

Office of the Secretary, DHS

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law, any information protected from disclosure by the CII Act coming to the officer or employee in the course of his or her employment or official duties or by reason of any examination or investigation made by, or return, report, or record made to or filed with, such department or agency or officer or employee thereof, shall be fined under title 18 of the United States Code, imprisoned not more than one year, or both, and shall be removed from office or employment.

(2) In addition to the penalties set forth in paragraph (d)(1) of this section,

if the PCII Program Manager determines that an entity or person who has received PCII has violated the provisions of this Part or used PCII for an inappropriate purpose, the PCII Program Manager may disqualify that entity or person from future receipt of any PCII or future receipt of any sensitive homeland security information under section 892 of the Homeland Security Act, provided, however, that any such decision by the PCII Program Manager may be appealed to the Office of the Under Secretary for Preparedness.

CHAPTER X—PRIVACY AND CIVIL LIBERTIES
OVERSIGHT BOARD

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PART 1000—DISCLOSURE OF RECORDS AND INFORMATION

EFFECTIVE DATE NOTE: At 72 FR 66041, Nov. 27, 2007, Chapter X was removed in its entirety, effective January 30, 2008.

FREEDOM OF INFORMATION ACT

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AUTHORITY: Public Law 108-408; 5 U.S.C. 552 *et seq.*

SOURCE: 72 FR 17789, Apr. 10, 2007, unless otherwise noted.

FREEDOM OF INFORMATION ACT

§ 1000.1 Definitions.

Agency means Agency as defined in 5 U.S.C. 552(f)(1). The Privacy and Civil Liberties Oversight Board shall not be considered as an agency for any other purpose, except as referred to in this Regulation, and for Freedom of Information Act (FOIA) purposes.

Board or *PCLOB* means the Privacy and Civil Liberties Oversight Board.

Calendar Days means all days, including Saturday, Sunday, or Federal holidays.

Commercial Use Request refers to 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 requestor or the person on whose behalf the request is made.

Compelling need means that a failure to obtain requested Records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or with respect to a request made by a person primarily engaged in disseminating information, an urgency to inform the public concerning actual or alleged Federal Government activity.

Computer search means the actual direct cost of providing the service. This will include the cost of operating the central processing unit for that portion of operating time that is directly attributable to Searching for potentially responsive records to a FOIA request and the portion of the salary of the operators/programmers attributable to the search.

Days means “work days” not including Saturday, Sunday, Federal holidays, or other days the Board is closed.

Direct costs means those expenditures that the Board actually incurs in searching for and duplicating (and in the case of commercial requestors, 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. Not included in direct costs are overhead expenses such as costs of space and heating or lighting the facility in which the Records are stored.

Duplication means the making of a copy of a document, or of the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microform, audiovisual materials, or electronic Records (e.g., magnetic tape or disk), among others.

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

FOIA means the Freedom of Information Act (5 U.S.C. 552).

Head of the agency means the Chairman of the Privacy and Civil Liberties Oversight Board or the Chairman’s designee.

Non-commercial scientific institution refers to an institution that is not operated on a commercial basis, 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.

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Record means a record as defined in 5 U.S.C. 552(f)(2). A Record must exist and be in the Board's custody and control at the time of the request to be considered subject to this part and FOIA.

Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services and Web sites), such media would be included in this category. In the case of freelance journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though they are not actually employed by it.

Review means the process of examining documents located in response to a request that is for a commercial use to determine whether any portion of any document located is exempt from release or otherwise permitted to be withheld. It also includes processing any documents for disclosure (doing all that is necessary to excise them and otherwise prepare them for release). Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from Records maintained in electronic form or format.

§ 1000.2 Purpose.

These regulations describe how the Board implements the requirements of the Freedom of Information Act, 5 U.S.C. 552 *et seq.*, and the procedures by which records may be obtained from the Board. Official records of the Board made available pursuant to FOIA shall be furnished to members of the public

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only pursuant to statute and as prescribed in these regulations.

§ 1000.3 Authority and functions of Board.

The Board advises the President and other senior Executive Branch officials to ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of all laws, regulations, and Executive Branch policies related to efforts to protect the Nation against terrorism. This includes advising on whether adequate guidelines, supervision, and oversight exist to protect these important legal rights of all Americans. The Board was established by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458).

§ 1000.4 Other information.

Additional information regarding the Board, including its members, organization, public statements, and relevant legislation, may be located on its Web site: <http://www.privacyboard.gov>.

§ 1000.5 Public reference.

(a) The Board will make available for public inspection a copy of all material required to be made public by 5 U.S.C. 552(a)(2), including all documents published by the Board in the FEDERAL REGISTER and currently in effect. This material will also be available on the Board's Web site, <http://www.privacyboard.gov>.

(b) In order to view documents maintained pursuant to § 1000.5(a), members of the public should contact the Board at (202) 456-1240 or by e-mail at privacyboard@who.eop.gov.

(c) The FOIA Officer shall also maintain a file open to the public, which shall contain copies of all grants or denials of appeals by the Board.

(d) The public may contact the Board's Chief FOIA Officer and the Public Liaison by writing to the address listed in § 1000.6(a) or by calling (202) 456-1240.

§ 1000.6 How to request records.

(a) A request for records pursuant to FOIA must be submitted in writing. An individual may submit a request via mail: FOIA Officer, Privacy and Civil

Liberties Oversight Board, The White House, Washington, DC 20502; or via fax: (202) 456-1066. To ensure prompt receipt, the Board recommends sending a request via fax, as security procedures may delay requests sent through the mail. The words "FOIA REQUEST" should be clearly marked on the envelope or cover page, as well as on the actual request. The request must contain a means of contacting the requestor via mail and via telephone. The Board does not accept FOIA requests by e-mail.

(b) Each request must reasonably describe the record(s) sought, including when known: The organization or individual originating the Record; subject matter; type of record; location; and any other pertinent information which would assist in promptly locating the Record. Requests shall also contain a description of their purpose so that a determination may be made regarding the appropriate fee structure that should be applied to the request. See §1000.10(i). Requests that do not meet these requirements will not be considered a proper request.

(c) When a request is not considered reasonably descriptive, or requires the production of voluminous records, or places an extraordinary burden on the FOIA Officer or other members of the Board staff that would seriously interfere with its normal functioning, the Board shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the Board an alternative time frame for processing the request or a modified request. Refusal by the person reasonably to modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of 5 U.S.C. 552(a)(6)(C).

§ 1000.7 Initial determination.

References to the FOIA Officer shall, unless otherwise stated, include the FOIA Officer's designee. The FOIA Officer shall have the authority to approve or deny requests received pursuant to these regulations. The decision of the FOIA Officer shall be final, subject

only to administrative appeal as provided in §1000.9.

§ 1000.8 Response to FOIA request.

(a) When a requested record has been identified and is available, the FOIA Officer shall notify the person making the request as to where and when the record is available for inspection or the copies will be available. The notification shall also advise the person making the request of any fees pursuant to §1000.10.

(b) The FOIA Officer shall approve or deny, in whole or in part, a request for Records as soon as reasonably possible. Such a response will be given in writing and will occur within 20 days after the Officer receives the request. The FOIA Officer may grant or deny a portion of a request if it appears that other, separate elements of the request will require additional time to complete. Pursuant to 5 U.S.C. 552(a)(6)(B), the FOIA Officer may extend these time limits by written notice to the person making such request. Such written notice shall set forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. Such a notice shall not specify a date that would result in an extension for more than 10 days, except as provided in §1000.6(c). Additional time may be required because:

(1) It is necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

(2) It is necessary to consult with another organization having a substantial interest in the determination of the request or among two or more components of the organization having substantial subject matter interest therein; or

(3) For other reasons discussed in 5 U.S.C. 552(a)(6)(B).

(c) If the request is denied, the written notification to the person making the request shall include the names of the individuals who participated in the determination, the reasons for the denial, and a notice that an appeal may be lodged with the head of the agency within 30 calendar days of receipt of the denial or partial denial.

(d) The FOIA officer may grant expedited consideration of a FOIA request

or appeal if the requestor shows a compelling need for such expedited consideration. The requestor must submit such a request in writing. A demonstration of a compelling need by a person making a request for expedited processing shall be made by a statement certified by such person to be true and correct to the best of such person's knowledge and belief. The FOIA officer will respond to such a request within 10 days of receipt of the request.

§ 1000.9 Administrative appeal.

Appeals shall be set forth in writing within 30 calendar days of receipt of a denial and addressed to the head of the agency via mail or fax pursuant to the contact information listed in § 1000.6(a). The words "FOIA APPEAL" must be clearly marked on the envelope or cover page, as well as the actual appeal. The appeal shall include a statement explaining the basis for the appeal. Determinations of appeals will be set forth in writing and signed by the head of the agency, or his designee, within 20 days of receipt of the appeal. If, on appeal, the denial is in whole or in part upheld, the written determination will also contain a notification of the provisions for judicial review, where a challenge may be filed, and the names of the persons who participated in the determination.

§ 1000.10 Charges for search, review, and reproduction.

(a) The Board will charge fees that recoup the full allowable direct costs it incurs. This may also include costs incurred by another organization to search for, review, and produce potentially responsive records. Moreover, it shall use the most efficient and least costly methods to comply with requests for records made under FOIA.

(b) With regard to manual searches for records, the Board will charge at the salary rate(s) (i.e., basic pay plus 16 percent) of the employee(s) making the search.

(c) In calculating charges for computer searches for records, the Board will charge at the actual direct cost of providing the service. This will include the cost of operating the central processing unit for that portion of oper-

ating time that is directly attributable to searching for records potentially responsive to a FOIA request and the portion of the salary of the operators/programmers attributable to the search.

(d) Only requestors who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are exempt from mandatory disclosure. Charges may be assessed only for the initial review—that is, the review undertaken the first time the Board analyzes the applicability of a specific exemption to a particular record or portion of a record. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The Board may assess the costs for such a subsequent review.

(e) Records will be duplicated at a rate of \$.15 per page, except that the Board may adjust that rate from time to time by notice published in the FEDERAL REGISTER. For copies prepared by computer, such as tapes or printouts, the Board shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Board will charge the actual direct costs of producing the document(s). If the Board estimates that duplication charges are likely to exceed \$25, it shall notify the requestor of the estimated amount of fees, unless the requestor has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requestor the opportunity to confer with PCLOB personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(f) Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the FOIA Officer, Privacy and Civil Liberties Oversight Board, The White House, Washington, DC 20502.

(g) A receipt for fees paid will be given upon request. Refund of fees paid

for services actually rendered will not be made.

(h) With the exception of requestors seeking documents for a Commercial Use, the Board will provide the first 100 pages of duplication and the first two hours of search time without charge.

(1) For purposes of these restrictions on assessment of fees, the word "pages" refers to 8½" x 11" or 11" x 14" paper copies. Thus, requestors are not entitled to 100 microfiche or 100 computer disks, for example. By contrast, a microfiche containing the equivalent of 100 pages or 100 pages of computer printout does meet the terms of the restriction.

(2) Similarly, the term "Search time" in this context applies to a manual search. To apply this term to searches made by computer, the Board will determine the hourly cost of operating the central processing unit and the operator's hourly salary plus 16 percent. When the cost of search (including the operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of the salary of the person performing the search, the Board will begin assessing charges for computer searches.

(i) The Board divides FOIA requestors into four categories: Commercial use requestors; educational and non-commercial scientific institutions; representatives of the news media; and all other requestors. The specific levels of fees for each of these categories are:

(1) *Commercial use requestors.* When the Board receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Requestors must reasonably describe the records sought. Commercial use requestors are entitled neither to two hours of free search time nor to 100 free pages of reproduction of documents. The Board may recover the cost of searching for and Reviewing Records even if there is ultimately no disclosure of Records.

(2) *Educational and non-commercial scientific institution requestors.* The Board shall provide documents to requestors in this category for the cost of reproduction alone, excluding charges for

the first 100 pages. To be eligible for inclusion in this category, requestors must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an Educational Institution) or scientific (if the request is from a non-commercial scientific institution) research. Requestors must reasonably describe the records sought.

(3) *Requestors who are representatives of the news media.* The Board will provide documents to requestors in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requestor must satisfy the definition of representatives of the news media in §1000.1, and his or her request must not be made for a commercial use. In reference to this class of requestor, a request for Records supporting the news dissemination function of the requestor shall not be considered to be a request that is for a commercial use. Requestors must reasonably describe the Records sought.

(4) *All other requestors.* The Board shall charge requestors who do not fit into any of the categories above fees that recover the full reasonable Direct Cost of Searching for and reproducing Records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of Search time shall be furnished without charge. Requestors must reasonably describe the Records sought.

(j) The Board may assess interest charges on an unpaid bill starting on the 31st Calendar Day following the day on which the billing was sent. The fact that the fee has been received within the thirty Calendar Day grace period, even if the fee has not been processed, will suffice to stay the accrual of interest. Interest will be at the rate prescribed in section 3717 of title 31 of the United States Code and will accrue from the date of the billing.

(k) The Board may assess charges for time spent searching, even if it fails to locate the Records or if Records located are determined to be exempt from disclosure. If the Board estimates

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that Search charges are likely to exceed \$25, it shall notify the requestor of the estimated amount of fees, unless the requestor has indicated in advance his willingness to pay fees as high as those anticipated.

(l) A requestor may not file multiple requests, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Board reasonably believes that a requestor, or a group of requestors acting in concert, has submitted requests that constitute a single request, involving clearly related matters, it may aggregate those requests and charge accordingly.

(m)(1) The Board may not require a requestor to make payment before work is commenced or continued on a request, unless:

(i) The Board estimates or determines that allowable charges that a requestor may be required to pay are likely to exceed \$250; or

(ii) A requestor has previously failed to pay a fee charged in a timely fashion (i.e., within 30 Days of the date of the billing).

(2) When the Board acts under paragraph (m)(1)(i) or (ii) of this section, the administrative time limits prescribed in FOIA, 5 U.S.C. §552(a)(6) will begin only after the Board has received fee payments described in paragraphs (m)(1)(i) and (ii) of this section.

(n) Fees otherwise chargeable in connection with a request for disclosure of a record shall be waived or reduced where it is determined 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 and is not primarily in the commercial interest of the requestor.

§ 1000.11 Annual report.

The FOIA Officer or the FOIA Officer's designee shall annually, on or before February 1, submit a FOIA report addressing the preceding fiscal year to the Attorney General. The report shall include those matters required by 5 U.S.C. 552(e)(1). The Board will make the annual report available to the public pursuant to 5 U.S.C. 552(e)(2).