

crabs with a shell width of 61/2 inches or greater may be taken or possessed;

(B) All crab pots used for subsistence fishing and left in saltwater unattended longer than a 2-week period must have all bait and bait containers removed and all doors secured fully open;

(C) You may take crabs only from June 1 through January 31.

(iv) The daily harvest and possession limit is 12 male Tanner crabs per person; only crabs with a shell width of 51/2 inches or greater may be taken or possessed.

(6) *Bering Sea Area.*

(i) In that portion of the area north of the latitude of Cape Newenham, shellfish may only be taken by shovel, jigging gear, pots, and ring net.

(ii) The operator of a commercially licensed and registered shrimp fishing vessel must obtain a subsistence fishing permit from the ADF&G prior to subsistence shrimp fishing during a closed commercial shrimp fishing season or within a closed commercial shrimp fishing district, section, or subsection; the permit must specify the area and the date the vessel operator intends to fish; no more than 500 pounds (227 kg) of shrimp may be in possession aboard the vessel.

(iii) In waters south of 60° North latitude, the daily harvest and possession limit is 12 male Dungeness crabs per person.

(iv) In the subsistence taking of king crab:

(A) In waters south of 60° North latitude, the daily harvest and possession limit is six male crabs per person;

(B) All crab pots used for subsistence fishing and left in saltwater unattended longer than a 2-week period must have all bait and bait containers removed and all doors secured fully open;

(C) In waters south of 60° North latitude, you may take crab only from June 1 through January 31;

(D) In the Norton Sound Section of the Northern District, you must have a subsistence permit.

(v) In waters south of 60° North latitude, the daily harvest and possession limit is 12 male Tanner crabs.

Dated: March 3, 2009.

**Peter J. Probasco,**

*Acting Chair, Federal Subsistence Board.*

Dated: March 5, 2009.

**Calvin Casipit,**

*Subsistence Program Leader, USDA-Forest Service.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 0

[FCC 08-282]

### Public Information, the Inspection of Records, and Implementation of Freedom of Information Act Amendments

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission amends its rules implementing the Freedom of Information Act (FOIA) to reflect changes in that law made by the OPEN Government Act of 2007. In addition, the rules are updated to reflect the current structure of the agency; to reflect the increased availability of records on the agency's Web site and the Commission's decisions over the years with respect to whether certain records are routinely available for public inspection; to ensure that the rules reflect the agency's experience with processing FOIA requests; and to clarify the fees applicable to FOIA requests.

**DATES:** Effective April 29, 2009.

**FOR FURTHER INFORMATION CONTACT:**

Laurence H. Schecker, Special Counsel, Administrative Law Division, Office of General Counsel, 202-418-1720 or [Laurence.Schecker@fcc.gov](mailto:Laurence.Schecker@fcc.gov).

**SUPPLEMENTARY INFORMATION:** In this Order, we amend part 0 of the Commission's rules to update sections implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552.

On December 14, 2005, the President issued an Executive Order concerning implementation of the FOIA. Executive Order No. 13392, *Improving Agency Disclosure of Information*, 70 FR 75373 (December 14, 2005) (FOIA Executive Order). Among other things, the Executive Order required each agency to review its FOIA operations, *see id.* sec. 3(a), 70 FR at 75375 (December 14, 2005), to develop a plan to improve its FOIA operations, *id.* sec. 3(b)(iii), 70 FR at 75375 (December 14, 2005), and to report to the Attorney General about its review and plan for improving FOIA operations. *Id.* sec. 3(c), 70 FR at 75375 (December 14, 2005). Consistent with the Executive Order, the Commission reviewed its FOIA operations, developed a plan for improvement, and issued its report. *Improving Agency Disclosure of Information: Executive Order 13392* (June 14, 2006) (*FCC FOIA Report*), available at [http://www.fcc.gov/foia/2006improv\\_disclosure\\_report.pdf](http://www.fcc.gov/foia/2006improv_disclosure_report.pdf). *See also* Letter from Samuel Feder,

General Counsel and Chief FOIA Officer, to Clay Johnson, III, Chairman, President's Management Council (July 30, 2007) (Updated Status Report—FOIA Implementation Plan), available at <http://www.fcc.gov/foia/2006improv-update.pdf>; Letter from Matthew Berry, General Counsel and Chief FOIA Officer, to Chairman Johnson (February 27, 2008) (Updated Status Report).

The Commission committed, *inter alia*, to review its FOIA implementing rules “[t]o ensure that the FCC’s information access regulations reflect the current structure of the agency, the availability of records to the public and whether more records should be posted pursuant to [FOIA] subsection (a)(2), [5 U.S.C. 552(a)(2)], the proper procedures for processing FOIA requests and appeals, and current fee information.” *FCC FOIA Report* at 9.

In late 2007, Congress passed and the President signed the Openness Promotes Effectiveness in our National Government Act, known as the OPEN Government Act. Public Law No. 110-175, 121 Stat. 2524 (2007), *codified at scattered sections of 5 U.S.C. 552*. The FOIA amendments adopted in this statute require additional changes to our FOIA implementing regulations.

In our FY 2007 FOIA Annual Report, we modified the target date for reviewing and amending our FOIA regulations so that a single revision of the rules could address the OPEN Government Act as well as the commitment made in the FCC’s FOIA Report. *See FCC FY 2007 FOIA Annual Report*, at 8-9 (Section XII.C) (<http://www.fcc.gov/foia/2007foiareport.pdf>); *see also* letter from Matthew Berry to Chairman Johnson (Feb. 27, 2008) (noting the change in the target date for revising our FOIA regulations). We have now completed an extensive review of our FOIA regulations and in this Order adopt various amendments to the rules. By this Order, we fulfill the commitment made in the *FCC FOIA Report*, as modified in our FY2007 FOIA Annual Report.

Our FOIA implementing rules are presently found at 47 CFR 0.441 through 0.470. The rules amended in this Order may generally be grouped into three sections: (1) rules describing records that are routinely available for public inspection (47 CFR 0.441, 0.445, 0.451, 0.453, 0.455, 0.460 and 0.465); (2) rules describing records that are not routinely available for public inspection and governing requests for confidential treatment (47 CFR 0.442, 0.457, 0.458, 0.459, 0.461, and 0.463); and (3) the FOIA fee rules (47 CFR 0.451(d), 0.465 through 0.470). We have reviewed these rules and, as set forth in Appendix,

adopt a variety of changes to (i) reflect the current structure of the agency; (ii) reflect the increased availability of records on the FCC's Web site and the Commission's decisions over the years with respect to whether certain records are routinely available for public inspection; (iii) implement the changes to the FOIA enacted in the OPEN Government Act; (iv) ensure that the rules reflect our experience with processing FOIA requests; and (v) clarify the fees applicable to FOIA requests. The following paragraphs describe the changes we adopt in the rules.

*Records Routinely Available for Public Inspection.* The FOIA requires that a variety of records be made "available for public inspection and copying." 5 U.S.C. 552(a)(2)(A)-(D) (requiring each agency to make available for public inspection and copying "final opinions \* \* \* [and] orders made in the adjudication of cases;" policy statements that "are not published in the **Federal Register**;" "administrative staff manuals and instructions to staff that affect a member of the public;" and records released pursuant to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records"); FOIA Executive Order, sec. 1(b). The Electronic Freedom of Information Act Amendments of 1996 (EFOIA), Public Law No. 104-231, 110 Stat. 3048 (1996), codified at scattered sections of 5 U.S.C. 552. See *Amendment of Part 0 of the Commission's Rules to Implement the Electronic Freedom of Information Act Amendments of 1996*, 13 FCC Rcd 3419 (1997), requires, and the FOIA Executive Order provides for, the use of electronic information technology to make records available to the public. See 5 U.S.C. 552(a)(2); FOIA Executive Order, sec. 3(a)(iv), 70 FR at 75375 (December 14, 2005). We have developed an extensive Web site, <http://www.fcc.gov>, providing the public with broad access to our records. Our Web site also affirmatively discloses much information about the Commission, consistent with the FOIA Executive Order's direction that agencies make "proactive" and "spontaneous disclosure of information to the public" to reduce the need for the public to make FOIA requests to obtain information from agencies. *Id.*, sec. 3(a)(iv). For example, our Web site makes available Commission and Bureau/Office level decisions, Commission rules, comments filed in rulemaking proceedings, public notices, applications for licenses or other

authorizations, and policy statements and staff guidance concerning our rules and operations, just to mention a few categories of records. We also maintain paper reading rooms for public access to our records. Our rules governing access to routinely available records require updating in light of changes in the structure of the Commission, changes in the types of proceedings we conduct, Internet availability of many of our records, and electronic filing and referencing capabilities for many of our proceedings. We therefore update sections 0.441, 0.445, 0.451, 0.453, 0.455, 0.460 and 0.465 of our rules as discussed below and as set forth in the rule changes.

Section 0.441 is amended to indicate that in addition to the sources for obtaining Commission information previously listed in the rule, information may be obtained from the Commission's copy contractor. It also contains updated Internet citations and FCC headquarters locations for obtaining information. We have also amended section 0.441 to note the availability of our FOIA Public Liaison to assist persons requesting information from the Commission in resolving any concerns relating to a FOIA request. OPEN Government Act, sec. 6(b)(1)(B); see <http://www.fcc.gov/foia/#contact> (FOIA Public Liaison contact).

Section 0.445 contains our regulation concerning the availability of our opinions, orders, policy statements, interpretations, administrative manuals and staff instructions. 47 CFR 0.445. This rule implements various statutory requirements concerning the public availability of these documents. See 5 U.S.C. 552(a)(2)(A)-(C). We are making minor modifications to this rule. We are changing the reference to Pike and Fisher Radio Regulation in section 0.445(b) to Pike and Fisher Communications Regulation, the current title of that publication. See [commreg.fcc.gov](http://commreg.fcc.gov). We are also removing paragraph (g), which currently refers to the FCC Administrative Manual, a document that no longer exists. We are modifying current paragraph (h), which will become paragraph (g), to reflect that general instructions to staff may be contained in orders published in the **Federal Register**. Finally, current paragraph (i), which will become paragraph (h), indicates we may redact information from published documents to protect personal privacy. See 5 U.S.C. 552(a) (allowing deletion of information to protect personal privacy). We are amending this section to indicate we may also redact information required or authorized to be withheld pursuant to other Federal statutes. This amendment

reflects our practice of issuing decisions redacting confidential commercial information, consistent with the Trade Secrets Act, 18 U.S.C. 1905. See *Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24854 (1998) (*Confidentiality R&O*) (orders containing confidential commercial information may be released in part under seal), *recon. den.*, 14 FCC Rcd 20128 (1999).

We are making a minor clarifying amendment to section 0.451(d), which currently refers only to search fees, to cross-reference copying and review fees that are provided for elsewhere in our FOIA regulations. We also amend section 0.451(b)(5) to cross-reference part 19 of our rules.

Two of our FOIA rules, sections 0.453 and 0.455, set out the public availability of records in our public reference rooms. 47 CFR 0.453 and 0.455. These rules are being updated to reflect the current nature of our proceedings and the structure of the agency. Section 0.453(a) is being amended to reflect the availability of the Commission's Electronic Comment Filing System (ECFS), which makes case histories available on the Internet to the public. *Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322 (1998) (*ECFS Decision*). Section 0.453(a)(2)(i) provides a current list of Broadcast Services proceedings which have records that are routinely available, and section 0.453(a)(2)(ii) updates common carrier proceedings presently in the Wireline Competition Bureau. Section 0.453(a)(2)(iii)(E) is amended to delete the last sentence to reflect that the Uniform Licensing System (ULS) is now fully functional. Section 0.453(a)(2)(iv) is amended to reflect the availability of certain contracts and to eliminate references to INTELSAT and INMARSAT in light of the privatization of those entities. Finally, section 0.453(a)(2)(v) updates the list of publicly available cable service proceedings. Minor changes are made to section 0.455. We update paragraph (a) to reflect the Media Bureau materials currently available in its reference room. We also amend former paragraph (c), now (b), to indicate that Commission minutes and records for votes are available in the Office of the Secretary, not the Agenda Group. References to separate Bureau reference rooms, now consolidated in the Reference Information Center, are also removed from section 0.455.

Section 0.460 governs requests for inspection of records that are routinely available for public inspection under

sections 0.453 and 0.455. Our rules have provided that records routinely available to the public can be requested either through the Commission directly or through our copy contractor. 47 CFR 0.460(f). *See also* 47 CFR 0.465(f). While a large portion of the records routinely available for public inspection are available on our Web site, there are still some routinely available records that are only available in paper copy at the Commission. Processing written requests for these records has placed a great burden on our staff. We are therefore amending paragraph (f) to require that written requests to obtain copies of records routinely available for public inspection must be processed through the Commission's copy contractor under section 0.465. We are also amending section 0.465(f) to indicate that the Commission's copy contractor will fulfill requests for records that are routinely available under section 0.453 or 0.455. These changes do not affect those personally inspecting records at the Commission. *See* 47 CFR 0.460(b).

*Records Not Routinely Available for Public Inspection.* Section 0.442 of our rules addresses situations in which we receive requests from other Federal agencies for records that were submitted to us with a request for confidential treatment or that we consider presumptively confidential. 47 CFR 0.442. This rule, based on sections of the Paperwork Reduction Act (PRA), 44 U.S.C. 3512 and 3510(b), indicates that such records will receive confidential treatment when we share them with other agencies, and sets forth the procedures we employ when we receive such requests. We are amending paragraphs (a) and (d)(3) to provide that the rule covers records that have been deemed confidential under other statutes, FCC orders, or regulations in addition to those deemed confidential under section 0.457 or 0.459. We are amending section 0.442(b) to indicate that the Commission may initiate the sharing of records with another Federal agency under this section. Paragraph (d)(1) provides for notice to the submitter of confidential information that we have received a request from another Federal agency for the records. We are amending this paragraph to make clear that we may provide this notice either individually or by public notice in instances where there are many submitters of confidential information. We are amending paragraph (d)(2) to provide that Federal agencies may request that we not provide notice to the submitter of confidential information if such notice

would interfere with national security or homeland defense activities as well as law enforcement activities. 47 CFR 0.442(d)(2)–(3). We are amending paragraph (d)(2) to indicate that Federal agencies should submit such requests in writing to us. We note that such a request may be made by e-mail.

In setting forth nine FOIA disclosure exemptions, the FOIA recognizes that not all agency records may be available to the public. 5 U.S.C. 552(b)(1)–(9). Section 0.457 of our rules sets forth these exemptions and lists circumstances in which we have already determined that certain types of records are not routinely available for public inspection. Section 0.457(a) is amended to clarify that documents for which the Commission has requested national security classification from another agency will not be disclosed pending a classification determination. We have also amended section 0.457(c)(3) to reflect our previous repeal of section 43.53. *See Amendment of Sections 43.51, 43.52, 43.53, 43.54 and 43.74 of the Commission's Rules To Eliminate Certain Reporting Requirements*, 1 FCC Rcd 933 (1986). In addition, the Commission determined in a 2004 rulemaking to accord confidential treatment to outage reports filed under part 4 of our rules, but did not update section 0.457(d) at that time. *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 19 FCC Rcd 16830 (2004), *adopting* 47 CFR 4.2. We are therefore adding a new section 0.457(d)(1)(vii) to reflect that action. A new section 0.457(d)(1)(viii) has also been added to reflect the commercially sensitive nature of coordination of satellite systems pursuant to procedures codified in the International Telecommunication Union (ITU) Radio Regulations. *See Robert J. Butler*, 6 FCC Rcd 5414 (1991) (documents that were generated during the course of certain international negotiations withheld pursuant to FOIA Exemption 4). We have deleted the reference to radio operator examinations that are no longer administered, *see Amendment of Part 13 of the Commission's Rules To Privatize the Administration of Examinations for Commercial Operator Licenses and To Clarify Certain Rules*, 8 FCC Rcd 1046 (1992), as well as a dated reference to equipment authorization procedures prior to 1974. 47 CFR 0.457(b)(3). In section 0.457(f) regarding personal privacy under FOIA Exemption 6, 5 U.S.C. 552(b)(6), we are expanding the reference to "employees" so as to include Commission contractors. *See U.S. Dep't of Justice v.*

*Reporters' Committee for Freedom of the Press*, 489 U.S. 749, 774 (1989) (an individual doing business with the federal government may have some protectible privacy interest). We are amending section 0.457(g), regarding law enforcement information, to more closely track the language of the FOIA.

Section 0.459 of our rules addresses requests for confidential treatment. *See generally Confidentiality R&O*, 13 FCC Rcd at 34826–27 (prescribing showing to be made for requests for confidential treatment). Where confidential treatment is sought for only a part of a document, we will require the filing of a redacted public version. We are adding a new paragraph indicating that this section does not apply to comments or materials filed by means of our Electronic Filing System (ECFS), consistent with the rulemaking decision adopting the ECFS system. *ECFS Decision*, 13 FCC Rcd at 11330–31 (confidential materials cannot be filed electronically through ECFS). We have added a new paragraph (a)(3) reflecting the practice of using a "checkbox" mechanism for indicating confidentiality on some forms. We are amending paragraph (c) concerning casual requests for confidential treatment to indicate that the existing required showing before confidential treatment will be granted means that simply stamping a record "confidential" will not be considered a request for confidential treatment. We are also amending paragraph (g) to provide that when a request for confidential treatment is denied, the person who submitted the records will have 10 days to seek review, instead of the 5 days currently provided for in the rule. This change harmonizes the time period in this rule with the time period in section 0.461(i)(1). *Compare* 47 CFR 0.459(g) (currently providing 5 days for filing an application for review or seeking a judicial stay when a request for confidentiality is denied in whole or in part) *with* 47 CFR 0.461(i)(1) (currently providing 10 days for filing an application for review or a judicial stay when in the context of a FOIA request a request for confidentiality is denied in whole or in part).

Finally, section 0.458 of our rules addresses situations when persons regulated by or practicing before the Commission come into possession of written non-public information. We amend this section to provide that such information should be returned to the Commission's Office of Inspector General promptly and without further distribution or use. This amendment tracks the current language of 47 CFR 19.735–203.

*Obtaining Records Not Routinely Available for Public Inspection.* Section 0.461 of our rules describes how the public may seek records not routinely available for public inspection. We herein make several amendments to section 0.461 to reflect our experience in processing FOIA requests and to implement the OPEN Government Act. We have amended section 0.461(a) to include the definition of “records” adopted in the OPEN Government Act. OPEN Government Act, sec. 9, *codified at* 5 U.S.C. 552(f)(2). This definition specifies that records include electronic records and records maintained for the Commission by another entity for purposes of records management. Section 0.461(a) is also amended to provide more detail for FOIA requesters concerning what information should be submitted with a request for inspection of records. We make this change to assist staff in processing FOIA requests. By providing a more detailed FOIA request, we hope staff processing the request will be able to locate the records quickly, thus reducing search time charges to FOIA requesters. We hope that this will minimize the need to contact FOIA requesters for clarification. *See* OPEN Government Act, sec. 6(a), *codified at* 5 U.S.C. 552a(6)(A)(ii) (limiting the tolling of time for processing FOIA requests when requesters must be contacted for clarification). *See also OIP Guidance: New Limitations on Tolling the FOIA’s Response Time* (DOJ/OIP November 11, 2008), available at <http://www.usdoj.gov/oip/foiapost/2008foiapost29.htm>. Section 0.461(a)(2) is amended to clarify that, pursuant to FOIA section 552(a)(3)(B), while requesters may specify the form or format of records to be produced, the records must be readily reproducible in the requested form or format for the Commission to comply with the request. *See* 5 U.S.C. 552(a)(3)(B). This is consistent with our practice. *See Rick Linsk*, 18 FCC Rcd 25601, 25602 (2003), *citing TPS, Inc. v. U.S. Dep’t of Defense*, 330 F.3d 1191, 1193 (9th Cir. 2003). Section 0.461(b) concerns information provided with FOIA requests, and is amended to provide that mailing addresses be included with a FOIA request so that we can mail paper copies of records produced to FOIA requesters. It is also amended to remind requesters that if they are seeking a FOIA fee waiver, such a request must be included with their original FOIA request. *See* 47 CFR 0.470(c).

Section 0.461(d)(3) provides for notification of persons who have submitted records to the Commission

that are confidential under sections 0.457 or 0.459 if a request for inspection of those records is filed under section 0.461. We have amended this section to clarify procedures for this notice and how all parties should serve each other with any pleadings. We are also adding a note to this section reminding parties that FOIA proceedings are permit-but-disclose proceedings under our *ex parte* rules. *See* 47 CFR 1.1206(a)(7).

Section 0.461(e) is amended to indicate that a FOIA request is deemed properly received when it is received and date stamped by our FOIA Control Office and assigned to the Bureau or Office that is the custodian of the records sought. *See* OPEN Government Act, sec. 6(a), *codified at* 5 U.S.C. 552(a)(6)(A). *See also OIP Guidance: Assigning Tracking Numbers and Providing Status Information for Requests* (DOJ/OIP November 18, 2008), available at <http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm>; *OIP Guidance: New Requirement to Route Misdirected FOIA Requests* (DOJ/OIP November 18, 2008), available at <http://www.usdoj.gov/oip/foiapost/2008foiapost31.htm>. A new paragraph is being added to paragraph (e), and language is added to sections 0.461(g)(1), 0.467(e)(2), and 0.469(c) concerning the tolling of the FOIA time limits for processing requests, to implement the OPEN Government Act’s provisions. This paragraph provides that the time for responding to a FOIA request is tolled while the custodian of records seeks reasonable clarification from the requester. Such a request must be made within 10 days after a request is properly received by the custodian of records, and only one such request may be made. The paragraph also provides for a tolling of the time limits when fee issues (including fee waivers) are unresolved. The OPEN Government Act allows us to make only one request for clarification of the scope of a FOIA request, but does not contain a similar restriction for fee matters. *Compare* 5 U.S.C. 552(a)(6)(A)(ii)(I) with 5 U.S.C. 552(a)(6)(A)(ii)(II). We will, however, endeavor to resolve fee matters with only one inquiry to requesters. Paragraph (e)(4) is also amended to reflect our practice of assigning control numbers to FOIA requests, and to indicate that we provide notice to a FOIA requester of the control number and of a telephone number that may be called to obtain the status of the FOIA request. These amendments reflect modifications to the FOIA made in the OPEN Government Act. OPEN Government Act, sec. 7(a), *codified at* 5 U.S.C. 552(a)(7). *See also OIP Guidance:*

*Assigning Tracking Numbers and Providing Status Information for Requests* (DOJ/OIP November 18, 2008), available at <http://www.usdoj.gov/oip/foiapost/2008foiapost30.htm>.

We sometimes receive FOIA requests that seek records that are the property of another federal agency or department. We have clarified in section 0.461(f) that such requesters will be directed to the correct department or agency. We have also amended section 0.461(f)(5), which addresses withholding part of a record pursuant to a FOIA exemption. The OPEN Government Act amended the FOIA to require that when a redaction is made to a record being released, we must indicate the FOIA exemption relied upon at the site of the redaction. *See* sec. 12, *codified at* 5 U.S.C. 552(b) (after paragraph 9). *See also OIP Guidance: Segregating and Marking Documents for Release in Accordance with the Open Government Act* (DOJ/OIP October 23, 2008), available at <http://www.usdoj.gov/oip/foiapost/2008foiapost26.htm>. Conforming or clarifying edits are also made to section 0.461(g).

We have amended section 0.461(i) to add persons with a personal privacy interest in a record to the categories of persons who may seek review of a decision to grant access to the records. We have also added a note to paragraphs 0.461(i) and (j) indicating that the General Counsel will review applications for review of initial FOIA decisions and may attempt informally to resolve issues with the applicant. This has been our practice and we have found it to be a consumer-friendly practice, consistent with the FOIA Executive Order. FOIA Executive Order, sec. 1(b)–(d), 70 FR at 75373 (December 14, 2005). We have also amended section 0.461(j) to make clear that applications for review of fee determinations and fee waiver decisions may be sought under this paragraph. *See* amended section 0.451(d) and new section 0.470(g). We have provided in section 0.461(k)(2) that the Commission may consolidate applications for review. Finally, we have clarified in section 0.461(l)(2) that, as appropriate, we may continue to process initial FOIA requests or applications for review if an action for judicial review has been filed.

*The Touhy Rule.* Section 0.463 is the Commission’s *Touhy* rule. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); 5 U.S.C. 301 (authorizing agencies to issue regulations regarding whether government employees or documents may be subpoenaed). We amend this rule to elaborate on the procedures used when determining whether Commission employees will be

permitted to testify or provide records relating to their official duties when they are directly subpoenaed or otherwise served with a request. This amendment also specifies and clarifies the criteria that the General Counsel will use when deciding whether to allow an employee to testify or provide records. We make these amendments based on the following: (1) Our experience in reviewing *Touhy* requests and the information that we typically need to obtain from the requester in order to properly evaluate the request; (2) our review of other agencies' *Touhy* rules; and (3) the factors that courts have considered when evaluating Administrative Procedure Act (APA) challenges to other agencies' *Touhy* decisions. See, e.g., *Houston Business Journal, Inc. v. Office of the Comptroller of the Currency, United States Dep't of the Treasury*, 86 F.3d 1208 (D.C. Cir. 1996) (agency decisions under *Touhy* regulation are reviewed under arbitrary or capricious standard under the APA); *Brobreski v. U.S. EPA*, 284 F.Supp.2d 67, 79–80 (D.D.C. 2003) (reviewing and upholding EPA's reasons for denying request for testimony by an agency inspector).

**FOIA Fee Related Rules.** We also make a variety of changes to our FOIA fee-related rules. 47 CFR 0.451(d), 0.465 through 0.470. In section 0.465, we amend paragraph (b) to reflect the availability of audio and video recordings or transcripts of Commission proceedings and note that in certain cases, not all formats may exist. In paragraph (c)(2), we reduce the per page copying fees we are required to charge under the FOIA, 5 U.S.C. 552(a)(4)(A), from \$0.17 to \$0.10. This reduction is a result of our re-evaluation of reproduction costs. We are also adding to paragraph (c)(2) a charge of \$5.00 per computer disk for instance when we provide copies in an electronic format, and add a reference to computer disks in this paragraph. Finally, we are amending paragraph (e) to reflect the availability of many of our documents on the Internet. Paragraphs (e) and (f) are also amended, consistent with our amendment of section 0.460 discussed *supra*, to indicate that the public must seek copies of records routinely available for public inspection in person or from our copy contractor.

Section 0.466 of our rules contains the definitions related to FOIA fees. In paragraph (a)(1) we are changing the definition of "direct costs" to reflect that we add 20 percent to our labor costs to cover benefits, to make it consistent with our current practice as reflected in paragraph 0.467(a)(2). When sections 0.466 and 0.467 were first amended to

reflect the changes in the FOIA regarding fees, the Commission indicated that it would add 16 percent to the basic rate of pay to cover employee benefits. *The Freedom of Information Reform Act of 1986; Fee Schedule and Administrative Procedures*, 3 FCC Rcd 5107 (1988). This was the percentage adopted in the *OMB FOIA Fee Guidelines* for Federal personnel benefits to be added to the Federal pay levels for search purposes. *The Freedom of Information Reform Act of 1986; Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 FR 10012 (March 27, 1987) (*OMB FOIA Fee Guidelines*). The FOIA charged OMB with promulgating "guidelines \* \* \* which shall provide for a uniform schedule of fees." 5 U.S.C. 552(a)(4)(A)(i). Over the years, we have updated the benefits section in paragraph 0.467(a)(1) to reflect actual costs of personnel benefits. In 1994 it was changed to 19 percent (see *Amendment To The Fee Schedule For The Processing Of Requests For Agency Records Pursuant To The Freedom Of Information Act*, 9 FCC Rcd 1810 (1994)) and in 1996 to 20 percent (see *Amendment To The Fee Schedule For The Processing Of Requests For Agency Records Pursuant To The Freedom Of Information Act*, 11 FCC Rcd 3606 (1996)). Because the search and review fees are to charge for our "direct costs," 5 U.S.C. 552(a)(4)(A)(iv), which includes benefits, it was reasonable to increase the percentage we added for benefits as those costs rose over the years, even though OMB never changed the *OMB FOIA Fee Guidelines* in this regard.

We amend paragraph (a)(7) to reflect the new definition of "representative of the news media" adopted in the OPEN Government Act, OPEN Government Act, sec. 3, *codified at* 5 U.S.C. 552(a)(4)(A)(ii). We also amend paragraph (a)(3) to indicate that dissemination of records by a representative of the news media shall not be considered to be for a commercial use. See *OMB FOIA Fee Guidelines*, 52 FR 10012, 10019 (March 27, 1987) (a request for records from a representative of the news media "shall not be considered to be a request that is for a commercial use."); *National Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387–88 (DC Cir. 1989).

In section 0.467, which addresses search and review fees, we delete the chart listing the hourly fee for FCC employees responding to FOIA requests because the rates change when federal salaries change. Instead, we provide that changes in the hourly fee will be announced by Public Notice and will be

posted on our FOIA Web site, <http://www.fcc.gov/foia>. We also specify in paragraph 0.461(a)(1) that labor rates for non-FCC employees will be assessed at their actual hourly cost to the agency. This includes Universal Service Administrative Company (USAC) personnel, who search for USAC records in response to FOIA requests. See *Inter-Tel Technologies, Inc.*, 19 FCC Rcd 5204 n.3 (2004).

In section 0.470, we implement the OPEN Government Act section that waives search fees for commercial and "all others" requesters and waives duplication fees for educational requesters or representatives of the news media when we fail to comply with FOIA's time limits in processing a FOIA request. OPEN Government Act, sec. 6(b), *codified at* 5 U.S.C. 552(a)(4)(A)(viii). See also *OIP Guidance: New Limitations on Assessing Fees* (DOJ.OIP November 11, 2008), available at <http://www.usdoj.gov/oip/foiapost/2008foiapost28.htm>. We are also codifying the considerations we take into account when addressing requests for FOIA fee waivers. These standards are well-established in judicial and Commission case law, see, e.g., *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987); *Robert J. Robbins, Call Communications Group., Inc.*, 21 FCC Rcd 6685 (2006), and are being set forth in this rule to provide guidance to any FOIA requesters who seek a fee waiver. We note that simply repeating the language of the FOIA fee waiver statute is an insufficient basis for requesting or our granting a fee waiver. We are also adding a new paragraph 0.470(e)(5) indicating that we generally will not rule on a request for fee waiver if no fees or de minimis fees (fifteen dollars or less) are involved. We give a requester ten working days, rather than the previous five, to provide additional information in certain circumstances. Finally, we have amended sections 0.451(d) and 0.461(j), and adopted a new section 0.470(g), to make clear that review may be sought for fee determinations and initial fee waiver decisions.

**No Notice and Comment Required.** We have determined that the changes we adopt here are general statements of policy, interpretive rules, or rules of agency organization, procedure or practice, and are therefore exempt from the notice and comment requirements of the APA, 5 U.S.C. 553(b)(A) (notice requirements inapplicable to "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice").

See *Confidentiality R&O*, 14 FCC Rcd at 20131 (amending 47 CFR 0.459 and 0.461 without notice and comment), citing *Aluminum Co. of America v. FTC*, 589 F. Supp. 169, 178 (S.D.N.Y. 1984) (holding FOIA rules are procedural rules); *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1255 (8th Cir. 1998) (*Touhy* regulations deal exclusively with internal administrative procedure). The substantive standards for obtaining agency records are set forth in the FOIA. See generally 5 U.S.C. 552.

*Regulatory Flexibility Act, Paperwork Reduction Act, and Congressional Review Act*. Section 603 of the Regulatory Flexibility Act, as amended (RFA), requires an initial regulatory flexibility analysis in notice and comment rulemaking proceedings. 5 U.S.C. 603(a). As we are adopting these rules without notice and comment, no regulatory flexibility analysis is required. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA). 44 U.S.C. 3501–3520. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002. 44 U.S.C. 3506(c)(4). Our FOIA rule amendments are being adopted without notice and comment, and therefore are not required to be submitted to Congress under the Congressional Review Act. 5 U.S.C. 804(3)(C) (rules subject to the Congressional Review Act do not include “any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties”).

*Segregability*. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

#### List of Subjects in 47 CFR Part 0

Freedom of information, Government publications, Organization and functions (Government agencies), Privacy.

Federal Communications Commission.

**William F. Caton,**

*Deputy Secretary.*

#### Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 0 as follows:

## PART 0—COMMISSION ORGANIZATION

### Subpart C—General Information

#### Public Information and Inspection of Records

■ 1. The authority citation continues to read as follows:

**Authority:** Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

■ 2. Sections 0.441 through 0.470 are revised to read as follows:

Sec.

0.441 General.

0.442 Disclosure to other Federal government agencies of information submitted to the Commission in confidence.

0.445 Publication availability and use of opinions, orders, policy statements, interpretations, administrative manuals and staff instructions.

0.451 Inspection of records: Generally.

0.453 Public reference rooms.

0.455 Other locations at which records may be inspected.

0.457 Records not routinely available for public inspection.

0.458 Nonpublic information.

0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.

0.460 Requests for inspection of records which are routinely available for public inspection.

0.461 Requests for inspection of materials not routinely available for public inspection.

0.463 Demand by competent authority for the production of documents or testimony concerning information contained therein.

0.465 Request for copies of materials which are available, or made available, for public inspection.

0.466 Definitions.

0.467 Search and review fees.

0.468 Interest.

0.469 Advance payments.

0.470 Assessment of fees.

#### § 0.441 General.

(a) Any person desiring to obtain information from the Commission may do so by contacting the Consumer and Governmental Affairs Bureau (CGB). Requests for information and general inquiries may be submitted by:

(1) Internet at <http://www.fcc.gov/cgb/fccinfo> or <http://www.fcc.gov/foia>.

(2) Telephone at 1–888–CALL–FCC (1–888–225–5322).

(3) TDD/TDY at 1–888–TELL–FCC (1–888–835–5322).

(4) Correspondence to: Consumer and Governmental Affairs Bureau, 445 12th Street, SW., Washington, DC 20554.

(5) Visiting the Reference Information Center of the Consumer and

Governmental Affairs Bureau at Room CY–A257 of the Commission’s main office at 445 12th Street, SW., Washington, DC 20554.

(6) Facsimile at 1–866–418–0232.

(7) Contacting the Commission’s Copy Contractor, see § 0.465(a).

(b) The Commission’s FOIA Public Liaison is available to assist any person requesting information from the Commission in resolving any concerns related to a Freedom of Information Act request. See <http://www.fcc.gov/foia/>.

#### § 0.442 Disclosure to other Federal government agencies of information submitted to the Commission in confidence.

(a) The disclosure of records to other Federal government agencies is generally governed by the Paperwork Reduction Act, 44 U.S.C. 3510, rather than the Freedom of Information Act. The acceptance of materials in confidence under § 0.457 or § 0.459, or any other statute, rule or Commission order, does not preclude their disclosure to other federal agencies.

(b) Information submitted to the Commission in confidence pursuant to § 0.457(c)(2) and (3), (d) and (g) or § 0.459, or any other statute, rule or order, may be disclosed to other agencies of the Federal government upon request or upon the Commission’s own motion, provided:

(1) Specific Commission assurances against such disclosure have not been given;

(2) The other agency has established a legitimate need for the information;

(3) Disclosure is made subject to the provisions of 44 U.S.C. 3510(b); and

(4) Disclosure is not prohibited by the Privacy Act or other provisions of law.

(c) The Commission’s staff may give assurances against disclosure of information to other Federal agencies only with the prior written approval of the General Counsel. In no event will assurance against disclosure to other agencies be given in advance of submission of the information to the Commission if submission is required by statute or by the provisions of this chapter; but the notice provisions of paragraph (d) of this section will apply to such required submissions.

(d)(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, a party who furnished records to the Commission with a request for confidential treatment, see § 0.459, will be notified at the time that the request for disclosure is submitted and will be afforded ten calendar days in which to submit an opposition to disclosure. This notification may be made either individually or by public notice.



(2) If the agency requesting the records provides in writing to the satisfaction of the Commission that notice to the party who furnished the records to the Commission will interfere unduly with its law enforcement, national security or homeland defense activities and further states that it will notify that party of the Commission's disclosure once the potential for such interference is eliminated, the Commission will not give notice of disclosure.

(3) A party who furnished records to the Commission in confidence will not be afforded prior notice when the disclosure is made to the Comptroller General of the United States, in the Government Accountability Office. Such a party will instead be notified of disclosure of the records to the Comptroller General either individually or by public notice.

(4) If disclosure is opposed and the Commission decides to make the records available to the other agency, the party who furnished the records to the Commission will be afforded ten calendar days from the date of the ruling to move for a judicial stay of the Commission's action. If the party does not move for stay within this period, the records will be disclosed.

(e) Except as provided in paragraph (d)(3) of this section, nothing in this section is intended to govern disclosure of information to Congress or the Comptroller General.

**§ 0.445 Publication, availability and use of opinions, orders, policy statements, interpretations, administrative manuals, and staff instructions.**

(a) Adjudicatory opinions and orders of the Commission, or its staff acting on delegated authority, are sent to the parties by mail, delivery service, or e-mail, unless the Commission determines that individual delivery would be unduly burdensome and instead issues a public notice of its decision. As part of the record, these documents are generally available for inspection in accordance with § 0.453 and § 0.455. In addition, many adjudicatory orders and opinions are available on the Commission's Web site, <http://www.fcc.gov>. In appropriate circumstances, the Commission may redact the copy made available to the public in order to protect information not routinely available to the public under § 0.457, which is treated confidentially pursuant to a request under § 0.459, or which is confidential pursuant to other statutes, regulations or orders.

(b) Texts adopted by the Commission or a member of its staff on delegated

authority and released through the Office of Media Relations are published in the FCC Record. Older materials of this nature are available in the FCC Reports. In the event that such older materials are not published in the FCC Reports, reference should be made to the **Federal Register** or Pike and Fischer Communications Regulation.

(c) All rulemaking documents or summaries thereof are published in the **Federal Register** and are available on the Commission's Web site. The complete text of the Commission decision also is released by the Commission and is available for inspection and copying during normal business hours in the Office of Media Relations, the Reference Information Center, via the Electronic Comment Filing System (ECFS), or as otherwise specified in the rulemaking document published in the **Federal Register**. The complete texts of rulemaking decisions may also be purchased from the Commission's copy contractor.

(d) Formal policy statements and interpretations designed to have general applicability are published in the **Federal Register**, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation. Commission decisions and other Commission documents not entitled formal policy statements or interpretations may contain substantive interpretations and statements regarding policy, and these are published as part of the document in the FCC Record, FCC Reports or Pike and Fischer Communications Regulation. General statements regarding policy and interpretations furnished to individuals, in correspondence or otherwise, are not ordinarily published.

(e) If the documents described in paragraphs (a) through (d) of this section are published in the **Federal Register**, the FCC Record, FCC Reports, or Pike and Fischer Communications Regulation, they are indexed, and they may be relied upon, used or cited as precedent by the Commission or private parties in any manner. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission. No person is expected to comply with any requirement or policy of the Commission unless he or she has actual notice of that requirement or policy or a document stating it has been published as provided in this paragraph. Nothing in this paragraph, however, shall be construed as precluding a reference to a recent document that is pending publication.

(f) Subparts A and B of this part describe the functions of the staff and list the matters on which authority has been delegated to the staff. All general instructions to the staff and limitations upon its authority are set forth in those subparts or in decisions of the Commission published in the **Federal Register**. Instructions to the staff in particular matters or cases are privileged and/or protected and are not published or made available for public inspection.

(g) To the extent required to prevent a clearly unwarranted invasion of personal privacy, or to prevent disclosure of information required or authorized to be withheld by another statute, the Commission may delete identifying details or confidential information when it makes available or publishes any document described in this section. The justification for any such deletion will be fully explained in a preamble to the document.

**§ 0.451 Inspection of records: Generally.**

(a) *Records which are routinely available for public inspection.* Sections 0.453 and 0.455 list those Commission records which are routinely available for public inspection and the places at which those records may be inspected. Procedures governing requests for inspection of such records are set out in § 0.460.

(b) *Records which are not routinely available for public inspection.* Records which are not listed in § 0.453 or § 0.455 are not routinely available for public inspection. Such records fall into two categories.

(1) The first category consists of those records or kinds of records listed in § 0.457 and of particular records withheld from public inspection under § 0.459. The Commission has determined that there is a statutory basis for withholding these records from public inspection. In some cases, the Commission is prohibited from permitting the inspection of records. In other cases, the records are the property of another agency, and the Commission has no authority to permit their inspection. In still other cases, the Commission is authorized, for reason of policy, to withhold records from inspection, but is not required to do so.

(2) The second category consists of records that are not listed in § 0.453, § 0.455, or § 0.457 and have not been withheld from inspection under § 0.459. In some cases, these records have not been identified for listing. In other cases (e.g., the general correspondence files), the Commission is unable to determine either that all records in a class should be routinely available for inspection or that all records in that class should not

be routinely available for inspection, and individualized determination is required.

(3) Procedures governing requests for inspection of these records are set forth in § 0.461.

(4) Procedures governing demands by competent authority for inspection of these records are set forth in § 0.463.

(5) Except as provided in § 0.461 and § 0.463, or pursuant to § 19.735–203 of this chapter, no officer or employee of the Commission shall permit the inspection of records which are not routinely available for public inspection under § 0.453 or § 0.455, or disclose information contained therein.

(c) *Copies.* Section 0.465 applies to requests for copies of Commission records which are routinely available for public inspection under § 0.453 and § 0.455 and those which are made available for inspection under § 0.461. Sections 0.467 and 0.465(c)(3) apply to requests for certified copies of Commission records.

(d) *Search and copying fees.* Section 0.465(c)(2) prescribes the per page fee for copying records made available for inspection under § 0.460 or § 0.461. Section 0.466 prescribes fees to cover the expense of searching for and reviewing records made available for inspection under § 0.460 or § 0.461. Review of initial fee determinations under § 0.467 through § 0.470 and initial fee reduction or waiver determinations under § 0.470(e) may be sought under § 0.461(j).

**Note to paragraph (d):** The Commission may require advance payment pursuant to § 0.469 before releasing documents.

#### § 0.453 Public reference rooms.

The Commission maintains the FCC Reference Information Center as its public reference room at its offices in Washington, DC. Much of the information available from the public reference room may also be retrieved from the Commission's main Web site at <http://www.fcc.gov> and its electronic reading room at <http://www.fcc.gov/foia/e-room.html>:

(a) *The Reference Information Center.* Maintains files containing the record of all docketed cases, petitions for rule making and related papers. A file is maintained for each docketed hearing case and for each docketed rule making proceeding. Cards summarizing the history of such cases for the years before 1984 are available for inspection. Information summarizing the history of such cases for the years from 1984 through present is available online on the Electronic Comment Filing System (ECFS).

(b) *Broadcast Services.* The following files and documents are available, including:

(1) Applications for radio and television broadcast station construction permits, licenses, modifications of facilities, license renewal, assignments and transfer of control, including any Commission correspondence or rulings pertaining to those applications;

(2) Petitions to deny, informal objections, and complaints directed against the stations and/or station applications;

(3) Ownership reports filed by licensees pursuant to § 73.3615 of this chapter;

(4) Television network application contracts, radio and television time brokerage agreements, and other documents required to be filed under § 73.3613 of this chapter;

(5) Children's television programming reports filed by commercial television licensees pursuant to § 73.3526 of this chapter;

(6) Annual DTV ancillary/supplementary services reports filed by commercial and non-commercial educational digital television licensees pursuant to § 73.624 of this chapter;

(7) Station requests for declaratory rulings, special temporary authorizations, and other waivers;

(8) Annual employment reports filed by licensees and permittees of broadcast stations pursuant to § 73.3612 of this chapter; and

(9) Responses from licensees to random audits of their Equal Employment Opportunity programs conducted pursuant to § 73.2080 of this chapter.

(c) *Common Carrier Services,* including:

(1) Annual reports filed by carriers under § 43.21 of this chapter;

(2) Reports of proposed changes in depreciation rates filed by carriers under § 43.43 of this chapter;

(3) Rate-of-return reports filed by price-cap and rate-of-return incumbent local exchange carriers under § 65.600 of this chapter;

(4) All applications for common carrier authorizations acted upon by the Enforcement Bureau, and related files;

(5) All formal and informal complaints against common carriers filed under § 1.711 through § 1.735 of this chapter, all documents filed in connection therewith, and all communications related thereto;

(6) Annual employment reports filed by common carrier licensees or permittees pursuant to § 1.815 of this chapter;

(7) Enforcement proceedings and public inquiries and related materials;

(8) Cost Allocation Manuals and related materials;

(9) Currently effective tariffs filed by Communications Common Carriers pursuant to various FCC Rules and Regulations; and

(10) Recent revisions to tariff filings and the Reference Information Center Log, which is prepared daily and lists the tariff filings received the previous day.

(d) *Wireless Telecommunications Services and Auction* related data including:

(1) Pending files containing applications for additional facilities or modifications of existing facilities;

(2) Cellular and Paging Granted Station files and related materials;

(3) Pending cellular and paging applications and related files;

(4) Electronically stored application and licensing data for commercial radio operators and for all authorizations in the Wireless Radio services are available for public inspection via the Commission's Web site, <http://wireless.fcc.gov/uls>. Wireless Radio services include Commercial and Private Mobile Radio, Common Carrier and Private Operational Field point-to-point Microwave, Local Television Transmission Service (LTTS), Digital Electronic Message Service (DEMS), Aviation Ground and Marine Coast applications; and

(5) Petitions and related materials.

(e) *International Services* as follows, except to the extent they are excluded from routine public inspection under another section of this chapter:

(1) Satellite and earth station applications files and related materials under part 25 of this chapter;

(2) Section 214 applications and related files under part 63 of this chapter, to the extent that they concern international communications facilities and services;

(3) International Fixed Public Radio applications and related files under part 23 of this chapter;

(4) Files relating to submarine cable landing licenses and applications for such licenses since June 30, 1934, except for maps showing the exact location of submarine cables, which are withheld from inspection under sec. 4(j) of the Communications Act, 47 U.S.C. 154(j) (see § 0.457(c)(1)(i));

(5) International broadcast applications, applications for permission to deliver programming to foreign stations, and related files under part 73 of this chapter; and

(6) Contracts and other arrangements filed under § 43.51 of this chapter, except for those that are filed with a request for confidential treatment (see



§ 0.459) or are deemed confidential pursuant to sec. 412 of the Communications Act (see also § 0.457(c)(3)).

(f) *Cable and other Multichannel Video Program Distribution Services.* The following files and records are available, including:

(1) Complaints regarding multichannel video programming, all documents filed in connection therewith, and all communications related thereto, unless the cable operator has submitted a request pursuant to § 0.459 that such information not be made routinely available for public inspection;

(2) Special relief petitions and files pertaining to cable television operations;

(3) Special relief petitions and files pertaining to DBS television operations;

(4) Petitions and related documents concerning the enforcement of regulations governing the installation of over-the-air reception devices (OTARD) pursuant to § 1.4000 of this chapter;

(5) Filings by cable television operators, including Cable Signal Leakage Reports (Form 320 and § 76.1804 of this chapter), Cable System Registration Statements (§ 76.1801 of this chapter), Cable System Operator Changes (§ 76.1610 of this chapter), Cable Aeronautical Frequency Notifications (§ 76.1804 of this chapter), Cable Annual Report (Form 325 and § 76.403 of this chapter), and filings related to CARS licenses (Part 78 of this chapter).

**Note to paragraph (f)(5):** This data also is available at <http://www.fcc.gov/coals>. Electronic submissions for cable filings (excluding CARS) are mandatory. Original forms are not available for information filed electronically, but the Reference Information Center or the Commission's Copy Contractor may assist in producing paper copies of information found in the COALS database;

(6) Annual employment reports filed by multichannel video programming distributors pursuant to § 76.1802 of this chapter; and

(7) Responses from multichannel video programming distributors to random audits of their Equal Employment Opportunity programs conducted pursuant to § 76.77 of this chapter.

**§ 0.455 Other locations at which records may be inspected.**

Except as provided in § 0.453, § 0.457, and § 0.459, records are routinely available for inspection in the Reference Information Center or the offices of the Bureau or Office which exercises responsibility over the matters to which those records pertain (see § 0.5), or will

be made available for inspection at those offices upon request. Upon inquiry to the appropriate Bureau or Office, persons desiring to inspect such records will be directed to the specific location at which the particular records may be inspected. Examples of the records available from Bureaus and Offices are set forth in paragraphs (a) through (c).

(a) *Media Bureau.* (1) Rulings under secs. 312(a)(7), 315, and 317 of the Communications Act of 1934, as amended;

(2) All materials associated with a rate proceeding for basic cable service and associated equipment over which the Commission has assumed jurisdiction pursuant to § 76.913 of this chapter;

(3) All materials associated with Commission review of franchise authority decisions concerning the rate charged for the basic cable service tier and associated equipment pursuant to § 76.944 of this chapter;

(4) All materials associated with local government requests for authorization to regulate basic cable rates pursuant to § 76.910 of this chapter (Form 328);

(5) All materials associated with the certification of Open Video System (OVS) operators pursuant to § 76.1502 of this chapter;

(6) A list of all registered cable communities is maintained electronically at <http://www.fcc.gov/mb>; and

(7) Public notices issued related to CARS licenses, Cable Special Relief Petitions, and other filings are available electronically at [http://www.fcc.gov/Document\\_Indexes/Media/](http://www.fcc.gov/Document_Indexes/Media/).

(b) *Office of Managing Director.* (1) All minutes of Commission actions, containing a record of all final votes, minutes of actions and internal management matters as provided in § 0.457(b)(1) and (c)(1)(i). These records and files are available for inspection in the Office of the Secretary.

(2) Files containing information concerning the history of the Commission's rules. These files are available for inspection in the Office of the Secretary.

(3) Reports filed by employees pursuant to 5 CFR Parts 2634 and 3902 and applications for inspection of such reports. See § 0.460(k).

(c) *International Bureau.* (1) The treaties and other international and bilateral agreements listed in § 73.1650 of this chapter are available for inspection in the office of the Chief, Strategic Analysis and Negotiations Division, International Bureau.

(2) Contracts and other arrangement filed under § 43.51 of this chapter and reports of negotiations regarding foreign

communication matters filed under § 43.52 of this chapter, except those kept confidential pursuant to sec. 412 of the Communications Act. See § 0.457(c)(3).

(3) Files relating to international settlements under part 64 of this chapter.

**§ 0.457 Records not routinely available for public inspection.**

The records listed in this section are not routinely available for public inspection pursuant to 5 U.S.C. 552(b). The records are listed in this section by category, according to the statutory basis for withholding those records from inspection; under each category, if appropriate, the underlying policy considerations affecting the withholding and disclosure of records in that category are briefly outlined. Except where the records are not the property of the Commission or where the disclosure of those records is prohibited by law, the Commission will entertain requests from members of the public under § 0.461 for permission to inspect particular records withheld from inspection under the provisions of this section, and will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection in the light of the facts of the particular case. In making such requests, there may be more than one basis for withholding particular records from inspection. The listing of records by category is not intended to imply the contrary but is solely for the information and assistance of persons making such requests. Requests to inspect or copy the transcripts, recordings or minutes of closed agency meetings will be considered under § 0.607 rather than under the provisions of this section.

(a) *Materials that are specifically authorized under criteria established by Executive Order (E.O.) to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order, 5 U.S.C. 552(b)(1).*

(1) Classified materials and information will not be made available for public inspection, including materials classified under E.O. 10450, "Security Requirements for Government Employees"; E.O. 10501, as amended, "Safeguarding Official Information in the Interests of the Defense of the United States"; and E.O. 12958, "Classified National Security Information," or any other executive order concerning the classification of records. See also 47 U.S.C. 154(j).

(2) Materials referred to another Federal agency for classification will not be disclosed while such a determination is pending.

(b) *Materials that are related solely to the internal personnel rules and practices of the Commission, 5 U.S.C. 552(b)(2).*

(1) Materials related solely to internal management matters, including minutes of Commission actions on such matters (see paragraph (f) of this section).

(2) Materials relating to the negotiation of contracts.

(c) *Materials that are specifically exempted from disclosure by statute (other than the Government in the Sunshine Act, 5 U.S.C. 552b, provided that such statute either requires that the materials be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of materials to be withheld).* The Commission is authorized under the following statutory provisions to withhold materials from public inspection.

(1) Section 4(j) of the Communications Act, 47 U.S.C. 154(j), provides, in part, that, “The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.” Pursuant to that provision, it has been determined that the following materials should be withheld from public inspection (see also paragraph (a) of this section):

(i) Maps showing the exact location of submarine cables.

(ii) Minutes of Commission actions on classified matters.

(iii) Maps of nation-wide point-to-point microwave networks.

(2) Under section 213 of the Communications Act, 47 U.S.C. 213(f), the Commission is authorized to order, with the reasons therefor, that records and data pertaining to the valuation of the property of common carriers and furnished to the Commission by the carriers pursuant to the provisions of that section, shall not be available for public inspection. If such an order has been issued, the data and records will be withheld from public inspection, except under the provisions of § 0.461. Normally, however, such data and information is available for inspection.

(3) Under sec. 412 of the Communications Act, 47 U.S.C. 412, the Commission may withhold from public inspection certain contracts, agreements and arrangements between common carriers relating to foreign wire or radio communication. Any person may file a petition requesting that such materials be withheld from public inspection. To support such action, the petition must show that the contract, agreement or arrangement relates to foreign wire or radio communications; that its

publication would place American communication companies at a disadvantage in meeting the competition of foreign communication companies; and that the public interest would be served by keeping its terms confidential. If the Commission orders that such materials be kept confidential, they will be made available for inspection only under the provisions of § 0.461.

(4) Section 605 of the Communications Act, 47 U.S.C. 605(a), provides, in part, that, “no person not being authorized by the sender shall intercept any communication [by wire or radio] and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person.” In executing its responsibilities, the Commission regularly monitors radio transmissions. Except as required for the enforcement of the communications laws, treaties and the provisions of this chapter, or as authorized in sec. 605, the Commission is prohibited from divulging information obtained in the course of these monitoring activities; and such information, and materials relating thereto, will not be made available for public inspection.

(5) Section 1905 of the federal criminal code, the Trade Secrets Act, 18 U.S.C. 1905, prohibits the unauthorized disclosure of certain confidential information. See paragraph (d) of this section and § 19.735–203 of this chapter.

(d) *Trade secrets and commercial or financial information obtained from any person and privileged or confidential—categories of materials not routinely available for public inspection, 5 U.S.C. 552(b)(4) and 18 U.S.C. 1905.*

(1) The materials listed in this paragraph have been accepted, or are being accepted, by the Commission on a confidential basis pursuant to 5 U.S.C. 552(b)(4). To the extent indicated in each case, the materials are not routinely available for public inspection. If the protection afforded is sufficient, it is unnecessary for persons submitting such materials to submit therewith a request for non-disclosure pursuant to § 0.459. A persuasive showing as to the reasons for inspection will be required in requests submitted under § 0.461 for inspection of such materials.

(i) Financial reports submitted by radio or television licensees.

(ii) Applications for equipment authorizations (type acceptance, type approval, certification, or advance approval of subscription television systems), and materials relating to such applications, are not routinely available

for public inspection prior to the effective date of the authorization. The effective date of the authorization will, upon request, be deferred to a date no earlier than that specified by the applicant. Following the effective date of the authorization, the application and related materials (including technical specifications and test measurements) will be made available for inspection upon request (see § 0.460). Portions of applications for equipment certification of scanning receivers and related materials will not be made available for inspection.

(iii) Information submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220.

(iv) Programming contracts between programmers and multichannel video programming distributors.

(v) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, if the U.S. international route is exempt from the international settlements policy under § 43.51(e)(3) of this chapter.

(vi) Outage reports filed under Part 4 of this chapter.

(vii) The following records, relating to coordination of satellite systems pursuant to procedures codified in the International Telecommunication Union (ITU) Radio Regulations:

(A) Records of communications between the Commission and the ITU related to the international coordination process, and

(B) Documents prepared in connection with coordination, notification, and recording of frequency assignments and Plan modifications, including but not limited to minutes of meetings, supporting exhibits, supporting correspondence, and documents and correspondence prepared in connection with operator-to-operator arrangements.

**Note to paragraph (d):** The content of the communications described in paragraph (d)(1)(vii)(A) of this section is in some circumstances separately available through the ITU’s publication process, or through records available in connection with the Commission’s licensing procedures.

(2) Unless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, any person who submits materials which he or she wishes withheld from public inspection under 5 U.S.C. 552(b)(4) must submit a request for non-disclosure pursuant to § 0.459. If it is shown in the request that the materials contain trade secrets or

privileged or confidential commercial, financial or technical data, the materials will not be made routinely available for inspection; and a persuasive showing as to the reasons for inspection will be required in requests for inspection submitted under § 0.461. In the absence of a request for non-disclosure, the Commission may, in the unusual instance, determine on its own motion that the materials should not be routinely available for public inspection.

(e) *Interagency and intra-agency memoranda or letters, 5 U.S.C. 552(b)(5)*. Interagency and intra-agency memoranda or letters and the work papers of members of the Commission or its staff will not be made available for public inspection, except in accordance with the procedures set forth in § 0.461. Normally such papers are privileged and not available to private parties through the discovery process, since their disclosure would tend to restrain the commitment of ideas to writing, would tend to inhibit communication among Government personnel, and would, in some cases, involve premature disclosure of their contents.

(f) *Personnel, medical and other files whose disclosure would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6)*. Under E.O. 10561, the Commission maintains an Official Personnel Folder for each of its employees. Such folders are under the jurisdiction and control, and are a part of the records, of the U.S. Office of Personnel Management. Except as provided in the rules of the Office of Personnel Management (5 CFR 293.311), such folders will not be made available for public inspection by the Commission. In addition, other records of the Commission containing private, personal or financial information concerning particular employees and Commission contractors will be withheld from public inspection.

(g) *Under 5 U.S.C. 552(b)(7), records compiled for law enforcement purposes, to the extent that production of such records:*

- (1) Could reasonably be expected to interfere with enforcement proceedings;
- (2) Would deprive a person of a right to fair trial or an impartial adjudication;
- (3) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;
- (4) Could reasonably be expected to disclose the identity of a confidential source;
- (5) Would disclose investigative techniques or procedures or would disclose investigative guidelines if such disclosure could reasonably be expected to risk circumvention of the law; or

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

**§ 0.458 Nonpublic information.**

Any person regulated by or practicing before the Commission coming into possession of written nonpublic information (including written material transmitted in electronic form) as described in § 19.735–203(a) of this chapter under circumstances where it appears that its release was inadvertent or otherwise unauthorized shall be obligated to and shall promptly return the information to the Commission's Office of Inspector General without further distribution or use. See 47 CFR 19.735–203.

**§ 0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.**

(a)(1) Any person submitting information or materials to the Commission may submit therewith a request that such information not be made routinely available for public inspection. (If the materials are specifically listed in § 0.457, such a request is unnecessary.) A copy of the request shall be attached to and shall cover all of the materials to which it applies and all copies of those materials. If feasible, the materials to which the request applies shall be physically separated from any materials to which the request does not apply; if this is not feasible, the portion of the materials to which the request applies shall be identified. In the latter circumstance, where confidentiality treatment is sought only for a portion of a document, the person submitting the document shall submit a redacted version for the public file.

(2) Comments and other materials may not be submitted by means of the Commission's Electronic Comment Filing System (ECFS) with a request for confidentiality treatment under this section.

(3) The Commission may use abbreviated means for indicating that the submitter of a record seeks confidential treatment, such as a checkbox enabling the submitter to indicate that the record is confidential. However, upon receipt of a request for inspection of such records pursuant to § 0.461, the submitter will be notified of such request pursuant to § 0.461(d)(3) and will be requested to justify the confidential treatment of the record, as set forth in paragraph (b) of this section.

(b) Except as provided in § 0.459(a)(3), each such request shall contain a statement of the reasons for withholding the materials from inspection (see

§ 0.457) and of the facts upon which those records are based, including:

- (1) Identification of the specific information for which confidential treatment is sought;
- (2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;
- (3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;
- (4) Explanation of the degree to which the information concerns a service that is subject to competition;
- (5) Explanation of how disclosure of the information could result in substantial competitive harm;
- (6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;
- (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;
- (8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and
- (9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

(c) Casual requests (including simply stamping pages "confidential") which do not comply with the requirements of paragraphs (a) and (b) of this section will not be considered.

(d)(1) If a response in opposition to a confidentiality request is filed, the party requesting confidentiality may file a reply within ten business days. All responses or replies filed under this paragraph must be served on all parties.

(2) Requests which comply with the requirements of paragraphs (a) and (b) of this section will be acted upon by the appropriate custodian of records (see § 0.461(d)(1)), who is directed to grant the request if it demonstrates by a preponderance of the evidence that non-disclosure is consistent with the provisions of the Freedom of Information Act, 5 U.S.C. 552. If the request for confidentiality is granted, the ruling will be placed in the public file in lieu of the materials withheld from public inspection.

(3) The Commission may defer acting on requests that materials or information submitted to the Commission be withheld from public inspection until a request for inspection has been made pursuant to § 0.460 or § 0.461. The information will be

accorded confidential treatment, as provided for in § 0.459(g) and § 0.461, until the Commission acts on the confidentiality request and all subsequent appeal and stay proceedings have been exhausted.

(e) If the materials are submitted voluntarily (*i.e.*, absent any requirement by statute, regulation, or the Commission), the person submitting them may request the Commission to return the materials without consideration if the request for confidentiality should be denied. In that event, the materials will ordinarily be returned (*e.g.*, an application will be returned if it cannot be considered on a confidential basis). Only in the unusual instance where the public interest so requires will the materials be made available for public inspection. However, no materials submitted with a request for confidentiality will be returned if a request for inspection has been filed under § 0.461. If submission of the materials is required by the Commission and the request for confidentiality is denied, the materials will be made available for public inspection once the period for review of the denial has passed.

(f) If no request for confidentiality is submitted, the Commission assumes no obligation to consider the need for non-disclosure but, in the unusual instance, may determine on its own motion that the materials should be withheld from public inspection. See § 0.457(g).

(g) If a request for confidentiality is denied, the person who submitted the request may, within ten business days, file an application for review by the Commission. If the application for review is denied, the person who submitted the request will be afforded ten business days in which to seek a judicial stay of the ruling. If these periods expire without action by the person who submitted the request, the materials will be returned to the person who submitted them or will be placed in a public file. Notice of denial and of the time for seeking review or a judicial stay will be given by telephone, with follow-up notice in writing. The first day to be counted in computing the time periods established in this paragraph is the day after the date of oral notice. Materials will be accorded confidential treatment, as provided in § 0.459(g) and § 0.461, until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

(h) If the request for confidentiality is granted, the status of the materials is the same as that of materials listed in

§ 0.457. Any person wishing to inspect them may submit a request for inspection under § 0.461.

(i) Third party owners of materials submitted to the Commission by another party may participate in the proceeding resolving the confidentiality of the materials.

**§ 0.460 Requests for inspection of records which are routinely available for public inspection.**

(a) Sections 0.453 and 0.455 list those Commission records which are routinely available for public inspection and the places at which those records may be inspected. Subject to the limitations set out in this section, a person who wants to inspect such records need only appear at the specified location and ask to see the records. Many such records also are available through the Commission's Web site, located at <http://www.fcc.gov> and the Commission's electronic reading room, located on its Web site at <http://www.fcc.gov/foia/e-room.html>. Commission documents listed in § 0.416 and § 0.445 are published in the FCC Record, and many such documents or summaries thereof are also published in the **Federal Register**.

(b) A person who wishes to inspect the records must appear at the specified location during the office hours of the Commission and must inspect the records at that location. (Procedures governing requests for copies are set out in § 0.465.) However, arrangements may be made in advance, by telephone or by correspondence, to make the records available for inspection on a particular date, and there are many circumstances in which such advance arrangements will save inconvenience. If the request is for a large number of documents, for example, a delay in collecting them is predictable. Current records may be in use by the staff when the request is made. Older records may have been forwarded to another location for storage.

(c) The records in question must be reasonably described by the person requesting them so as to permit their location by staff personnel. The information needed to locate the records will vary, depending on the records requested. Advice concerning the kind of information needed to locate particular records will be furnished in advance upon request. Members of the public will not be given access to the area in which records are kept and will not be permitted to search the files.

(d) If it appears that there will be an appreciable delay in locating or producing the records (as where a large number of documents is the subject of

a single request or where an extended search for a document appears to be necessary), the requester may be directed to submit or confirm the request in writing in appropriate circumstances.

(e)(1) Written requests shall be directed to the Commission's copy contractor pursuant to the procedures set forth in § 0.465. Requests shall be captioned "Request For Inspection Of Records," shall be dated, shall list the mailing address, telephone number (if any) of the person making the request, and the e-mail address (if any) and for each document requested, shall set out all information known to the person making the request which would be helpful in identifying and locating the document. Written requests shall, in addition, specify the maximum search fee the person making the request is prepared to pay (see § 0.467).

(2) Written requests shall be delivered or mailed directly to the Commission's copy contractor (see § 0.465(a)).

(f) When a written request is received by the copy contractor, it will be date-stamped.

(g) All requests limited to records listed in § 0.453 and § 0.455 will be granted, subject to paragraph (k) of this section. Requests for records listed in those sections shall not be combined with requests for other records.

(h) The records will be produced for inspection at the earliest possible time.

(i) Records shall be inspected within 7 days after notice is given that they have been located and are available for inspection. After that period, they will be returned to storage and additional charges may be imposed for again producing them.

(j) In addition to the other requirements of this section, the following provisions apply to the reports filed with the Commission pursuant to 5 CFR Parts 2634 and 3902.

(1) Such reports shall not be obtained or used:

- (i) For any unlawful purpose;
- (ii) For any commercial purpose, other than by news and communications media for dissemination to the general public;
- (iii) For determining or establishing the credit rating of any individual; or
- (iv) For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) Such reports may not be made available to any person nor may any copy thereof be provided to any person except upon a written application by such person stating:

- (i) That person's name, occupation and address;

(ii) The name and address of any other person or organization on whose behalf the inspection or copying is requested; and

(iii) That such person is aware of the prohibitions on the obtaining or use of the report. Further, any such application for inspection shall be made available to the public throughout the period during which the report itself is made available to the public. (Secs. 4, 303, 307, 48 Stat., as amended, 1066, 1082, 1083; 47 U.S.C. 154, 303, 397; 18 U.S.C. 207(j))

**§ 0.461 Requests for inspection of materials not routinely available for public inspection.**

Any person desiring to inspect Commission records that are not listed in § 0.453 or § 0.455 shall file a request for inspection meeting the requirements of this section. The FOIA Public Liaison is available to assist persons seeking records under this section. See § 0.441(a).

(a)(1) Records include:

(i) Any information that would be an agency record subject to the requirements of the Freedom of Information Act when maintained by the Commission in any format, including an electronic format; and

(ii) Any information maintained for the Commission by an entity under Government contract, for purposes of records management.

(2) The records in question must be reasonably described by the person requesting them, so as to permit their location by staff personnel with a reasonable amount of effort. Whenever possible, a request should include specific information about each record sought, such as the title or name, author, recipient, and subject matter of the record. Requests should also specify the date or time period for the records sought. The custodian of records sought may contact the requester to obtain further information about the records sought to assist in locating them.

(3) The person requesting records under this section may specify the form or format of the records to be produced provided that the records may be made readily reproducible in the requested form or format.

(b)(1) Requests shall be captioned "Freedom of Information Act Request," shall be dated, shall list the telephone number (if any), street address, and e-mail address (if any) of the person making the request, and should reasonably describe, for each document requested (see § 0.461(a)(1)), all information known to the person making the request that would be helpful in identifying and locating the document.

(2) The request shall, in addition, specify the maximum search fee the person making the request is prepared to pay or a request for waiver or reduction of fees if the requester is eligible (see § 0.470(e)). By filing a FOIA request, the requester agrees to pay all applicable fees charged under § 0.467, unless the person making the request seeks a waiver of fees (see § 0.470(e)), in which case the Commission will rule on the waiver request before proceeding with the search.

(c) If the records are of the kinds listed in § 0.457 or if they have been withheld from inspection under § 0.459, the request shall, in addition, contain a statement of the reasons for inspection and the facts in support thereof. In the case of other materials, no such statement need accompany the request, but the custodian of the records may require the submission of such a statement if he or she determines that the materials in question may lawfully be withheld from inspection.

(d)(1) Requests shall be

(i) Delivered or mailed to the Managing Director, FCC, 445—12th Street, SW., Room 1—A836, Washington, DC 20554;

(ii) Sent by e-mail to [foia@fcc.gov](mailto:foia@fcc.gov);

(iii) Filed electronically through the Internet at <http://www.fcc.gov/foia/#reqform>; or

(iv) Sent by facsimile to (202) 418—2826 or (202) 418—0521.

If the request is filed by mail or facsimile, an original and two copies of the request shall be submitted. If the request is enclosed in an envelope, the envelope shall be marked, "Freedom of Information Act Request."

(2) For purposes of this section, the custodian of the records is the Chief of the Bureau or Office where the records are located. The Chief of the Bureau or Office may designate an appropriate person to act on a FOIA request.

(3) If the request is for materials submitted to the Commission by third parties and not open to routine public inspection under § 0.457(d), § 0.459, or another Commission rule or order, or if a request for confidentiality is pending pursuant to § 0.459, or if the custodian of records has reason to believe that the information may contain confidential commercial information, one copy of the request will be provided by the custodian of the records (see § 0.461(e)) to the person who originally submitted the materials to the Commission. If there are many persons who originally submitted the records and are entitled to notice under this paragraph, the custodian of records may use a public notice to notify the submitters of the request for inspection. The submitter or

submitters will be given ten calendar days to respond to the FOIA request. See § 0.459(d)(1). If a submitter has any objection to disclosure, he or she is required to submit a detailed written statement specifying all grounds for withholding any portion of the information (see § 0.459). This response shall be served on the party seeking to inspect the records. The requester may submit a reply within ten business days unless a different period is specified by the custodian of records. The reply shall be served on all parties that filed a response. In the event that a submitter fails to respond within the time specified, the submitter will be considered to have no objection to disclosure of the information.

**Note to paragraph (d)(3):** Under the ex parte rules, § 1.1206(a)(7) of this chapter, a proceeding involving a FOIA request is a permit-but-disclose proceeding, but is subject to the special service rules in this paragraph. We also note that while the FOIA request itself is a permit-but-disclose proceeding, a pleading in a FOIA proceeding may also constitute a presentation in another proceeding if it addresses the merits of that proceeding.

(e)(1) When the request is received by the Managing Director, it will be assigned to the Freedom of Information Act (FOIA) Control Office, where it will be date-stamped and assigned to the appropriate custodian of the records. A FOIA request is then considered properly received. This will occur no later than ten calendar days after the request is first received by the agency.

(2)(i) Except for the purpose of making a determination regarding expedited processing under paragraph (h) of this section, the time for processing a request for inspection of records will be tolled

(A) While the custodian of records seeks reasonable clarification of the request;

(B) Until clarification with the requester of issues regarding fee assessment occurs, including:

(1) While there is an unresolved fee waiver issue pending under § 0.470(e), unless the requester has provided a written statement agreeing to pay some or all of the fees pending the outcome of the waiver question;

(2) Following the denial of a fee waiver, unless the requester had provided a written statement agreeing to pay the fees if the fee waiver was denied;

(3) Where advance payment is required pursuant to § 0.469 and has not been made.

(ii) Only one Commission request for information shall be deemed to toll the time for processing a request for

inspection of records under § 0.461(e)(2)(i)(A). Such request must be made no later than ten calendar days after a request is properly received by the custodian of records under § 0.461(e)(1).

(3) The FOIA Control Office will send an acknowledgement to the requester notifying the requester of the control number assigned to the request, the due date of the response, and the telephone contact number (202-418-0440) to be used by the requester to obtain the status of the request. Requesters may also obtain the status of an FOIA request via e-mail at [foia@fcc.gov](mailto:foia@fcc.gov).

(4) Multiple FOIA requests by the same or different FOIA requesters may be consolidated for disposition. See also § 0.470(b)(2).

(f) Requests for inspection of records will be acted on as follows by the custodian of the records.

(1) If the Commission is prohibited from disclosing the records in question, the request for inspection will be denied with a statement setting forth the specific grounds for denial.

(2)(i) If records in the possession of the Commission are the property of another agency, the request will be referred to that agency and the person who submitted the request will be so advised, with the reasons for referral.

(ii) If it is determined that the FOIA request seeks only records of another agency or department, the FOIA requester will be so informed by the FOIA Control Officer and will be directed to the correct agency or department.

(3) If it is determined that the Commission does not have authority to withhold the records from public inspection, the request will be granted.

(4) If it is determined that the Commission does have authority to withhold the records from public inspection, the considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented, and the request will be granted, either conditionally or unconditionally, or denied.

(5) If there is a statutory basis for withholding part of a document from inspection, that part will be deleted and the remainder will be made available for inspection. Records disclosed in part shall be marked or annotated to show the amount of information deleted unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted and the exemption under which the deletion is made also shall be indicated on the record, if technically feasible.

(6) In locating and recovering records responsive to an FOIA request, only

those records within the Commission's possession and control as of the date of its receipt of the request shall be considered.

(g)(1) The custodian of the records will make every effort to act on the request within twenty business days after it is received and date-stamped by the FOIA Control Office.

However, if a request for clarification has been made under § 0.461(e)(2)(i)(A) or an issue is outstanding regarding the payment of fees for processing the FOIA request is pending under § 0.461(e)(2)(i)(B), the counting of time will start upon resolution of these requests. If it is not possible to locate the records and to determine whether they should be made available for inspection within twenty business days, the custodian may, in any of the following circumstances, extend the time for action by up to ten business days:

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

(ii) 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; or

(iii) It is necessary to consult with another agency having a substantial interest in the determination of the request, or among two or more components of the Commission having substantial subject matter interest therein.

(2) The custodian of the records will notify the requester in writing of any extension of time exercised pursuant to paragraph (g) of this section. The custodian of the records may also call the requester to extend the time provided a subsequent written confirmation is provided. If it is not possible to locate the records and make the determination within the extended period, the person or persons who made the request will be provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request, and asked to consent to an extension or further extension. If the requester agrees to an extension, the custodian of the records will confirm the agreement in a letter or e-mail specifying the length of the agreed-upon extension. If he or she does not agree to an extension, the request will be denied, on the grounds that the custodian has not been able to locate the

records and/or to make the determination within the period for a ruling mandated by the Freedom of Information Act, 5 U.S.C. 552. In that event, the custodian will continue to search for and/or assess the records and will advise the person who made the request of further developments; but that person may file an application for review by the Commission. When action is taken by the custodian of the records, written notice of the action will be given. Records will be made available with the written notice of action or as soon thereafter as is feasible.

(3) If the custodian of the records grants a request for inspection of records submitted to the Commission in confidence under § 0.457(d), § 0.459, or some other Commission rule or order, the custodian of the records will give the submitter written notice of the decision and of the submitter's right to seek review pursuant to § 0.461(i).

(h)(1) Requesters who seek expedited processing of FOIA requests shall submit such requests, along with their FOIA requests, to the Managing Director, as described in § 0.461(d). If the request is enclosed in an envelope, the envelope shall be marked "Request for Expedited Proceeding—FOIA Request." An original and two copies of the request for expedition shall be submitted, but only one copy is necessary if submitted by e-mail or by the Internet. When the request is received by the Managing Director, it, and the accompanying FOIA request, will be assigned to the FOIA Control Office, where it will be date-stamped and assigned to the custodian of records.

(2) Expedited processing shall be granted to a requester demonstrating a compelling need that is certified by the requester to be true and correct to the best of his or her knowledge and belief.

(3) For purposes of this section, *compelling need* means—

(i) That failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(4)(i) Notice of the determination whether to grant expedited processing shall be provided to the requester by the custodian of records within ten calendar days after receipt of the request by the FOIA Control Office. Once the determination has been made to grant expedited processing, the custodian



shall process the FOIA request as soon as practicable.

(ii) If a request for expedited processing is denied, the person seeking expedited processing may file an application for review within five business days after the date of the written denial. The application for review and the envelope containing it (if any) shall be captioned "Review of FOIA Expedited Proceeding Request." The application for review shall be delivered or mailed to the General Counsel. (For general procedures relating to applications for review, see § 1.115 of this chapter.) The Commission shall act expeditiously on the application for review, and shall notify the custodian of records and the requester of the disposition of such an application for review.

(i)(1) If a request for inspection of records submitted to the Commission in confidence under § 0.457(d), § 0.459, or another Commission rule or order is granted in whole or in part, an application for review may be filed by the person who submitted the records to the Commission, by a third party owner of the records or by a person with a personal privacy interest in the records, or by the person who filed the request for inspection of records within the ten business days after the date of the written ruling. The application for review and the envelope containing it (if any) shall be captioned "Review of Freedom of Information Action." The application for review shall be filed within ten business days after the date of the written ruling, shall be delivered or mailed to the General Counsel, and shall be served on the person who filed the request for inspection of records and any other parties to the proceeding. The person who filed the request for inspection of records may respond to the application for review within ten business days after it is filed.

(2) The first day to be counted in computing the time period for filing the application for review is the day after the date of the written ruling. If an application for review is not filed within this period, the records will be produced for inspection.

(3) If an application for review is denied, the person filing the application for review will be notified in writing and advised of his or her rights.

(4) If an application for review filed by the person who submitted, owns, or has a personal privacy interest in the records to the Commission is denied, or if the records are made available on review which were not initially made available, the person will be afforded ten business days from the date of the written ruling in which to move for a

judicial stay of the Commission's action. The first day to be counted in computing the time period for seeking a judicial stay is the day after the date of the written ruling. If a motion for stay is not made within this period, the records will be produced for inspection.

(j) Except as provided in paragraph (i) of this section, an application for review of an initial action on a request for inspection of records, a fee determination (see § 0.467 through § 0.470), or a fee reduction or waiver decision (see § 0.470(e)) may be filed only by the person who made the request. The application shall be filed within 30 calendar days after the date of the written ruling by the custodian of records. The application for review and the envelope (if any) shall be captioned, "Review of Freedom of Information Action." The application shall be delivered or mailed to the General Counsel. If the proceeding involves records subject to confidential treatment under § 0.457 or § 0.459, or involves a person with an interest as described in § 0.461(i), the application for review shall be served on such persons. That person may file a response within ten business days after the application for review is filed. If the records are made available for review, the person who submitted them to the Commission will be afforded ten business days after the date of the written ruling to seek a judicial stay. See paragraph (i) of this section. The first day to be counted in computing the time period for filing the application for review or seeking a judicial stay is the day after the date of the written ruling.

**Note to paragraphs (i) and (j):** The General Counsel may review applications for review with the custodian of records and attempt to informally resolve outstanding issues with the consent of the requester. For general procedures relating to applications for review, see § 1.115 of this chapter.

(k)(1)(i) The Commission will make every effort to act on an application for review of an action on a request for inspection of records within twenty business days after it is filed. In the following circumstances and to the extent time has not been extended under paragraphs (g)(1)(i), (ii), or (iii) of § 0.461(g) of this section, the Commission may extend the time for acting on the application for review up to ten business days. (The total period of extensions taken under this paragraph and under paragraph (g) of this section without the consent of the person who submitted the request shall not exceed ten business days.):

(A) It is necessary to search for and collect the requested records from field facilities or other establishments that are

separate from the office processing the request;

(B) 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; or

(C) It is necessary to consult with another agency having a substantial interest in the determination of the request or among two or more components of the Commission having substantial subject matter interest therein.

(ii) If these circumstances are not present, the person who made the request may be asked to consent to an extension or further extension. If the requester or person who made the request agrees to an extension, the General Counsel will confirm the agreement in a letter specifying the length of the agreed-upon extension. If the requestor or person who made the request does not agree to an extension, the Commission will continue to search for and/or assess the records and will advise the person who made the request of further developments; but that person may file a complaint in an appropriate United States district court.

(2) The Commission may at its discretion or upon request consolidate for consideration related applications for review filed under § 0.461(i) or § 0.461(j).

(l)(1) Subject to the application for review and judicial stay provisions of paragraphs (i) and (j) of this section, if the request is granted, the records will be produced for inspection at the earliest possible time.

(2) If a request for inspection of records becomes the subject of an action for judicial review before the custodian of records has acted on the request, or before the Commission has acted on an application for review, the Commission may continue to consider the request for production of records.

(m) Staff orders and letters ruling on requests for inspection are signed by the official (or officials) who give final approval of their contents. Decisions of the Commission ruling on applications for review will set forth the names of the Commissioners participating in the decision.

(n) Records shall be inspected within seven days after notice is given that they have been located and are available for inspection. After that period, they will be returned to storage, and additional charges may be imposed for again producing them.

**§ 0.463 Disclosure of Commission records and information in legal proceedings in which the Commission is a non-party.**

(a) This section sets forth procedures to be followed with respect to the production or disclosure of any material within the custody and control of the Commission, any information relating to such material, or any information acquired by any person while employed by the Commission as part of the person's official duties or because of the person's official status.

(b) In the event that a demand is made by a court or other competent authority outside the Commission for the production of records or testimony (e.g., a subpoena, order, or other demand), the General Counsel shall promptly be advised of such demand, the nature of the records or testimony sought, and all other relevant facts and circumstances. The General Counsel, in consultation with the Managing Director, will thereupon issue such instructions as he or she may deem advisable consistent with this subpart.

(c) A party in a court or administrative legal proceeding in which the Commission is a non-party who wishes to obtain records or testimony from the Commission shall submit a written request to the General Counsel. Such request must be accompanied by a statement setting forth the nature of the proceeding (including any relevant supporting documentation, e.g., a copy of the Complaint), the relevance of the records or testimony to the proceeding (including a proffer concerning the anticipated scope and duration of the testimony), a showing that other evidence reasonably suited to the requester's needs is not available from any other source (including a request submitted pursuant to § 0.460 or § 0.461 of the Commission's rules), and any other information that may be relevant to the Commission's consideration of the request for records or testimony. The purpose of the foregoing requirements is to assist the General Counsel in making an informed decision regarding whether the production of records or the testimony should be authorized.

(d) In deciding whether to authorize the release of records or to permit the testimony of present or former Commission personnel, the General Counsel, in consultation with the Managing Director, shall consider the following factors:

(1) Whether the request or demand would involve the Commission in issues or controversies unrelated to the Commission's mission;

(2) Whether the request or demand is unduly burdensome;

(3) Whether the time and money of the Commission and/or the United States would be used for private purposes;

(4) The extent to which the time of employees for conducting official business would be compromised;

(5) Whether the public might misconstrue variances between personal opinions of employees and Commission policy;

(6) Whether the request or demand demonstrates that the records or testimony sought are relevant and material to the underlying proceeding, unavailable from other sources, and whether the request is reasonable in its scope;

(7) Whether, if the request or demand were granted, the number of similar requests would have a cumulative effect on the expenditure of Commission resources;

(8) Whether the requestor has agreed to pay search and review fees as set forth in § 0.467 of this subpart;

(9) Whether disclosure of the records or the testimony sought would otherwise be inappropriate under the circumstances; and

(10) Any other factor that is appropriate.

(e) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which any of the following factors exist:

(1) Disclosure of the records or the testimony would violate a statute, Executive Order, rule, or regulation;

(2) The integrity of the administrative and deliberative processes of the Commission would be compromised;

(3) Disclosure of the records or the testimony would not be appropriate under the rules of procedure governing the case or matter in which the demand arose;

(4) Disclosure of the records, including release *in camera*, or the testimony, is not appropriate or required under the relevant substantive law concerning privilege;

(5) Disclosure of the records, except when *in camera* and necessary to assert a claim of privilege, or of the testimony, would reveal information properly classified or other matters exempt from unrestricted disclosure; or

(6) Disclosure of the records or the testimony could interfere with ongoing Commission enforcement proceedings or other legal or administrative proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, or disclose trade secrets or similarly confidential commercial or financial information.

(f) The General Counsel, following consultation with the Managing Director and any relevant Commission Bureau or Office, is authorized to approve non-privileged testimony by a present or former employee of the Commission or the production of non-privileged records in response to a valid demand issued by competent legal authority, or a request for records or testimony received under this section, and to assert governmental privileges on behalf of the Commission in litigation that may be associated with any such demand or request.

(g) Any employee or former employee of the Commission who receives a demand for records of the Commission or testimony regarding the records or activities of the Commission shall promptly notify the General Counsel so that the General Counsel may take appropriate steps to protect the Commission's rights.

(Secs. 4(i), 303(r), Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r); 5 U.S.C. 301; 47 CFR 0.231(d))

**§ 0.465 Request for copies of materials which are available, or made available, for public inspection.**

(a) The Commission awards a contract to a commercial duplication firm to make copies of Commission records and offer them for sale to the public. In addition to the charge for copying, the contractor may charge a search fee for locating and retrieving the requested documents from the Commission's files.

**Note to paragraph (a):** The name, address, telephone number, and schedule of fees for the current copy contractor are published at the time of contract award of renewal in a public notice and periodically thereafter. Current information is available at <http://www.fcc.gov/foia> and <http://www.fcc.gov/cgb>. Questions regarding this information should be directed to the Reference Information Center of the Consumer and Governmental Affairs Bureau at 202-418-0270.

(b) Audio or video recordings or transcripts of Commission proceedings are available to the public through the Commission's current copy contractor. In some cases, only some of these formats may be available.

(c)(1) Contractual arrangements which have been entered into with commercial firms, as described in this section, do not in any way limit the right of the public to inspect Commission records or to retrieve whatever information may be desired. Coin-operated and debit card copy machines are available for use by the public.

(2) The Commission has reserved the right to make copies of its records for its

own use or for the use of other agencies of the U.S. Government. When it serves the regulatory or financial interests of the U.S. Government, the Commission will make and furnish copies of its records free of charge. In other circumstances, however, if it should be necessary for the Commission to make and furnish copies of its records for the use of others, the fee for this service shall be ten cents (\$0.10) per page or \$5 per computer disk in addition to charges for staff time as provided in § 0.467. For copies prepared with other media, such as computer tapes, microfiche, videotape, the charge will be the actual direct cost including operator time. Requests for copying should be accompanied by a statement specifying the maximum copying fee the person making the request is prepared to pay. If the Commission estimates that copying charges are likely to exceed the greater of \$25 or the amount which the requester has indicated that he/she is prepared to pay, then it shall notify the requester of the estimated amount of fees. Such a notice shall offer the requester the opportunity to confer with Commission personnel with the object of revising or clarifying the request.

**Note to paragraph (c)(2):** The criterion considered in acting on a waiver request is whether "waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. 552(a)(4)(A). A request for a waiver or reduction of fees will be decided by the General Counsel as set forth in § 0.470(e).

(3) *Certified Documents.* Copies of documents which are available or made available, for inspection under § 0.451 through § 0.465, will be prepared and certified, under seal, by the Secretary or his or her designee. Requests shall be in writing, specifying the exact documents, the number of copies desired, and the date on which they will be required. The request shall allow a reasonable time for the preparation and certification of copies. The fee for preparing copies shall be the same as that charged by the Commission as described in § 0.465(c)(2). The fee for certification shall be \$10 for each document.

(d)(1) Computer maintained databases produced by the Commission and available to the public may be obtained from the FCC's Web site at <http://www.fcc.gov> or if unavailable on the Commission's Web site, from the copy contractor.

**Note to paragraph (d)(1):** The Commission awards a contract to provide the public with access to FCC databases from the copy contractor. See note to paragraph (a) of this section.

(2) Copies of computer generated data stored as paper printouts or electronic media and available to the public may also be obtained from the Commission's copy contractor (see paragraph (a) of this section).

(3) Copies of computer source programs and associated documentation produced by the Commission and available to the public may be obtained from the Office of the Managing Director.

(e) This section does not apply to records available on the Commission's Web site, <http://www.fcc.gov>, or printed publications which may be purchased from the Superintendent of Documents or private firms (see § 0.411 through § 0.420), nor does it apply to application forms or information bulletins, which are prepared for the use and information of the public and are available upon request (see § 0.421 and § 0.423) or on the Commission's Web site, <http://www.fcc.gov/formpage.html>.

(f) Anyone requesting copies of documents pursuant to this section may either come in person to the Commission (see § 0.461) or request that the copy contractor fulfill the request. If a request goes directly to the contractor, the requester will be charged by the contractor pursuant to the price list set forth in the latest contract.

#### § 0.466 Definitions.

(a) For the purpose of § 0.467 and § 0.468, the following definitions shall apply:

(1) The term *direct costs* means those expenditures which the Commission actually incurs in searching for and duplicating (and in case of commercial requesters, reviewing) documents to respond to a FOIA request. Direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus twenty 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.

(2) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material contained within documents. Such activity should be distinguished, however, from "review" of material in order to determine whether the material is exempt from disclosure (see paragraph (a)(3) of this section).

(3) The term *review* refers to the process of examining documents located in response to a commercial use request (see paragraph (a)(4) of this section) to determine whether any portion of a

document located is exempt from disclosure. It also includes processing any documents for disclosure, e.g., performing such functions that are necessary to excise them or otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of FOIA exemptions.

(4) The term *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 interests of the requester. In determining whether a requester properly falls within this category, the Commission shall determine the use to which a requester will put the documents requested. Where the Commission has reasonable cause to question the use to which a requester will put the documents sought, or where that use is not clear from the request itself, the Commission shall seek additional clarification before assigning the request to a specific category. The dissemination of records by a representation of the news media (see § 0.466(a)(7)) shall not be considered to be for a commercial use.

(5) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of professional education and an institution of vocational education, which operates a program or programs of scholarly research.

(6) The term *non-commercial scientific institution* refers to an institution that is not operated on a commercial basis as that term is referenced in paragraph (a)(4) of this section, 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.

(7) The term *representative of the news media* refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term *news* means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase or subscription by, or free distribution to, the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example,

the adoption of electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, 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 such a determination. See 5 U.S.C. 552(a)(4)(A)(ii).

(8) The term *all other requester* refers to any person not within the definitions in paragraphs (a)(4) through (a)(7) of this paragraph.

(b) [Reserved]

#### **§ 0.467 Search and review fees.**

(a)(1) Subject to the provisions of this section, an hourly fee shall be charged for recovery of the full, allowable direct costs of searching for and reviewing records requested under § 0.460 or § 0.461, unless such fees are reduced or waived pursuant to § 0.470. The fee is based on the pay grade level of the FCC's employee(s) who conduct(s) the search or review, or the actual hourly rate of FCC contractors or other non-FCC personnel who conduct a search.

**Note to paragraph (a)(1):** The fees for FCC employees will be modified periodically to correspond with modifications in the rate of pay approved by Congress and any such modifications will be announced by public notice and will be posted on the Commission's Web site, <http://www.fcc.gov/foia/#feeschedule>.

(2) The fees specified in paragraph (a)(1) of this section are computed at Step 5 of each grade level based on the General Schedule and include twenty percent for personnel benefits. Search and review fees will be assessed in ¼ hour increments.

(b) Search fees may be assessed for time spent searching, even if the Commission fails to locate responsive records or if any records located are determined to be exempt from disclosure.

(c) The Commission shall charge only for the initial review, *i.e.*, the review undertaken initially when the Commission analyzes the applicability of a specific exemption to a particular record. The Commission shall not charge for review at the appeal level of an exemption already applied. However, 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 of such a subsequent review, under these circumstances, are properly assessable.

(d) The fee charged will not exceed an amount based on the time typically required to locate records of the kind requested.

(e)(1) If the Commission estimates that search charges are likely to exceed the greater of \$25 or the amount which the requester indicated he/she is prepared to pay, then it shall notify the requester of the estimated amount of fees. Such a notice shall offer the requester the opportunity to confer with Commission personnel with the object of revising or clarifying the request. See § 0.465(c)(2) and § 470(d).

(2) The time for processing a request for inspection shall be tolled while conferring with the requester about his or her willingness to pay the fees required to process the request. See § 0.461(e).

(f) When the search has been completed, the custodian of the records will give notice of the charges incurred to the person who made the request.

(g) The fee shall be paid to the Financial Management Division, Office of Managing Director, or as otherwise directed by the Commission.

(h) Records shall be inspected within seven days after notice is given that they have been located and are available for inspection. See § 0.461(n). After that period, they will be returned to storage, and additional charges may be imposed for again producing them.

#### **§ 0.468 Interest.**

Interest shall be charged those requesters who fail to pay the fees charged. The agency will begin assessing interest charges on the amount billed starting on the 31st day following the day on which the billing was sent. The date on which the payment is received by the agency will determine whether and how much interest is due. The interest shall be set at the rate prescribed in 31 U.S.C. 3717.

#### **§ 0.469 Advance payments.**

(a) The Commission may not require advance payment of estimated FOIA fees except as provided in paragraph (b) or where the Commission estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00 and the requester has no history of payment. Where allowable charges are likely to exceed \$250.00 and the requester has a history of prompt payment of FOIA fees the Commission may notify the requester of the estimated cost and obtain satisfactory assurance of full

payment. Notification that fees may exceed \$250.00 is not, however, a prerequisite for collecting fees above that amount.

(b) Where 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), the Commission may require the requester to pay the full amount owed plus any applicable interest as provided in § 0.468, and to make an advance payment of the full amount of the estimated fee before the Commission begins to process a new request or a pending request from that requester.

(c) When the Commission acts under paragraph (a) of this section, the administrative time limits prescribed in §§ 0.461(g) and (k) (*i.e.*, twenty business days from receipt of initial requests and twenty business days from receipt of appeals from initial denials, plus permissible extensions of these time limits (see § 0.461(g)(1)(i) through (iii) and § 0.461(k)(1)(i) through (iii)) will begin only after the agency has received the fee payments described in this section. See § 0.461(e)(2)(ii) and § 0.467(e)(2).

#### **§ 0.470 Assessment of fees.**

(a)(1) *Commercial use requesters.* (i) When the Commission receives a request for documents for commercial use, it will assess charges that recover the full direct cost of searching for, reviewing and duplicating the records sought pursuant to § 0.466 and § 0.467, above.

(ii) Commercial use requesters shall not be assessed search fees if the Commission fails to comply with the time limits under § 0.461(g)(1), if no unusual or exceptional circumstances (§ 0.461(g)(1)(i) through (iii)) apply to the processing of the request.

(2) *Educational and non-commercial scientific institution requesters and requesters who are representatives of the news media.* (i) The Commission shall provide documents to requesters in these categories for the cost of reproduction only, pursuant to § 0.465 above, excluding reproduction charges for the first 100 pages, provided however, that requesters who are representatives of the news media shall be entitled to a reduced assessment of charges only when the request is for the purpose of distributing information.

(ii) Educational requesters or requesters who are representatives of the news media shall not be assessed fees for the cost of reproduction if the Commission fails to comply with the time limits under § 0.461(g)(1), if no unusual or exceptional circumstances

(§ 0.461(g)(1)(i) through (iii)) apply to the processing of the request.

(3) *All other requesters.* (i) The Commission shall charge requesters who do not fit into any of the categories above fees which cover the full, reasonable direct cost of searching for and reproducing records that are responsive to the request, pursuant to § 0.465 and § 0.467, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

(ii) All other requesters shall not be assessed search fees if the Commission fails to comply with the time limits under § 0.461(g)(1), if no unusual or exceptional circumstances (§ 0.461(g)(1)(i) through (iii)) apply to the processing of the request.

(b)(1) The 100 page restriction on assessment of reproduction fees in paragraphs (a)(2) and (a)(3) of this section refers to 100 paper copies of a standard size, which will normally be "8½ x 11" or "11 x 14," or microfiche containing the equivalent of 100 pages or 100 pages of computer printout.

(2) When the agency reasonably believes that a requester or group of requesters is attempting to segregate a request into a series of separate individual requests for the purpose of evading the assessment of fees, the agency will aggregate any such requests and assess charges accordingly.

(c) When a requester believes he or she is entitled to a reduced fee assessment pursuant to paragraphs (a)(2) and (a)(3) of this section, or a waiver pursuant to paragraph (e) of this section, the requester must include, in his or her original FOIA request, a statement explaining with specificity, the reasons demonstrating that he or she qualifies for a reduced fee or a fee waiver. Included in this statement should be a certification that the information will not be used to further the commercial interests of the requester.

**Note to paragraph (c):** Anyone requesting a reduced fee or a fee waiver must submit the request directly to the Commission and not to the contractor who will provide documents only at the contract price.

(d) If the Commission reasonably believes that a commercial interest exists, based on the information provided pursuant to paragraph (c) of this section, the requester shall be so notified and given an additional ten business days to provide further information to justify receiving a reduced fee. See § 0.467(e)(2). During this time period, the materials will be available for inspection to the extent that the time period exceeds the time period for responding to FOIA requests, as appropriate.

(e)(1) Copying, search and review charges shall be waived or reduced by the General Counsel when "disclosure of the 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." 5 U.S.C. 552(a)(4)(A)(iii). Simply repeating the fee waiver language of section 552(a)(4)(A)(iii) is not a sufficient basis to obtain a fee waiver.

(2) The criteria used to determine whether disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government include:

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

(ii) Whether the disclosure is likely to contribute to an understanding of government operations or activities; and

(iii) Whether disclosure of the requested information will contribute to public understanding as opposed to the individual understanding of the requester or a narrow segment of interested persons.

(3) The criteria used to determine whether disclosure is primarily in the commercial interest of the requester include:

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

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

(4) This request for fee reduction or waiver must accompany the initial request for records and will be decided under the same procedures used for record requests.

(5) If no fees or de minimis fees would result from processing a FOIA request and a fee waiver or reduction has been sought, the General Counsel will not reach a determination on the waiver or reduction request.

(f) Whenever the total fee calculated under this section is \$15 or less, no fee will be charged.

(g) Review of initial fee determinations under § 0.467 through § 0.470 and initial fee reduction or waiver determinations under § 0.470(e) may be sought under § 0.461(j).

[FR Doc. E9-7033 Filed 3-27-09; 8:45 am]

BILLING CODE 6712-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 225

#### Railroad Accidents/Incidents: Reports Classification, and Investigations

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation.

**ACTION:** Notice of interpretation.

**SUMMARY:** FRA is issuing this notice of interpretation to inform interested parties of its application and enforcement of the harassment or intimidation provisions contained in 49 CFR part 225, specifically relating to situations in which a supervisor or other railroad official accompanies an injured employee into an examination room. This notice of interpretation informs the regulated community as to when such behavior constitutes harassment or intimidation calculated to discourage or prevent the reporting of an accident, incident, injury or illness. This document is not intended to address or impact statutory provisions related to providing "prompt medical attention," as enforcement of those provisions fall within the jurisdiction of the U.S. Department of Labor.

**FOR FURTHER INFORMATION CONTACT:** Douglas H. Taylor, Staff Director, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS-11, Mail Stop 25, Washington, DC 20590 (telephone 202-493-6255); or Zeb Schorr, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., RCC-11, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6072).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Section 225.33(a) of Title 49 of the Code of Federal Regulations requires each railroad to "adopt and comply with a written Internal Control Plan" addressing the railroad's policies and procedures regarding accident/incident reporting. This section further requires that such Internal Control Plans include, at a minimum, a "policy statement declaring the railroad's commitment \* \* \* to the principle, in absolute terms, that harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted or tolerated \* \* \*." The FRA Guide for Preparing Accident/Incident Reports also notes that "many railroad