

# Proposed Rules

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

## ELECTION ASSISTANCE COMMISSION

### 11 CFR Chapter II

[Docket No. EAC-2008-0024]

RIN 3265-AA00

### Freedom of Information, Government in the Sunshine, and Privacy Act Requirements

**AGENCY:** United States Election Assistance Commission (EAC).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The U.S. Election Assistance Commission is proposing administrative regulations to implement the Freedom of Information Act, the Government in the Sunshine Act, and the Privacy Act. **DATES:** You must submit comments on or before August 29, 2008.

**ADDRESSES:** You may submit comments, identified by docket number, by any of the following methods. Please submit your comments via only one of the methods described.

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *E-mail:* Send comments to [havainfo@eac.gov](mailto:havainfo@eac.gov) with "Comments for [Insert Docket Number Here]" in the subject line.

- *Fax:* Send to "EAC Regulations" at (202) 566-3128. Comments sent by fax must be limited to 6 pages. This limitation is necessary to assure access to the facsimile machine.

- *Mail:* Send to "EAC Regulations" at U.S. Election Assistance Commission, 1225 New York Avenue, Suite 1100, Washington, DC 20005. Comments sent by mail must be unbound, be on paper no larger than 8.5" by 11"; and be submitted in duplicate. Mailed comments will not be accepted in electronic form (floppy disk, CD, etc.).

- *Hand Delivery/Courier:* Deliver to Suite 1100, 1225 New York Avenue, Washington, DC 20005 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. Comments

submitted by hand delivery must be unbound, be on paper no larger than 8.5" by 11"; and be submitted in duplicate. Comments sent by courier or hand delivery will not be accepted in electronic form (floppy disk, CD, etc.).

*Instructions:* All submissions must include the agency name and docket number for this rulemaking. Please also identify comments on regulatory text by subpart and section. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading below. Note that all comments received will be publicly posted, including any personal information provided. Please see the Privacy Act heading below. The EAC will post comments without change unless the comment contains profanity or material that is prohibited from disclosure by law.

*Docket:* For access to the docket to read comments received, go to <http://www.regulations.gov> at any time or to Suite 1100 at 1225 New York Avenue, NW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy Act:* Anyone is able to search comments received by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

*Public participation:* The electronic docket is available 24 hours each day, 365 days each year. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

EAC will file in the public docket all comments received, subject to the limitations in this notice. EAC will consider all comments received on or before the closing date for comments; and may consider comments filed late, to the extent practicable. The EAC may, however, issue a final rule at any time after the close of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Tamar Nedzar, Attorney, U.S. Election Assistance Commission, 1225 New York Avenue, NW., Suite 1100, Washington, DC 20005. Telephone (202) 566-3100.

**SUPPLEMENTARY INFORMATION:**

### Preamble Table of Contents

The following is an outline of the preamble.

- I. Legal Basis for the Rulemaking
- II. Discussion of the Proposed Rulemaking
- III. Rulemaking Analyses and Notices

#### I. Legal Basis for the Rulemaking

This rulemaking action is taken in response to the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended; the Government in the Sunshine Act (Sunshine Act), 5 U.S.C. 552b; and the Privacy Act, 5 U.S.C. 552a, as amended. The U.S. Election Assistance Commission (EAC) is a federal agency, and is required to promulgate regulations to implement the FOIA, the Sunshine Act, and the Privacy Act. The FOIA requires each federal agency to publish certain information in the **Federal Register**, to make available for public inspection and copying certain other information, and to make available certain information to any members of the public upon specific request for that information. The FOIA stipulates that an agency must promulgate regulations, pursuant to notice and public comment, specifying the schedule of fees applicable to the processing of requests for information. The Government in the Sunshine Act requires meetings of a federal agency headed by a collegial body, a majority of whose members are appointed by the President with the advice and consent of the Senate, to be open to public observation. The EAC is a collegial body subject to the Act. The Act specifies certain exemptions from the open meeting requirement, and the procedures that an agency must follow to conduct or to close a meeting. The Sunshine Act requires publication in the **Federal Register** and opportunity for public comment of regulations to implement the policies of the Act. The Privacy Act creates requirements that apply to systems of records pertaining to individuals that are established, maintained, or controlled by a federal agency, and prescribes rights and limits to access to such records. The Privacy Act requires publication in the **Federal Register** for public comment of agency policies concerning systems of records maintained by the agency.

#### II. Discussion of the Proposed Rulemaking

The United States Election Assistance Commission was created by Congress in the Help America Vote Act of 2002. The

Commission's primary function is to serve as a national clearinghouse and resource for information on and procedures for federal elections. The EAC conducts studies on election administration and makes those studies available to the public. The EAC also has adopted Voluntary Voting System Guidelines; administers a voting system testing and certification program; allocates election-related federal funding to the States; and carries out administrative duties under the National Voter Registration Act of 1993 (the Motor Voter Law), including developing and maintaining a mail voter registration application form for elections to federal office.

The EAC is committed to operating transparently, competently, and subject to public scrutiny and accountability. To help implement these goals, the EAC is proposing regulations to implement three important federal statutes addressing access to information about the EAC and its activities—the Freedom of Information Act, as amended, including recent amendments found in the OPEN Government Act of 2007; the Government in the Sunshine Act; and the Privacy Act.

Most of the regulatory requirements that the EAC is proposing are specified in detail by the FOIA Act, the Sunshine Act, and the Privacy Act. In addition, the EAC is modeling the three sets of regulatory requirements it is proposing on similar regulations previously adopted by other federal agencies. Thus, many of the provisions in today's rules are identical to or closely resemble the requirements adopted by other federal agencies, and as such represent regulatory "best practices" on the topics of FOIA, open government, and protection of the privacy of information about individuals.

At a few points the EAC also has adopted certain unique or new provisions, to ensure that the rules as proposed meet current statutory requirements and reflect the practices of the Commission. The EAC is requesting comment in particular on the following provisions:

#### FOIA

*Definition of Representative of the News Media:* The Freedom of Information Act and implementing regulations contain special requirements for the treatment of requests for information from representatives of the news media. In § 9405.2 of the proposed rule, the EAC is proposing a definition of "representative of the news media" that reflects amendments to the Freedom of Information Act adopted by Congress in the "Openness Promotes

Effectiveness in our National Government Act of 2007," also known as the "OPEN Government Act of 2007" signed by the President on December 31, 2007. These provisions were intended to address the increased role of electronic media as part of the news media. The proposed definition includes as a potential representative of the news media a "web log" defined as "a publicly available Web site, usually maintained by an individual, with regular entries of commentary, descriptions of events, or other material."

*FOIA Officials:* Section 9405.3 of the proposed rule provides for the designation of a Chief Freedom of Information Act Officer and FOIA Public Liaison Officers, as required by section 10 of the "OPEN Government Act of 2007." These officials are intended to provide a clear point of contact for the public in dealing with the EAC on FOIA matters.

*Time limits for agencies to act on requests:* In § 9405.7(c), the EAC is proposing time limits for action on FOIA requests that reflect the requirements established in section 6 of the "OPEN Government Act of 2007." The proposed rule provides that the EAC will determine within 20 working days after receipt of a FOIA request whether to comply with the request; the EAC may make one request for additional information from the requester and interrupt the 20-day period while waiting for the clarification; the EAC will decide within 20 working days on appeals by requesters from EAC's decisions not to release the requested information; and the 20-day periods will be extended only in unusual circumstances.

*Fee provisions:* In § 9405.9 of the proposed rule, the EAC has designed the fee provisions to be consistent with the "Uniform Freedom of Information Act Fee Schedule and Guidelines" established by the Office of Management and Budget (52 FR 10017, March 27, 1987). Fees are based on the actual direct cost of conducting searches for requested records. When manual searches are necessary, the EAC will charge at the salary rates of the employees making the search, calculated as their basic pay plus 16 percent, as authorized by the OMB Guidelines. Records will be duplicated at the rate of \$0.15 per page for basic duplication; the actual direct costs of production will be charged for creation of computer tapes or printouts and other methods of reproduction.

#### *Government in the Sunshine Act*

The proposed regulation generally tracks the requirements of the Government in the Sunshine Act and implementing regulations adopted by other federal agencies. It also has been drafted to ensure that it accurately reflects current means of communication and the practices of the EAC. Thus, the definition of "meeting" in § 9407.2 of the proposed rule specifies that a deliberation "conducted through telephone or similar communications equipment in which all persons participating can hear each other shall be considered a meeting." To help ensure that this provision does not limit public access to meetings, § 9407.3(d) of the proposed rule provides that when open meetings are conducted by telephone or similar communications equipment, the Commission will make an effort to provide sufficient access to the public. The proposed rule also provides that "meeting" does not include "a process of notation voting by circulated memorandum for the purpose of expediting consideration of official Commission business."

#### *Privacy*

The proposed regulation generally tracks the requirements of the Privacy Act and implementing regulations adopted by other federal agencies. To ensure consistency among the EAC's administrative regulations, § 9410.10 establishes fees for the cost of searching for and reproducing records that parallel the fees established in § 9405.9 of the proposed FOIA regulations.

### III. Regulatory Analyses and Notices

#### *Regulatory Flexibility Act, as amended*

The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 601 *et seq.*) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small government jurisdictions. The EAC has considered the effects of this proposed regulatory action on small entities and certifies that these proposed rules will not have a significant impact on a substantial number of small entities. This rulemaking proposal would require applicants for information to submit a

letter to the EAC describing in adequate detail the information requested. The cost to a requester in terms of labor, supplies, and postage will be small. In addition, a requester may be required to pay the actual cost of identifying and copying the information. However, in most cases this cost is also expected to be small, and the proposed rules provide that it may be waived under certain specified circumstances. The average number of requesters is expected to be small. The EAC's past experience indicates that about 30 FOIA requests will be received annually, and a proportion of those will not be from small entities. The EAC also does not anticipate significant numbers of requests under the Sunshine Act or the Privacy Act regulations. Currently, the EAC only maintains 2 systems of records. Accordingly, the EAC's consideration of the economic impacts of the requirements on small entities has led it to certify that this proposed rule would not have a significant economic impact on a substantial number of small entities.

#### *Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 2 U.S.C. 1532) requires each agency to assess the effects of its regulatory actions on State, local, and tribal governments and the private sector. Any agency promulgating a rule likely to result in a federal mandate requiring expenditures by a State, local, or tribal government or by the private sector of \$120.7 million or more in any one year must prepare a written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. The EAC has determined that these proposed rules would create no unfunded mandates because they require no expenditures by a State, local, or tribal government and will not have an impact of \$120.7 million or more in any one year.

#### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by SBREFA, provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. If the rule meets the definition of a major rule, as defined in SBREFA, the Comptroller General must provide a report to Congress and the rule may not take effect until 60 days after it has been published in the **Federal Register**. The current action is a Notice of Proposed Rulemaking and is not a major rule. No

actions are required under the Congressional Review Act.

#### *National Environmental Policy Act*

The EAC analyzed these rules for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined that this action includes no circumstances that would have any effect on the quality of the environment. The proposed rules pertain solely to the dissemination of information. Thus, these actions do not require an environmental assessment or an environmental impact statement.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires the EAC to consider the impact of paperwork and other information collection burdens imposed on the public. These proposed rules do not impose any reporting or recordkeeping requirements. They pertain solely to the dissemination of information under the FOIA; access to information about meetings and the decision-making process of the EAC; and dissemination of information about what information is maintained about identifiable individuals by the EAC and how they may gain access to and correct or amend information about them.

#### *Executive Order 12630 (Taking of Private Property)*

These proposed rules would not affect a taking of private property or otherwise have taking implications under Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights."

#### *Executive Order 12988 (Civil Justice Reform)*

These proposed rules meet applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, "Civil Justice Reform," to minimize litigation, eliminate ambiguity, and reduce burden.

#### *Executive Order 13045 (Protection of Children)*

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (April 23, 1997, 62 FR 19885), requires that agencies issuing economically significant rules, which also concern an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, must include an evaluation of the environmental health and safety effects of the regulation on children. Section 5 of Executive Order 13045 directs an agency to submit for a covered

regulatory action an evaluation of its environmental health or safety effects on children. The EAC has determined that these proposed rules are not covered regulatory actions as defined under Executive Order 13045. This determination is based upon the fact that these proposed rules are not economically significant under Executive Order 12866, because the changes proposed would not have an impact of \$100 million or more in any one year, and do not constitute an environmental health risk or safety risk that would disproportionately affect children.

#### *Executive Order 12372 (Intergovernmental Review)*

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on federal programs and activities do not apply to this rulemaking.

#### *Executive Order 13211 (Energy Supply, Distribution, or Use)*

The EAC has analyzed these proposed rules under Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use." This proposal is not a significant energy action within the meaning of section 4(b) of the Executive Order. This proposal involves internal procedures of and dissemination of information about the EAC, is not economically significant, and will not have a significant adverse effect on the supply, distribution, or use of energy.

#### **List of Subjects**

##### *11 CFR Part 9405*

Administrative practice and procedure, Confidential business information, Freedom of information, Government employees.

##### *11 CFR Part 9407*

Administrative practice and procedure, Government employees.

##### *11 CFR Part 9410*

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

In consideration of the foregoing, EAC proposes to amend title 11, Code of Federal Regulations, by adding chapter II, consisting of parts 9405, 9407, and 9410, to read as follows:

**CHAPTER II—ELECTION ASSISTANCE  
COMMISSION**

**PART 9405—PROCEDURES FOR  
DISCLOSURE OF RECORDS UNDER  
THE FREEDOM OF INFORMATION ACT**

Sec.

- 9405.1 Purpose and scope.
- 9405.2 Definitions.
- 9405.3 Policy on disclosure of records.
- 9405.4 Availability of records.
- 9405.5 Categories of exemptions.
- 9405.6 Discretionary release of exempt records.
- 9405.7 Requests for records.
- 9405.8 Appeals of denials of requests for records.
- 9405.9 Fees in general.
- 9405.10 Fees to be charged—categories of requesters.
- 9405.11 Miscellaneous fee provisions.
- 9405.12 Waiver or reduction of charges.

**Authority:** 5 U.S.C. 552, as amended.

**§ 9405.1 Purpose and scope.**

The regulations in this part implement the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, with respect to the availability of records for inspection and copying.

**§ 9405.2 Definitions.**

As used in this part, the term—

*Chief FOIA Officer* means the person designated under § 9405.3(d) who has Commission-wide responsibility for the efficient and appropriate compliance with the FOIA.

*Commercial use request* means a FOIA request from or on behalf of a person who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests, which can include furthering those interests through litigation. The FOIA Officer will determine, whenever reasonably possible, the use to which a requester will put the requested documents. Where the FOIA Officer has reasonable cause to doubt the use for which the requester claims to have made the FOIA request or where that use is not clear from the FOIA request itself, the FOIA Officer will seek additional clarification before assigning the request to a specific category.

*Commission* means the U.S. Election Assistance Commission, established by the Help America Vote Act of 2002, 42 U.S.C. 15301 *et seq.*

*Commissioner* means an individual appointed to the Commission by the President and confirmed by the Senate under section 203 of the Help America Vote Act of 2002, 42 U.S.C. 15323.

*Direct costs* means those expenditures which the Commission actually incurs in searching for, duplicating, and, in the case of commercial use requesters,

reviewing documents to respond to a FOIA request. Direct costs include, but are not limited to, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that basic rate to cover benefits) and the cost of operating duplicating equipment. Direct costs do not include overhead expenses, such as the cost of space and heating or lighting the facility in which the records are stored.

*Duplication* means the process of making a copy of a document necessary to respond to a FOIA request. Examples of the form such copies can take include, but are not limited to, paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape, DVD, or CD). The Commission will honor a requester's specified preference of form or format of disclosure if the records requested are reasonably reproducible with reasonable efforts in the requested form or format.

*Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institute of graduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

*Executive Director* means the Executive Director of the Commission or his or her designee.

*FOIA* means Freedom of Information Act, 5 U.S.C. 552, as amended.

*FOIA Officer* means a person designated by the Chief FOIA Officer under § 9405.3(d) to carry out day-to-day implementation of the FOIA activities of the Commission.

*FOIA Public Liaison* means a person designated by the Chief FOIA Officer under § 9405.3(d) to assist in the resolution of any disputes between the requester and the Commission.

*FOIA request* means to seek the release of records under 5 U.S.C. 552, as amended.

*General Counsel* means the General Counsel of the Commission or his or her designee.

*Non-commercial scientific institution* means an organization that is not operated on a commercial basis and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

*Record* means any information that would be a Commission record subject to the requirements of this part when maintained by the Commission in any format, including, but not limited to, an

electronic format. Record includes information that is maintained for the Commission by an entity under Government contract for the purposes of records management.

*Representative of the news media* means any person or entity that gathers information of potential interest to a segment of the public, uses editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. As used in this paragraph, “news” means information that is about current events or that would be of current interest to the public. Examples of news media entities include, but are not limited to, television or radio stations broadcasting to the public at large, web logs, and publishers of periodicals (but only in those instances in which these entities can qualify as disseminators of news, as defined in this paragraph) who make their products available for purchase or subscription by the general public. As used in this paragraph, a “web log” means a publicly available Web site, usually maintained by an individual, with regular entries of commentary, descriptions of events, or other material. A freelance journalist may be regarded as working for a news media entity and therefore, considered a representative of the news media if that person can demonstrate a solid basis for expecting publication by a news organization (whether or not the journalist is actually employed by the entity). A publication contract would present a solid basis for such an expectation. The Commission may also consider the past publication record of the requester in making this determination.

*Requester* is any person who submits a FOIA request to the Commission for release of a record under 5 U.S.C. 552, as amended.

*Review* means the process of examining a document located in response to a commercial use request to determine whether any portion of the document located is exempt from disclosure. Review also refers to processing any document for disclosure, i.e., doing all that is necessary to excise exempt portions of the document or otherwise prepare the document for release. Review time includes time spent considering any formal objection to disclosure made by a business submitter requesting confidential treatment but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

*Search* means all time spent reviewing, manually or by automated means, Commission records for the purpose of locating those records that

are responsive to a FOIA request, including, but not limited to, page-by-page or line-by-line identification of material within documents and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. Search time does not include review of material to determine whether the material is exempt from disclosure.

#### § 9405.3 Policy on disclosure of records.

(a) The Commission will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of individuals and other entities with respect to trade secret and commercial or financial information entitled to privileged and confidential treatment, and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption.

(b) All Commission records shall be available to the public unless they are specifically exempt under this part.

(c) In the interest of efficiency and economy, the Commission's preference is to furnish records to requesters in electronic format, when possible.

(d) To carry out this policy, the Commission shall designate a Chief Freedom of Information Act Officer (Chief FOIA Officer). The Chief FOIA Officer shall designate one or more Commission officials, as appropriate, as FOIA Public Liaison and/or as FOIA Officers. A FOIA Public Liaison shall serve as a supervisory official to whom a FOIA requester can raise questions about the service the FOIA requester has received. A FOIA Officer shall have the authority, subject to the direction and supervision of the Chief FOIA Officer, the requirements of this part, and the FOIA, to make decisions concerning disclosure of records to the public.

#### § 9405.4 Availability of records.

(a) The FOIA and its provisions apply only to existing Commission records; the FOIA does not require the creation of new records.

(b) In accordance with 5 U.S.C. 552(a)(2), the Commission shall make the following materials available for public inspection and copying:

(1) Statements of policy and interpretation that have been adopted by the Commission but have not been published in the **Federal Register**;

(2) Administrative staff manuals and instructions to staff that affect a member of the public;

(3) Copies of all records, regardless of form or format, that have been released to any person under this paragraph and that, because of their nature or subject

matter, the Commission determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

(4) A general index of the records referred to in paragraph (b)(3) of this section.

(c) In accordance with 5 U.S.C. 552(a)(3), the Commission shall make available, upon proper request, all non-exempt Commission records, or portions of records, not previously made public under 5 U.S.C. 552(a)(1) and (a)(2).

(d) The Commission shall maintain and make available current indexes and supplements providing identifying information regarding any matter issued, adopted, or promulgated after July 4, 1967. These indexes and supplements shall be published and made available on at least a quarterly basis for public distribution unless the Commission determines by Notice in the **Federal Register** that publication would be unnecessary, impracticable, or not feasible due to budgetary considerations. Nevertheless, copies of any index or supplement shall be made available upon request at a cost not to exceed the direct cost of duplication.

(e) If documents or files contain both disclosable and non-disclosable information, the non-disclosable information will be deleted and the disclosable information released, unless the disclosable portions cannot be reasonably segregated from the other portions in a manner which will allow meaningful information to be disclosed.

(f) All records created in the process of implementing provisions of 5 U.S.C. 552 will be maintained by the Commission in accordance with the authority granted by the National Archives and Records Service of the General Services Administration.

(g) The Commission encourages the public to explore the information available on the Commission's Web site, located at <http://www.eac.gov>.

#### § 9405.5 Categories of exemptions.

(a) No FOIA requests under 5 U.S.C. 552 shall be denied release unless the record contains, or its disclosure would reveal, matters that are:

(1) 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 under such Executive Order;

(2) Related solely to the internal personnel rules and practices of the Commission;

(3) Specifically exempted from disclosure by statute, provided that such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person that are privileged or confidential. Such information includes confidential business information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount of source of income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, if the disclosure is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information. For purposes of this section, trade secret means 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. Examples of trade secrets may include, but are not limited to, plans, schematics, specifications of materials used in production, source code used to develop software, technical descriptions of manufacturing process, quality control methodology, and test results. The following procedures shall be used for submitting business information in confidence:

(i) Clearly mark any portion of any data or information being submitted that in the submitter's opinion is a trade secret or commercial and financial information that the submitter is claiming should be treated as privileged and confidential and submit such data or information separately from other material being submitted to the Commission;

(ii) A request for confidential treatment shall be addressed to the Chief FOIA Officer, U.S. Election Assistance Commission, 1225 New York Avenue, NW., Suite 1100, Washington, DC 20005 and shall indicate clearly on the envelope that it is a request for confidential treatment.

(iii) With each submission of, or offer to submit, business information which a

submitter desires to be treated as confidential under paragraph (a)(4) of this section, the submitter shall provide the following, which may be disclosed to the public:

(A) A written description of the nature of the subject information and a justification for the request for its confidential treatment, and

(B) A certification in writing under oath that substantially identical information is not available to the public.

(iv) Approval or denial of requests shall be made only by the Chief FOIA Officer or his or her designees. A denial shall be in writing, shall specify the reason for the denial, and shall advise the submitter of the right to appeal to the Commission.

(v) For good cause shown, the Commission may grant an appeal from a denial by the Chief FOIA Officer or his or her designee if the appeal is filed within 15 days after receipt of the denial. An appeal shall be addressed to the Chief FOIA Officer, U.S. Election Assistance Commission, 1225 New York Avenue, NW., Suite 1100, Washington, DC 20005 and shall clearly indicate that it is a confidential submission appeal. An appeal will be decided within 20 days after its receipt (excluding Saturdays, Sundays, and legal holidays) unless an extension, stated in writing with the reasons therefore, has been provided to the person making the appeal.

(vi) Any business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law. In the event that any business information submitted to the Commission is not entitled to confidential treatment, the submitter will be permitted to withdraw the tender unless it is the subject of a request under the FOIA or of judicial discovery proceedings.

(5) Interagency or intra-agency memoranda or letters that would not be available by law to a party in litigation with the Commission;

(6) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(b) Any portion of a record that reasonably can be segregated from the balance of the record shall be provided to any individual requesting such record after deletion of the portions which are exempt. The amount of information deleted and the exemption under which the deletion is made shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by an exemption in paragraph (a) of this section under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

(c) If a requested record is one of another government agency or deals with subject matter to which a government agency other than the Commission has exclusive or primary responsibility, the request for such a record shall be promptly referred by the Commission to that agency for disposition or guidance as to disposition.

(d) Nothing in this part authorizes withholding of information or limiting the availability of records to the public, except as specifically provided; nor is this part authority to withhold information from Congress.

#### **§ 9405.6 Discretionary release of exempt records.**

The Commission may, in its discretion, release requested records despite the applicability of the exemptions in § 9405.5, if it determines that it is in the public interest and that the rights of third parties would not be prejudiced. The Executive Director will

have the authority to determine that requested records may be released despite otherwise applicable exemptions.

#### **§ 9405.7 Requests for records.**

(a) Requests for copies of Commission records under the FOIA shall be made in writing and addressed to the Chief FOIA Officer, U.S. Election Assistance Commission, 1225 New York Avenue, NW., Suite 1100, Washington, DC 20005. The request shall reasonably describe the records sought with sufficient specificity with respect to names, dates, and subject matter to permit the records to be located. A requester will be promptly advised if the records cannot be located on the basis of the description given and that further identifying information must be provided before the request can be satisfied.

(b) Requests for Commission records and copies thereof shall specify the preferred form or format (including electronic formats) of the response. The Commission shall accommodate requesters as to form or format if the record is readily available in that form or format. When requesters do not specify the form or format of the response, the Commission shall respond in the form or format in which the document is most accessible to the Commission. In the interest of efficiency and economy, the Commission's preference is to furnish records to requesters in electronic format, whenever possible.

(c) The Commission shall determine within 20 working days after receipt of a request, or 20 working days after an appeal is granted, whether to comply with such request, unless in unusual circumstances the time is extended. The 20-day period shall commence on the date on which the request was first received by the appropriate component of the Commission, but in any event, not later than 10 days after the request is first received by the component of the Commission designated to receive requests under this part. The 20-day period shall not be tolled by the Commission except—

(1) The Commission may make one request of the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester.

(2) If it is necessary to clarify with the requester issues regarding fee assessment.

(3) Under paragraphs (c)(1) or (2) of this section, the Commission's receipt of the requester's response to the Commission's request for information or clarification ends the tolling period.

(d) In the event the time is extended under paragraph (c) of this section, the requester shall be notified of the reasons for the extension and the date on which a determination is expected to be made.

An extension may be made if it is—

(1) Necessary to locate records or transfer them from physically separate facilities; or

(2) Necessary to search for, collect, and appropriately examine a large quantity of separate and distinct records that are the subject of a single request; or

(3) Necessary for consultation with another agency that has a substantial interest in the determination of the request.

(e) If the Commission determines that an extension of time is necessary to respond to a request satisfying the unusual circumstances specified in paragraph (c) of this section, the Commission shall so notify the requester and give the requester an opportunity to limit the scope of the request so that it may be processed within the time limit prescribed in paragraph (c) of this section or arrange with the Commission an alternative time frame for processing the request or a modified request.

(f) The Commission may aggregate and process as a single request requests by the same requester, or a group of requesters acting in concert, if the Commission reasonably believes that the requests actually constitute a single request that would otherwise satisfy the unusual circumstances specified in paragraph (c) of this section, and the requests involve clearly related matters.

(g) The Commission will process requests under the FOIA based on the order they are received.

(h) The Commission shall consider requests for the expedited processing of requests in cases where the requester demonstrates a compelling need for such processing.

(1) The term “compelling need” means, with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal government activity.

(2) Requesters for expedited processing must include in their requests a statement setting forth the basis for the claim that a “compelling need” exists for the requested information, certified by the requester to be true and correct to the best of his or her knowledge and belief.

(3) The Commission shall determine whether to grant a request for expedited processing and notify the requester of such determination within 10 days of receipt of the request. Denials of

requests for expedited processing may be appealed as set forth in § 9405.8. The Commission shall expeditiously determine any such appeal. As soon as practicable, the Commission shall process the documents responsive to a request for which expedited processing is granted.

(i) Any person denied access to records by the Commission shall be notified immediately of the denial, including the reasons for the decision and notified of his or her right to appeal the adverse determination to the Commission.

(j) The date of receipt of a request under this part shall be the date on which the Chief FOIA Officer actually receives the request.

(k) Each request received by the Chief FOIA Officer will be assigned an individualized tracking number. Requesters may call (866) 747-1471 and, using the tracking number, obtain information about the request, including the date on which the Commission originally received the request and an estimated date on which the Commission will complete action on the request.

#### § 9405.8 Appeals of denials of requests for records.

(a) Any person who has been notified under § 9405.7(i) that his/her request for inspection of a record or for a copy of a record has been denied, or who has received no response within 20 working days (or within such extended period as is permitted under § 9405.7(d)) after the request has been received by the Commission, or who has received no response within 20 days after a request for expedited processing has been received by the Commission, may appeal the adverse determination or the failure to respond by requesting the Commission to direct that the record be made available or that the expedited processing shall occur.

(b) The appeal request shall be in writing, shall clearly and prominently state on the envelope or other cover and at the top of the first page “FOIA Appeal,” and shall identify the record in the form in which it was originally requested.

(c) The appeal request should be delivered or addressed to the Chief FOIA Officer, U.S. Election Assistance Commission, 1225 New York Avenue NW., Suite 1100, Washington, DC 20005.

(d) The requester may state facts and cite legal or other authorities as he or she deems appropriate in support of the appeal request.

(e) The Commission will make a determination with respect to any

appeal within 20 working days after receipt of the appeal (or within such extended period as is permitted under § 9405.7). If, on appeal, the denial of the request for a record or a copy is in whole or in part upheld, the Commission shall advise the requester of the denial and shall notify him or her of the provisions for judicial review of that determination as set forth in 5 U.S.C. 552(a)(4).

(f) Because of the risk of misunderstanding inherent in oral communications, the Commission will not entertain any appeal from an alleged denial or failure to comply with an oral request. Any person who has orally requested a copy of a record that he or she believes to have been improperly denied should resubmit the request in writing as set forth in § 9405.7.

#### § 9405.9 Fees in general.

(a) *Generally.* The Commission will charge fees that recoup the full allowable direct costs it incurs. The Commission will use the most efficient and least costly means to comply with requests for documentation.

(b) *Manual searches for records.* The Commission will charge fees at the salary rate(s) (basic pay plus 16 percent) of the employee(s) making the search.

(c) *Computer searches for records.* The Commission will charge the actual direct cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and operator/programmer salary apportionable to the search.

(d) *Review of records.* Only requesters 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 (i.e. the review undertaken the first time the Commission 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 costs for such a subsequent review are assessable. The Commission will charge at the salary rate(s) (basic pay plus 16 percent) of the employee(s) reviewing records.

(e) *Duplication of records.* Records will be duplicated at a rate of fifteen (15) cents per page. For copies prepared by computers, such as tapes, CDs, DVDs, or printouts, the Commission shall charge the actual cost, including



operator time, of production. For other methods of reproduction or duplication, the Commission will charge the actual direct costs of producing the document(s). If the Commission estimates that duplication charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance a willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(f) *Other charges.* The Commission will recover the full costs of providing services such as those enumerated below when it provides them in response to a direct request for such services:

(1) Certifying that records are true copies; or

(2) Sending records by special methods such as express mail.

(g) *Payment of fees.* Remittance 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. Remittance shall be made payable to the order of the Treasury of the United States and mailed to the Chief FOIA Officer, U.S. Election Assistance Commission, 1225 New York Avenue NW., Suite 1100, Washington, DC 20005.

(h) *Receipt of fees.* A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.

(i) *Restrictions on assessing fees.* The Commission shall not assess search fees or duplication fees under this paragraph if the Commission fails to comply with any time limit in these regulations. The Commission will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. With the exception of requesters seeking documents for a commercial use, the Commission will not charge fees for the first 100 pages of duplication and the first two hours of search time.

(1) The elements to be considered in determining the "cost of collecting a fee" are the administrative costs of receiving and recording a requester's remittance and processing the fee for deposit in the Treasury Department's special account.

(2) For purposes of these restrictions on assessment of fees, the word "pages" means paper copies of 8.5" x 11" or 11" x 14." Thus, requesters are not entitled to 100 computer disks, for example.

(3) For purposes of these restrictions on assessment of fees, the term "search

time" means manual search. To apply this term to searches made by computer, the Commission will determine the hourly cost of operating the CPU and the operator's hourly salary plus 16 percent. When the cost of such search (including operator time and the cost of operating the computer to process a request) equals the equivalent dollar amount of two hours of salary of the person performing the search (i.e. the operator), the Commission will begin assessing charges for computer search.

#### **§ 9405.10 Fees to be charged—categories of requesters.**

There are four categories of FOIA requesters: Commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters.

(a) *Commercial use requesters.* When the Commission 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. Commercial use requesters are neither entitled to two hours of free search time nor 100 free pages of duplication. The Commission may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see § 9405.11(b)).

(b) *Educational and non-commercial scientific institution requesters.* The Commission shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the record 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 the furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(c) *Representatives of the news media.* The Commission shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, the requester must fit the definition of a representative of the news media as stated in § 9405.2, and the request must not be made for commercial use. For purposes of this paragraph, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use.

(d) *All other requesters.* The Commission shall charge requesters 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.

#### **§ 9405.11 Miscellaneous fee provisions.**

(a) *Charging Interest—notice and rate.* The Commission may begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the billing was sent. The fact that the fee has been received by the Commission within the 30-day grace period, even if it is not 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.

(b) *Charges for unsuccessful search.* The Commission may assess charges for time spent searching, even if it fails to locate the records or if the records located are determined to be exempt from disclosure. If the Commission estimates that search charges are likely to exceed \$25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer the requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

(c) *Aggregating requests.* A requester may not file multiple requests at the same time, each seeking portions of a document or documents, solely in order to avoid payment of fees. When the Commission reasonably believes that a requester or a group of requesters acting in concert has submitted requests that constitute a single request involving clearly related matters, the Commission may aggregate those requests and charge accordingly. One element to be considered in determining whether a belief would be reasonable is the time period over which the requests have occurred.

(d) *Advance payments.* The Commission may not require a requester to make an advance payment (i.e., payment before work is commenced or continued on a request) unless:

(1) The Commission estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250. Then, the Commission will notify the requester of the likely cost and obtain satisfactory



assurance of full payment where the requester has a history of prompt payment of FOIA fees or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment; or

(2) A requester has previously failed to pay a fee charged in a timely fashion (*i.e.*, within 30 days of the date of the billing). Then, the Commission may require the requester to:

(i) Pay the full amount owed plus any applicable interest as provided above or demonstrate that he or she has, in fact, paid the fee, and

(ii) Make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester.

(3) When the Commission acts under paragraphs (d)(1) or (2) of this section, the administrative time limits prescribed in 5 U.S.C. 552(a)(6) will begin only after the Commission has received payments described in paragraphs (d)(1) and (2) of this section.

(e) *Effect of Debt Collection Act of 1982.* The Commission shall comply with the provisions of the Debt Collection Act, including disclosure to consumer reporting agencies and use of collection agencies, where appropriate, to encourage repayment.

#### **§ 9405.12 Waiver or reduction of charges.**

Records responsive to a request will be furnished without charge when the Chief FOIA Officer determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

### **PART 9407—IMPLEMENTATION OF THE GOVERNMENT IN THE SUNSHINE ACT**

Sec.

9407.1 Purpose and scope.

9407.2 Definitions.

9407.3 Open meetings.

9407.4 Notice of meetings.

9407.5 Closed meetings.

9407.6 Procedures for closing meetings.

9407.7 Recordkeeping requirements.

9407.8 Public availability of records.

**Authority:** 5 U.S.C. 552b.

#### **§ 9407.1 Purpose and scope.**

This part contains the regulations of the U.S. Election Assistance Commission implementing the Government in the Sunshine Act (5 U.S.C. 552b). Consistent with the Act, it

is the policy of the Commission that the public is entitled to the fullest practicable information regarding its decision making processes. This part sets forth the basic responsibilities of the Commission with regard to this policy and offers guidance to members of the public who wish to exercise the rights established by the Act. These regulations also fulfill the requirement of 5 U.S.C. 552b(g) that each agency subject to the Act promulgates regulations to implement the open meeting requirements of paragraphs (b) through (f) of section 552b.

#### **§ 9407.2 Definitions.**

As used in this part, the term—

*Commission* means the U.S. Election Assistance Commission, established by the Help America Vote Act of 2002, 42 U.S.C. 15301 *et seq.*

*Commissioner* means an individual appointed to the Commission by the President and confirmed by the Senate under section 203 of the Help America Vote Act of 2002, 42 U.S.C. 15323.

*Executive Director* means the Executive Director of the Commission or his or her designee.

*General Counsel* means the General Counsel of the Commission or his or her designee.

*Meeting* means the deliberations of at least three Commissioners where such deliberations determine or result in the joint conduct or disposition of official Commission business. A deliberation conducted through telephone or similar communications equipment in which all persons participating can hear each other shall be considered a meeting. For the purposes of this section, “joint conduct” does not include situations where the requisite number of members is physically present in one place but not conducting agency business as a body. In addition, the term “meeting” does not include a process of notation voting by circulated memorandum for the purpose of expediting consideration of official Commission business. The term “meeting” also does not include deliberations on whether to:

(1) Schedule a meeting;

(2) Hold a meeting with less than seven days notice, as provided in § 9407.4(e);

(3) Change the subject matter of a publicly announced meeting or the determination of the Commission to open or close a meeting or portions of a meeting to public observation, as provided in § 9407.4(f);

(4) Change the time or place of an announced meeting, as provided in § 9407.4(g);

(5) Close a meeting or portions of a meeting, as provided in § 9407.5; or

(6) Withhold from disclosure information pertaining to a meeting or portions of a meeting, as provided in § 9407.5.

*Public observation* means attendance by one or more members of the public at a meeting of the Commission but does not include participation in the meeting.

*Public participation* means the presentation or discussion of information, raising of questions, or other manner of involvement in a meeting of the Commission by one or more members of the public in a manner that contributes to the disposition of Commission business.

#### **§ 9407.3 Open meetings.**

(a) The Commissioners shall not jointly conduct, determine, or dispose of agency business other than in accordance with this section.

(b) Except as otherwise provided in this part, every portion of every Commission meeting shall be open to public observation.

(c) No additional right to participate in Commission meetings is granted to any person by this part. Meetings of the Commission, or portions of a meeting, shall be open to public participation only when an announcement to that effect is issued under § 9407.4(b)(4). Public participation shall be conducted in an orderly, non-disruptive manner and in accordance with any procedures as the chairperson of the meeting may establish. Public participation may be terminated at any time for any reason.

(d) When holding open meetings, the Commission shall make a diligent effort to provide appropriate space, sufficient visibility, and adequate acoustics to accommodate the public attendance anticipated for the meeting. When open meetings are conducted through telephone or similar communications equipment, the Commission shall make an effort to provide sufficient access to the public in a manner which allows the public to clearly hear, see, or otherwise follow the proceedings. The meeting room or other forum selected shall be sufficient to accommodate a reasonable number of interested members of the public. The Commission shall ensure that public meetings are held at a reasonable time and are readily accessible to individuals with disabilities.

(e) Members of the public attending open Commission meetings may use small electronic audio recording devices to record the proceedings. The use of any other recording equipment and cameras requires advance coordination with and notice to the Commission's Communications Office. The chair or acting chair of the Commission may

prohibit, at any time, the use of any recording equipment during a public meeting if he or she determines that such recording would disrupt the orderly conduct of the meeting.

#### § 9407.4 Notice of meetings.

(a) Except as otherwise provided in this section, the Commission shall make a public announcement at least seven days prior to a meeting.

(b) The public announcement shall include:

- (1) The time and place of the meeting;
- (2) The subject matter of the meeting;
- (3) Whether the meeting is to be open, closed, or portions of a meeting will be closed;
- (4) Whether public participation will be allowed; and
- (5) The name and telephone number of the person who will respond to requests for information about the meeting.

(c) The public announcement requirement shall be implemented by:

- (1) Publishing the announcement on the Commission's Web site; and
- (2) Distributing the announcement to affected government entities and persons and organizations that the Executive Director determines may have an interest in the subject matter of the meeting.

(d) The announcement will be submitted for publication in the **Federal Register** immediately following the public posting and distribution noted in paragraph (c) of this section.

(e) A meeting may be held with less than seven days' notice if a majority of the Commission determines by recorded vote that the business of the Commission so requires. The Commission shall make a public announcement to this effect at the earliest practicable time. The announcement shall include the information required by paragraph (b) of this section and shall be issued in accordance with those procedures set forth in paragraphs (c) and (d) of this section that are practicable given the available period of time.

(f) The subject matter of an announced meeting or the determination of the Commission to open or close a meeting or portions of a meeting to public observation may be changed only if:

- (1) A majority of the Commissioners determine by a recorded vote that agency business so requires and that no earlier announcement of the change was possible,
- (2) The Commission publicly announces the change and the vote of each Commissioner upon such change at the earliest practicable time.

(3) The announcement of the change noted in paragraph (f)(2) of this section is issued in accordance with those procedures set forth in paragraphs (c) and (d) of this section that are practicable given the available period of time.

(g) The time or place of an announced meeting may be changed only if a public announcement of the change is made at the earliest practicable time. The announcement shall be issued in accordance with those procedures set forth in paragraphs (c) and (d) of this section that are practicable given the available period of time.

#### § 9407.5 Closed meetings.

(a) A meeting or portions of a meeting may be closed and information pertaining to such meeting or portions of a meeting may be withheld from the public only if the Commission determines that such meeting or portions of a meeting or the disclosure of such information is likely to:

- (1) Disclose matters that are:
  - (i) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and
  - (ii) To be properly classified under that Executive Order;
- (2) Relate solely to the internal personnel rules and practices of the Commission;

(3) Disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, 5 U.S.C. 552) provided that the statute:

- (i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
- (ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Disclose the trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) Involve either accusing any person of a crime or formally censuring any person;

(6) Disclose information of a personal nature, if disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose either investigatory records compiled for law enforcement purposes or information which, if written, would be contained in such records but only to the extent that the production of the records or information would:

- (i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to either a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source or sources and, in the case of a record compiled either by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source or sources,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the Commission. This exception shall not apply in any instance where the Commission has already disclosed to the public the content or nature of the proposed action or where the Commission is required by law to make such disclosure on its own initiative prior to taking final action on the proposal; or

(10) Specifically concern the issuance of a subpoena by the Commission; or the participation of the Commission in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration; or the initiation, conduct, or disposition by the Commission of a particular case of formal adjudication under the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

(b) Before a meeting or portions of a meeting may be closed to public observation, the Commission shall determine, notwithstanding the exemptions set forth in paragraph (a) of this section, whether the public interest requires that the meeting or portions of a meeting be open consistent with Federal law. The Commission may open a meeting or portions of a meeting that could be closed under paragraph (a) of this section if the Commission finds it to be in the public interest to do so and the disclosure is not otherwise prohibited by Federal law.

#### § 9407.6 Procedures for closing meetings.

(a) A meeting or portions of a meeting may be closed and information

pertaining to a meeting or portions of a meeting may be withheld under § 9407.5(a) only when a majority of the members of the Commission vote to take the action.

(b) A separate vote of the Commissioners shall be taken with respect to each meeting or portion of a meeting proposed to be closed and with respect to information which is proposed to be withheld. A single vote may be taken with respect to a series of meetings or portions of a meeting that are proposed to be closed, so long as each meeting or portion of a meeting in the series involves the same particular matter and is scheduled to be held no more than 30 days after the initial meeting in the series. The vote of each participating Commission member shall be recorded, and no proxies shall be allowed.

(c) A person whose interests may be directly affected by a portion of a meeting may request in writing that the Commission close that portion of the meeting for any of the reasons referred to in § 9407.5(a) (5), (6), or (7). Upon the request of a Commissioner, a recorded vote shall be taken whether to close such meeting or a portion of a meeting.

(d) Before the Commission may hold a meeting that is closed, in whole or part, a certification shall be obtained from the General Counsel that, in his or her opinion, the meeting may properly be closed. The certification shall be in writing and shall state each applicable exemption provision from § 9407.5(a).

(e) Within one day of a vote taken under this section, the Commission shall make publicly available a written copy of such vote reflecting the vote of each Commissioner.

(f) In the case of the closure of a meeting or portions thereof, the Commission shall make publicly available within one day of the vote on such action a full written explanation of the reasons for the closing with a list of all persons expected to attend the meeting and their affiliation.

#### § 9407.7 Recordkeeping requirements.

(a) The Commission shall maintain either a complete transcript or electronic recording of the proceedings of each meeting.

(b) In the case of either a meeting or portions of a meeting closed to the public under § 9407.5(a)(8) or (10), the Commission shall maintain a complete transcript, an electronic recording, or a set of minutes of the proceedings. If minutes are maintained, they shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken

and the reasons for which such actions were taken, including a description of the views expressed on any item and a record reflecting the vote of each Commissioner. All documents considered in connection with any action shall be identified in the minutes.

(c) The transcript, electronic recording, or copy of the minutes of a meeting shall disclose the identity of each speaker.

(d) The Commission shall maintain a complete verbatim copy of the transcript, a complete electronic recording, or a complete copy of the minutes of the proceedings of each meeting for at least two years, or for one year after the conclusion of any Commission proceeding with respect to which the meeting was held, whichever occurs later.

#### § 9407.8 Public availability of records.

The Commission shall make available to the public the transcript, electronic recording, or minutes of a meeting, except for items of discussion or testimony that relate to matters the Commission has determined to contain information that may be withheld under § 9407.5(a). This information shall be made available as soon as practicable after each meeting on the Commission's Web site. Otherwise, requests to receive or review transcripts, electronic recordings, or minutes of a meeting should be addressed to the Communications Director, U.S. Election Assistance Commission, 1225 New York Avenue, Suite 1100, Washington, DC 20005. Copies of a transcript, a transcription of the electronic recording, or the minutes of a meeting (except for items of discussion or testimony that relate to matters withheld under § 9407.5) shall be furnished at cost to any person upon written request pursuant to the requirements of 11 CFR 9405.

### PART 9410—IMPLEMENTATION OF THE PRIVACY ACT OF 1974

Sec.

9410.1 Purpose and scope.

9410.2 Definitions.

9410.3 Procedures for requests pertaining to individual records in a record system.

9410.4 Times, places, and requirements for identification of individuals making requests.

9410.5 Disclosure of requested information to individuals.

9410.6 Request for correction or amendment to record.

9410.7 Commission review of request for correction or amendment of record.

9410.8 Appeal of initial adverse determination on amendment or correction.

9410.9 Disclosure of record to person other than the individual to whom it pertains.

9410.10 Fees.

9410.11 Penalties.

**Authority:** 5 U.S.C. 552a.

#### § 9410.1 Purpose and scope.

(a) This part sets forth rules that inform the public as to what information is maintained by the U.S. Election Assistance Commission about identifiable individuals and that inform those identifiable individuals how they may gain access to and correct or amend information about them.

(b) The regulations in this part carry out the requirements of the Privacy Act of 1974 (Pub. L. 93-579) and in particular 5 U.S.C. 552a as added by that Act.

(c) The regulations in this part apply only to records disclosed or requested under the Privacy Act of 1974 and not to requests for information made under 5 U.S.C. 552, the Freedom of Information Act, or requests for reports and statements filed with the Election Assistance Commission which are public records and available for inspection and copying.

#### § 9410.2 Definitions.

As used in this part, the term—

*Commission* means the U.S. Election Assistance Commission, established by the Help America Vote Act of 2002, 42 U.S.C. 15301 *et seq.*

*Commissioner* means an individual appointed to the Commission by the President and confirmed by the Senate under section 203 of the Help America Vote Act of 2002, 42 U.S.C. 15323.

*Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

*Maintain* includes maintain, collect, use, or disseminate.

*Record* means any item, collection, or grouping of information about an individual that is maintained by the Commission including, but not limited to, his or her education, financial transactions, medical history, and criminal or employment history and that contains his or her name or the identifying number, symbol, or other identifying information particularly assigned to the individual, such as finger or voice print or a photograph.

*Systems of records* means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying information particularly assigned to the individual.

**§ 9410.3 Procedures for requests pertaining to individual records in a record system.**

(a) Any individual may request the Commission to inform him or her whether a particular record system named by the individual contains a record pertaining to him or her. The request may be made in person or in writing at the location of the record system and to the person specified in the notice describing that record system.

(b) An individual, who believes that the Commission maintains records pertaining to him or her but cannot determine which record system contains those records, may request assistance by mail or in person from the Executive Director, U.S. Election Assistance Commission, 1225 New York Avenue, Suite 1100, Washington, DC 20005 during the hours of 9 a.m. to 5:30 p.m.

(c) Requests under paragraphs (a) or (b) of this section shall be acknowledged by the Commission within 15 working days from the date of receipt of the request. If the Commission is unable to locate the information requested under paragraphs (a) or (b) of this section, it shall so notify the individual within 15 working days after receipt of the request. The notification may request additional information to assist the Commission in locating the record, or it may advise the individual that no record or document exists about that individual.

**§ 9410.4 Times, places, and requirements for identification of individuals making requests.**

(a) After being informed by the Commission that a record system contains a record pertaining to him or her, an individual may request that the Commission disclose that record in the manner described in this section. Each request for the disclosure of a record or a copy of a record it shall be made in person or by written correspondence to the U.S. Election Assistance Commission, 1225 New York Avenue, Suite 1100, Washington, DC 20005 and to the person identified in the notice describing the systems of records. Requests can also be made by specifically authorized agents or by parents or guardians of individuals.

(b) Each individual requesting the disclosure of a record or copy of a record shall furnish the following information with his or her request:

(1) The name of the record system containing the record;

(2) Proof as described in paragraph (c) of this section that he or she is the individual to whom the requested record relates; and

(3) Any other information required by the notice describing the record system.

(c) Proof of identity as required by paragraph (b)(2) of this section shall be provided as described in paragraphs (c) (1) and (c)(2) of this section. Requests made by an agent, parent, or guardian shall be in accordance with the procedures described in § 9410.9.

(1) Requests made in writing shall include a statement affirming the individual's identity, signed by the individual and either notarized or witnessed by two persons (including witnesses' addresses). If the individual appears before a notary, he or she shall submit adequate proof of identification in the form of a driver's license, birth certificate, passport, or other identification acceptable to the notary. If the statement is witnessed, it shall include a sentence above the witnesses' signatures that they personally know the individual or that the individual has submitted proof of his or her identification to their satisfaction. In cases involving records of extreme sensitivity, the Commission may determine that the identification is not adequate and may request the individual to submit additional proof of identification.

(2) If the request is made in person, the requester shall submit proof of identification similar to that described in paragraph (c)(1) of this section, acceptable to the Commission.

**§ 9410.5 Disclosure of requested information to individuals.**

(a) Upon submission of proof of identification as required by § 9410.4, the Commission shall allow the individual to see and/or obtain a copy of the requested record or shall send a copy of the record to the individual by registered mail. If the individual requests to see the record, the Commission may make the record available either at the location where the record is maintained or at a place more suitable to the requestor, if possible. The record shall be made available as soon as possible, but in no event later than 15 working days after proof of identification. The individual may have a person or persons of his or her own choosing accompany him or her when the record is disclosed.

(b) The Commission must furnish each record requested by an individual under this part in a form intelligible to that individual.

(c) If the Commission denies access to a record to an individual, he or she shall be advised of the reason for the denial and advised of the right to judicial review.

(d) Upon request, an individual will be provided access to the accounting of disclosures from his or her record under the same procedures as provided above and in § 9410.4.

**§ 9410.6 Request for correction or amendment to record.**

(a) Any individual who has reviewed a record pertaining to him or her that was furnished under this part may request that the Commission correct or amend all or any part of that record.

(b) Each individual requesting a correction or amendment shall send or provide in person the written request to the Commission through the person who furnished the record.

(c) Each request for a correction or amendment of a record shall contain the following information:

(1) The name of the individual requesting the correction or amendment;

(2) The name of the system of records in which the record sought to be amended is maintained;

(3) The location of the system of records from which the individual record was obtained;

(4) A copy of the record sought to be amended or corrected or a sufficiently detailed description of that record;

(5) A statement of the material in the record that the individual desires to correct or amend; and

(6) A statement of the basis for the requested correction or amendment including any material that the individual can furnish to substantiate the reasons for the correction or amendment sought.

**§ 9410.7 Commission review of request for correction or amendment of record.**

(a) The Commission shall, not later than 10 working days after the receipt of the request for a correction or amendment of a record under § 9410.6, acknowledge receipt of the request and inform the individual whether additional information is required before the correction or amendment can be considered.

(b) If no additional information is required, within 10 working days from receipt of the request, the Commission shall either make the requested correction or amendment or notify the individual of its refusal to do so, including in the notification the reasons for the refusal and the appeal procedures provided in § 9410.8.

(c) The Commission shall make each requested correction or amendment to a record if that correction or amendment will negate inaccurate, irrelevant, untimely, or incomplete information in the record.

(d) The Commission shall inform prior recipients of a record of any

amendment or correction or notation of dispute of the individual's record if an accounting of the disclosure was made. The individual may request a list of prior recipients if an accounting of the disclosure was made.

**§ 9410.8 Appeal of initial adverse determination on amendment or correction.**

(a) Any individual whose request for a correction or amendment has been denied in whole or in part may appeal that decision to the Commissioners no later than 180 days after the adverse decision is rendered.

(b) The appeal shall be in writing and shall contain the following information:

- (1) The name of the individual making the appeal;
- (2) Identification of the record sought to be amended;
- (3) The record system in which that record is contained;
- (4) A short statement describing the amendment sought; and
- (5) The name and location of the Commission official who initially denied the correction or amendment.

(c) Not later than 30 working days after the date on which the Commission receives the appeal, the Commissioners shall complete their review of the appeal and make a final decision thereon. However, for good cause shown, the Commissioners may extend that 30-day period. If the Commissioners extend the period, the individual requesting the review shall be promptly notified of the extension and the anticipated date of a decision.

(d) After review of an appeal, the Commission shall send a written notice to the requestor containing the following information:

- (1) The decision and, if the denial is upheld, the reasons for the decision;
- (2) The right of the requestor to institute a civil action in a Federal District Court for judicial review of the decision; and
- (3) The right of the requestor to file with the Commission a concise statement setting forth the reasons for his or her disagreement with the Commission's denial of the correction or amendment. The Commission shall make this statement available to any person to whom the record is later disclosed, together with a brief statement, if appropriate, of the Commission's reasons for denying the requested correction or amendment. The Commission shall also send a copy of the statement to prior recipients of the individual's record if an accounting of the disclosures was made.

**§ 9410.9 Disclosure of record to person other than the individual to whom it pertains.**

(a) Any individual who desires to have a record covered by this part disclosed to or mailed to another person may designate such person and authorize the person to act as his or her agent for that specific purpose. The authorization shall be in writing, signed by the individual, and notarized or witnessed as provided in § 9410.4(c).

(b) The parent of any minor individual or the legal guardian of any individual who has been declared by a court of competent jurisdiction to be incompetent due to physical or mental incapacity or age may act on behalf of that individual in any matter covered by this part. A parent or guardian who desires to act on behalf of such an individual shall present suitable evidence of parentage or guardianship, by birth certificate, certified copy of a court order, or similar documents, and proof of the individual's identity in a form that complies with § 9410.4(c).

(c) An individual to whom a record is to be disclosed in person under this part may have a person or persons of his or her own choosing accompany him or her when the record is disclosed.

**§ 9410.10 Fees.**

(a) The Commission shall not charge an individual for the cost of making a search for a record or the cost of reviewing the record. When the Commission makes a copy of a record as a necessary part of the process of disclosing the record to an individual, the Commission shall not charge the individual for the cost of making that copy. When the Commission makes a copy of a record in response to a request from an individual, the Commission may charge the individual for the reasonable cost of making the copy.

(b) If an individual requests that the Commission furnish a copy of the record, the Commission shall charge the individual for the cost of making the copy. The fee that the Commission has established for making a copy is fifteen (15) cents per page.

**§ 9410.11 Penalties.**

Any person who makes a false statement in connection with any request for a record or an amendment or correction thereto under this part is subject to the penalties prescribed in 18 U.S.C. 494 and 495 and 5 U.S.C. 552a(i)(3).

**Thomas R. Wilkey,**

*Executive Director, U.S. Election Assistance Commission.*

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**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

[Docket No. FAA-2008-0545; Directorate Identifier 2008-NE-16-AD]

RIN 2120-AA64

**Airworthiness Directives; Dowty Propellers Models R354/4-123-F/13; R354/4-123-F/20; R354/4-123-F/21; R375/4-123-F/21; R389/4-123-F/25; R354/4-123-F/26; and R390/4-123-F/27 Propellers**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) issued by the European Aviation Safety Agency (EASA) to identify and correct an unsafe condition on Dowty Propellers models R354/4-123-F/13; R354/4-123-F/20; R354/4-123-F/21; R375/4-123-F/21; R389/4-123-F/25; R354/4-123-F/26; and R390/4-123-F/27 propellers. The MCAI describes the unsafe condition as:

A number of propeller blade outer sleeves have been found with cracks since 1996. Testing has shown that blade retention integrity is not affected by this cracking. However, this condition, if not detected and corrected, can lead to blade counterweight release, possibly resulting in damage to the aircraft and injury to occupants or persons on the ground.

We are proposing this AD to prevent blade counterweight release, which could result in injury or damage to the airplane.

**DATES:** We must receive comments on this proposed AD by July 30, 2008.

**ADDRESSES:** You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493-2251.