to Congress.* In addition to the information already provided to Congress in the Department's Annual Report on FOIA Activities, the Department will include the following: the number of Privacy Act (PA) requests handled; the number of backlogged requests; the number of days taken to process requests; the number of staff devoted to processing FOIA requests; whether a claimed (b)(3) statute has been upheld in court; and the costs of litigation. The Department's annual

report will be available both in hard copy and through the Internet. In the past, annual reports were required based on a calendar year and were provided to Congress on or before March 1 of the following year. However, the new law has changed the annual reporting requirements now to be related to the Department's fiscal year. Thus, the Annual Report to Congress on FOIA Activities for 1997 only encompassed the first nine months (January through September), and was reported by March 1, 1998. The FY 98 report will begin in October 1997 and conclude at the end of September 1998. This report will be presented to the Department of Justice instead of Congress, by February 1, 1999, and Justice will report all Federal agency FOIA activity through electronic means.

(j) *Reference materials and guides.* The Department has available in hard copy, and will have electronically via the Internet, a guide for requesting records under the FOIA and an index and description of all major information systems of the Department. The guide is a simple explanation of what the FOIA is intended to do, and how you can use it to access Broadcasting Board of Governors records. The Index explains the types of records that may be requested from the Department through FOIA requests and why some records cannot, by law, be made available by Broadcasting Board of Governors.

[63 FR 71587, Dec. 29, 1998]

## PART 505—PRIVACY ACT POLICIES AND PROCEDURES

### Sec.

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- 505.15 Exempt systems of records used.

AUTHORITY: Pub. L. 93-579, 88 Stat. 1897; 5 U.S.C. 552a; 55 FR 31940, Aug. 6, 1990, as amended.

SOURCE: 62 FR 10630, Mar. 7, 1997, unless otherwise noted.

### § 505.1 Purpose and scope.

The Broadcasting Board of Governors will protect individuals' privacy from misuse of their records, and grant individuals access to records concerning them which are maintained by the Board's domestic and overseas offices, consistent with the provisions of Public Law 93-579, 88 Stat. 1897; 5 U.S.C. 552a, the Privacy Act of 1974, as amended. The Board has also established procedures to permit individuals to amend incorrect records, to limit the disclosure of personal information to third parties, and to limit the number of sources of personal information. The Board has also established internal rules restricting requirements of individuals to provide social security account numbers.

### § 505.2 Definitions.

(a) *Access Appeal Committee (AAC)*—the body established by and responsible to the Director of Broadcasting Board of Governors for reviewing appeals made by individuals to amend records held by the Board.

(b) *Board*—Broadcasting Board of Governors, its offices, divisions, branches and its Foreign Service establishments.

(c) *Amend*—To make a correction to or expunge any portion of a record about an individual which that individual believes is not accurate, relevant, timely or complete.

(d) *Individual*—A citizen of the United States or an alien lawfully admitted for permanent residence.

(e) *Maintain*—Collect, use, store, disseminate or any combination of these record-keeping functions; exercise of control over and hence responsibility and accountability for systems of records.

(f) *Record*—Any information maintained by the Board about an individual that can be reproduced, including finger or voice prints and photographs, and which is retrieved by that