| FEDERAL COMMUNICATIONS COMMISSION<br>Washington, D.C. 20554 | Title | |
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| | Freedom of Information Act (FOIA) Requests | |
| **FCC DIRECTIVE** | **Directive Number** | **Effective Date** |
| | FCCINST 1179.2 | April 16, 2012 |

1. PURPOSE: To implement standard internal procedures for use within the Federal Communications Commission (FCC or Commission) in receiving, processing, and reporting on Freedom of Information Act (FOIA) requests. This directive supplements procedures in the FCC Rules and Regulations 47 C.F.R. §§ 0.460 and 0.461 and does not in any way alter the rights of the public to file FOIA requests.

2. CANCELLATION: This instruction supersedes FCCINST 1179.1 dated December 2006.

3. BACKGROUND: The FOIA, 5 U.S.C. § 552, as amended, makes many federal records available for public inspection. It ensures public access to Federal records in a reasonable, timely fashion.

   The FOIA was most recently amended in 2007 by the Openness Promotes Effectiveness in our National Government Act, known as the OPEN Government Act. It made several procedural amendments to the FOIA, including revising the definition of news media requesters; specifying the manner of computing and tolling the time limits for responding to requests; requiring tracking of FOIA requests by agencies; amending the annual agency reporting requirements; amending the way agency records maintained by government contractors are treated under the FOIA; codifying the Chief FOIA Officer and FOIA public liaison position; setting forth new marking requirements for redactions of documents; and creating a new Office of Government Information Services (OGIS) as part of the National Archives and Records Administration (NARA).

4. RESPONSIBILITIES:

   A. The Chairman of the FCC delegated responsibility to the Office of General Counsel (OGC) to serve as the Chief FOIA Officer for the Commission. As Chief FOIA Officer, the General Counsel is responsible for overseeing and monitoring the efficiency and effectiveness of the FOIA program.

   B. The Office of Managing Director (OMD), Performance Evaluation and Records Management (PERM) is responsible for the administration and day-to-day management of the FOIA program. PERM serves as the FOIA Public Liaison and the FOIA Requester Service Center.

C. General Counsel:

(1) Subject to the authority of the Chairman, the General Counsel serves as the Chief FOIA Officer for the Commission and is responsible for the Commission's efficient and appropriate compliance with the FOIA.

(2) Monitors FOIA implementation throughout the Commission.

(3) Reviews and reports, through the Chairman, on the Commission's performance implementing FOIA.

(4) Prepares the annual Chief FOIA Officer Report.

(5) Facilitates public understanding of the purpose of the FOIA with respect to the FCC.

(6) Issues FOIA-related policy documents.

(7) Serves as the FOIA coordinator for the Chairman and Commissioners.

(8) Provides consultation on FOIA issues to B/Os and PERM when requested.

(9) Consults with PERM when requested with respect to the category of the requester for fee assessment purposes. If there is a disagreement, OGC will make the final determination on the category of the requester.

(10) Acts on requests for waiver of search, copying or review fees.

(11) Prepares recommendations to the Commission on the disposition of applications for review (FOIA appeals) and represents the Commission in court actions involving FOIA matters.

D. Office of Managing Director/Performance Evaluation and Records Management:

(1) Manages the FCC's FOIA program and the FOIA Requester Service Center.

(2) Serves as the central control and contact point on all requests for records received pursuant to the FOIA, acknowledging receipt of all incoming FOIAs, processing and distributing initial FOIA requests to appropriate B/O for response, monitoring the B/O's progress in responding to requests, preparing and submitting all routine reports on the disposition of requests, and notifying Financial Operations (FO) of the amount to be billed to the requester.

(3) Where multiple B/Os are likely to have responsive records, assigns lead B/O to prepare the initial response with the assistance of other B/Os.

(4) Serves as the FOIA Public Liaison. Responds to public inquiries concerning the status of FOIA requests and addresses concerns about the processing of requests. Resolves disputes between the public and the Bureau/Office processing the request to the extent possible.

(5) Leads efforts to consult with or refer a FOIA request to other government agencies and Departments when necessary, as described in section 6, *infra*.

(6) Ensures customer-friendly responses to FOIA requests and FOIA related inquiries.

(7) Reviews monthly report of delinquent accounts to ensure that requesters who have an outstanding financial obligation to the Commission do not obtain FOIA services until the debt is satisfied.

(8) In consultation with the OGC, prepares the required annual report for submittal to the Department of Justice.

(9) Maintains B/O records of FOIA requests, actions, and responses and disposes of these records in accordance with the provisions of the General Records Schedule 14 which pertains to FOIA records.

(10) Establishes and maintains a FOIA home page on the FCC Website to explain the scope of the FCC's FOIA program to provide requesters with the option of submitting FOIA requests electronically. At a minimum, the FCC FOIA home page shall contain general information about the FOIA program, maintain an electronic reading room containing frequently requested information, FCC Annual FOIA Reports, a listing of the principal FOIA contacts at the FCC including the FOIA Liaison, and a FOIA (EFOIA) request form.

(11) Establishes and maintains a FOIA home page on the FCC Intranet to expand the availability of FOIA documents to FCC staff. At a minimum the FCC FOIA Intranet page shall contain FCC B/O contact names and information, weekly FOIA reports, copies of incoming FOIA requests, fee waiver letters, Applications for Review (AFRs), decisions on AFRs, and copies of initial FOIA responses.

(12) Manages the Privacy Act program. The Privacy Act of 1974, as amended (5 U.S.C. § 552a) is a companion to the FOIA. The Privacy Act and the FOIA have different procedures and exemptions. Employees who are involved with processing public requests should become familiar with procedures under both Acts. For additional information on the FCC's Privacy Act program, see 47 C.F.R. §§ 0.551-0.561 and FCCINST Directive 1113 (the Privacy Act Manual). For a listing of the Commission's systems of records, see http://intranet.fcc.gov/omd/perm/privacyact/pra-systemrecord.html.

(13) Pursuant to the 2007 OPEN Government Act, designates a FOIA Public Liaison, "who shall assist in the resolution of any disputes"; assign tracking numbers to FOIA requests that take longer than 10 days; provide systems determining the status of a request; and make the raw statistical data used in its reports available electronically upon request.

E. Bureau/Office Chiefs:

(1) Designate an internal coordinator as point of contact to manage B/O FOIA actions. Encourage coordinators and others routinely involved with FOIA to attend FOIA training at least once a year from a recognized source of FOIA expertise (preferably the Department of Justice FOIA training).

(2) Review response to FOIA requests, exercise final approval authority, and sign all FOIA correspondence as the responsible official. This responsibility may be delegated as appropriate.

F. Bureau/Office FOIA Coordinators:

(1) Manage requests within B/O to ensure response within 20 business days or within an extension as permitted by law. B/O will make every effort to act on the request within 20 business days. B/O may extend that time by an additional 10 business days under certain circumstances (see 47 C.F.R. § 0.461 and section 5, Procedures below) or by agreement with the FOIA requester.

(2) Inform requesters of any necessary extensions.

(3) Notify PERM when a new response date has been extended or negotiated. Forward a copy of the letter of extensions and requests for additional time to PERM.

(4) Notify PERM when a request has been withdrawn.

(5) Review and act on requests for expedited processing of FOIA requests in accordance with 47 C.F.R. § 0.461(h). 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/her knowledge and belief. Notice of the determination as to whether to grant expedited processing shall be provided to the requester within 10 calendar days. The B/O that grants a request for expedited processing is expected to process the request as soon as practicable.

(6) Determine applicable fees and receive requester's agreement to pay fees prior to fulfilling the request. Document all determinations that lead to a decision to charge or not to charge a FOIA requester. This can be done either by including in the written response the assessed charges, if any. Notify requesters by letter that they will be receiving under separate cover a bill for payment and instructions for payment.

(7) Mail response to the requester. Forward an electronic copy of the FOIA response letter to PERM.

(8) Keeps records documenting all responses (including records released or redacted and released) and fee determinations in accordance with the provision of the General Records Schedule 14 which pertains to FOIA records.

G. Administrative Services Center (ASC):

Immediately delivers all mail identified as a FOIA request to PERM.

5. PROCEDURES:

A. General:

As codified in 5 U.S.C. § 552(a)(6)(A) and (B), the FOIA requires a determination of "whether to comply" with a FOIA request within 20 business days. This 20 day period begins when PERM date stamps and logs the FOIA request into the database. The FCC may take an extension of 10 or more business days in "unusual circumstances" by providing the requester a written notice. Use of the additional 10 business days may be claimed for the following reasons:

(1) 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;

(2) 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

(3) 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.

If it is not possible to locate the records and make the determination within the extended period, as described in section 0.461(g) of the Commission's rules, the requester will be provided an opportunity to limit the scope of the request so that it may be processed within the extended time period, or an opportunity to arrange an alterative time frame for processing the request or a modified request, and asked to consent to an extension or further extension. Agreement of extensions should be documented in writing. If the requester does not agree to an extension, pursuant to section 0.461(g)(2) of the Commission's rules, 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 FOIA. In that event, the custodian will continue to search for and/or assess the records and will advise the requester of further developments; but the requester 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.

B. Receipt:

The ASC, or the receiving B/O, will deliver all letters identifiable as requests for the inspection of records or as FOIA requests to PERM. The request will be given a control number and date stamped by PERM in order to establish the Commission's date of a proper request.

PERM will ensure that the proper B/Os receive the FOIA request within eight working hours or less. The B/Os must establish sufficient safeguards to ensure compliance with the relevant response period.

C. Processing. Prior to forwarding a request to a B/O for response, PERM will:

(1) Determine the classification of a FOIA request on the basis of the interpretative guidelines issued by the Office of Management and Budget (codified in FCC rules at § 0.466) and/or through additional information obtained from the FOIA requester.

(2) Determine and note on the cover sheet the proper time code to be used for processing a FOIA request.

(3) Send a copy of requests for a waiver of review, search or copying fees (pursuant to 47 C.F.R. § 0.466 or 0.470(e)) to OGC.

(4) Scan non-electronic materials and mount the FOIA requests to the Commission's Intranet FOIA site on a daily basis.

(5) PERM shall forward a copy of any FOIA from major news media outlets to the Chief of the Office of Media Relations.

(6) Requests for expedited processing shall be forwarded to OGC.

D. Responding:

(1) Upon receipt, the B/O FOIA coordinator will:

(a) Determine if the FOIA request has been directed to the appropriate office. If is determined that the FOIA request has been misdirected, promptly return the request to PERM for appropriate handling rather than forwarding it to another B/O.

(b) If a request is not specific enough, either notify the requester in writing or by telephone requesting a more complete description of the material requested. Clarification obtained orally must be confirmed in writing (including by email exchange). During this period the request may be tolled. However, note that the OPEN Government Act limits when and how often agencies are allowed to toll the 20-day time period. Agencies are allowed to

toll under two circumstances: (1) one time to obtain information from the requester; and, (2) as many times as necessary to clarify fee-related issues with the requester. B/Os should make an effort to ask all non-fee related questions at one time, since they are not allowed to toll the clock for additional requests to the requesters. Note that in either circumstance, the Commission's receipt of the requesters' response ends the tolling period and the response clock resumes. Tolling decisions must be provided to the requester within 10 business days after a request is properly received by the custodian of records, and as noted only one such request may be made for non-fee related questions.

(c) Thoroughly search files and records for material requested. The cut off date for the search of records is the date the FOIA request is received, unless the requester specifies a date. See 47 C.F.R. § 0.461(f)(6). However, if a requester specifies an earlier or later date, it should be accommodated unless there are compelling reasons not to do so.

(d) When requested records have been removed to storage in a Federal Records Center (FRC) (including the Commission's off-site storage facility), use Form A-113, "Request for Recall of Records" to retrieve the records. Across the top print in block letters "FOIA Request" and notify the requester in the written response that the files have been requested and that she/he will be told when the records are retrieved from FRC.

(e) When records have been accessioned as permanent records to the National Archives, the FOIA requester should be advised in writing to contact the National Archives and Records Administration (NARA) for access. If all of the responsive records fall under this category, the request can be closed after such notification.

(f) Make a determination of whether the request for release is routinely available, *i.e.*, for material normally available for public inspection such as license files or other public files (47 C.F.R. §§ 0.453, 0.455). If the request is routine, notify requester in writing of three options for obtaining the requested material:

(i) material is available for inspection and may be reviewed in person at the Commission's offices in Washington, D.C. between 8:30 am and 5:30 pm;

(ii) copies can be obtained (at their expense) from the FCC's duplicating contractor; or

(iii) copies are available on the Commission's website.

(g) If the records are not routinely available for public inspection, determine whether any of the FOIA exemptions in section 6 of this instruction (see also 47 C.F.R. § 0.457(d)) apply. When redactions are made to a record being released, B/Os must indicate the amount of materials being redacted and indicate at the site of the redaction the FOIA exemption relied upon.

(h) If making an adverse determination, the B/O shall notify the requester of that determination and of his/her appeals rights. A requester has the right to administratively appeal any adverse determination, including for example: denials of records in full or in part; "no records" responses, denials of requests for fee waivers; fee estimates; and denials of request for expedited treatment.

(i) If records requested were generated outside the FCC and submitted under a request for confidentiality (47 C.F.R. § 0.459) or are deemed confidential (47 C.F.R. § 0.457), the B/O FOIA coordinator shall send a letter informing the original source of the document request with a copy to the party that submitted the FOIA request. The letter may be transmitted via e-mail if a functioning e-mail address of the original source is known. The letter shall include a full copy of the FOIA request and the name and address of the requester. In addition, the letter shall inform the original source of the sought-after records of its right to respond to the FOIA request within ten calendar days, explaining why any portions of these records are confidential commercial information that should be withheld in whole or in part pursuant to FOIA Exemption 4. The letter shall also indicate that the party that filed the FOIA request may file a reply within ten (10) business days of receipt of the response. In instances where there are many submitters involved, the notice may be either provided individually or by public notice. When a request for confidential treatment is denied, the person who submitted the records will have ten business days to seek review. If no request for confidentiality was submitted, the Commission assumes no obligation to consider the need of non-disclosure but, in unusual instances, may determine on its own motion that materials should be withheld from public inspection.

(j) If the records are the property of another agency, the request will be referred to that agency for a response and the requester will be so advised. If another Federal agency has an interest in the records located in response to a FOIA request, that agency will be consulted prior to issuing a response.

(k) Estimate search and review fees in accordance with the criteria established by 47 C.F.R. §§ 0.467 and 0.470. Factors to consider include time required, the grade of persons conducting the search and review and time needed to prepare responsive records. No fees will be assessed if the fees would be equal to or less than

$15.00. See 47 C.F.R. § 0.470(f) and section 6 below for more detailed information on fees. If the Commission estimates that charges are likely to exceed the greater of $25 or the amount which the requester indicated he or she is prepared to pay, then it shall notify the requester of the estimated amount of fees and provide the requester with the opportunity to revise or clarify the request. Initial FOIA letters will include a paragraph setting forth the applicable fees or the reason there are no fees for processing the request (see section E(1)(g) below). Note that the Commission's failure to comply with the statutory time limits may limit the Commission's collection of all applicable fees. If the Commission fails to meet the statutory or agreed-upon deadline, it cannot assess search fees from commercial requesters, or duplication fees from educational, noncommercial scientific institution, or representatives of the news media requesters.

(l) When sending an electronic distribution that includes personally identifiable information (PII), any PII shall be attached as an encrypted file, consistent with the FCC's "Cyber Security Policy" (July 2011).

(2) Granting or denying a request is done by the B/O that is the custodian of the records at issue based upon the provisions of the FOIA, FCC regulations, and precedents established by the courts and the FCC. A B/O may in its discretion determine who within the B/O shall issue the letter disposing of a FOIA request.

(3) The OGC will provide advice in any case when requested. However, the OGC must be advised when a FOIA request involves classified materials or materials that may potentially be candidates for derivative classification, or if the B/O Chief believes that the decision to grant or deny a request breaks new ground (establishes instances of a new or different precedent) or when the B/O Chief is uncertain of an issue's reasonable potential for reversal on appeal. In addition, the OGC and PERM must always be given prior notice of any proposed disclosure when it involves:

(a) Information gathered by monitoring radio communications and other materials covered by Section 705 of the Communications Act, 47 U.S.C § 705;

(b) Materials covered by a FOIA exemption; and

(c) Data possibly protected by the Privacy Act (see FCCINST 1113.1).

E. Reporting:

(1) The response letter should be prepared after a determination has been made. The response letter may be transmitted via e-mail if a functioning

e-mail address is known, with responsive records attached electronically. Any such electronic distribution shall ensure that sensitive information, particularly privacy data, is attached as an encrypted file, consistent with the FCC's "Cyber Security Policy." The response letter should contain the following elements and be provided consistent with this guidance:

(a) Include the FOIA control number; the nature of the request and the Commission's understanding of the request.

(b) Describe any tolled period, time extension and the reason for it (*e.g.*, needed to search records of multiple Bureaus), or whether the deadline has been missed.

(c) Identify records that are being released or if no responsive records have been located.

(d) State the cut-off date used.

(e) Describe the records or portions that are being withheld, whether in whole or in part, and the authority for the withholding, citing applicable exemption(s) and providing a clear explanation of the reasons the exemption(s) was invoked. Consider whether any reasonably segregable portion of the record may be released and explain the basis for this determination. Then, examine records or portions of records being withheld to determine if any discretionary releases may be made. Agencies are encouraged to make discretionary releases if there is no foreseeable harm that would result from the release, even if an exemption would apply to a record. Discretionary releases are probably most applicable for records withheld under exemption 5, but should be considered in all instances where records are withheld. However, Bureaus and Offices should be sure to consult with the OGC before making any discretionary releases.

(f) If records are being released but copies are not being provided, explain when and where records are available.

(g) Provide explanation of the FOIA fees being assessed. If no fees are being assessed, indicate why.

(h) Include procedures and time limits for appealing the denial to the OGC. Use the following or similar language: "If you believe this to be a denial of your request, you may file an application for review with the FCC's Office of General Counsel within 30 calendar days of the date of this letter. 47 C.F.R. §§ 0.461(j) and 1.115." If a request for confidential treatment is denied, cite 47 C.F.R. § 0.461(i) (10 days to seek review of denial of confidentiality request in context of an initial FOIA decision). If a decision grants in part and denies in part a FOIA request and a request for confidential treatment, the FOIA requester will get 30 calendar days to seek review, and the party whose request for

confidentiality was denied in whole or in part will get 10 business days to seek review.

(i) Include address, name, and title of persons responsible for denial.

(j) When sending an electronic distribution that includes personally identifiable information (PII), any PII shall be attached as an encrypted file, consistent with the FCC's "Cyber Security Policy" (July 2011).

(2) When the response is prepared and sent to the requester, forward a signed electronic copy of the final response letter to PERM.

(3) If the request involves materials filed with a request for confidential treatment, a copy of the letter disposing of the request will be sent to the party that originally provided the records. The letter may be transmitted via e-mail if a functioning e-mail address of the original source is known.

(4) If an initial FOIA decision determines that material submitted in confidence should be released to the requester, the disclosure may not occur unless the submitter agrees to disclosure or the time for an appeal by the submitting party (10 business days) has passed.

6. INTERAGENCY COORDINATION: In the course of processing records responsive to FOIA requests, it is not uncommon to locate records which either originated with another agency or which contain information that is of interest to another agency. The long-standing practice in such situations is to either *refer* the requested record to the originating agency or to *consult* with the other agency or component that has equity in the document to get its views on the sensitivity of the content of the document prior to making a disclosure determination. Typically, agencies *refer* records for direct handling to another agency when the records originated with that other agency. By contrast, when records originated with the Commission, but contain within them information of interest to another agency, the Commission should *consult* with that other agency prior to making a release determination.

A. Threshold Considerations:

(1) While the typical practice should be to refer records when they originated with another agency, agencies may jointly agree that the records can be handled as a consultation.

(2) Referrals may only be made to other Federal agencies that are subject to the FOIA. Thus, a referral should not be made to Congress, the courts, state governmental entities, private businesses, or individuals. However, as discussed below, the FCC may consult with such entities as necessary, but must then make a disclosure determination and respond itself concerning those documents.

(3) When the B/O FOIA Coordinators find that they routinely locate the same or similar types of documents or information that originated with another agency, or finds that it routinely receives for consultation or referral the same type of record or information from another agency, B/O FOIA coordinators should look for ways to collaborate to see if they can adopt standard processing procedures with regard to the documents or information that might reduce the number of referrals or consultations that need to be made.

B. Procedures for Making a Referral:

When records are located which originated with another agency, the records should ordinarily be referred to the originating agency for processing and direct response to the requester. The following steps should be taken when making a referral of documents to another agency, subject to the exceptions described below regarding coordinating a response.

(1) Identify records appropriate for referral to other agencies as soon as practicable during the course of processing a request.

(2) Prior to making the referral, review the records and include the FCC's disclosure recommendations in the referral memorandum in order to facilitate the processing of the referral by the receiving agency.

(3) Send the documents, with the accompanying memorandum containing the FCC's disclosure recommendations, to the originating agency or agencies as soon as practicable during the course of the processing.

(4) Include in the referral package the FOIA request number assigned by the FCC. That original FOIA request number should always accompany any communication concerning the referred documents. Also include a copy of the FOIA request.

(5) Provide the date the request giving rise to the referral was received by the FCC.

(6) Advise the FOIA requester that a referral of records has been made, provide the name of the agency to which the referral was directed, and include that agency's FOIA contact information.

(7) Maintain a copy of the records being referred and the cover memorandum accompanying the referral.

C. Procedures Upon Receipt of a Referral:

When the FCC receives a referral of documents from another agency, the following steps should be taken to ensure efficiency and accountability.

(1) Assign the FCC's FOIA tracking number to the referral so that it can be readily tracked.

(2) Send the FOIA requester an acknowledgment of receipt of the referral and identify the agency that made the referral, subject to the exceptions described below for coordinating a response.

(3) Include in the acknowledgement both the FCC's FOIA tracking number and the original FOIA request tracking number assigned by the agency making the referral so that the requester can readily link the referred records to his or her original request.

(4) Provide the FOIA requester with a telephone line or internet service that can be used to obtain information about the status of the referred records.

(5) Track the referral just as you would an incoming request and include it in the FCC's Annual FOIA Report.

(6) Always include the original request number from the referring agency as well as our own referral number in any correspondence with the requester regarding the referred documents.

(7) The referring agency should receive a copy of the response to the requester.

D. Exceptions to Standard Procedures for Making Referrals – Coordinating the Response:

(1) When the FCC locates in its files law enforcement records originating with a law enforcement agency or classified records originating with an agency that is a member of the Intelligence Community, the FCC shall respond to the requester itself, after coordinating with the law enforcement or Intelligence Community agency that originated the records unless the other agency prefers to respond.

(2) However, where the involvement of the originating agency is not publicly acknowledged, the standard referral procedures are not appropriate, and the Commission will coordinate with the agency which originated the documents and then make the response itself. This may be the case if, for example, the FCC locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, or if the Commission locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged. In such instances, disclosure of that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party or potentially could cause national security harms, and therefore shall not be disclosed.

E. Procedures for Coordinating a Response:

To avoid inadvertently invading an individual's personal privacy or inadvertently revealing protected national security information, requests involving unacknowledged law enforcement or national security records that originated with another agency should be coordinated with the originating agency before itself making a response to the requester according to the following steps. For documents involving Intelligence Community agencies, because the Commission might be unaware of the sensitivity of the documents at issue, it is important that no referral be made without first coordinating with the Intelligence Community agency involved.

(1) Upon identification of unacknowledged law enforcement or Intelligence Community records, contact the agency originating such records to inquire whether that agency's involvement in the matter can be publicly acknowledged without invading personal privacy or causing national security harms. Provide copies of the request and the requested records as necessary to facilitate this process.

(2) If the agency that originated the records advises that there are no privacy or national security harms at risk by virtue of their involvement, then the standard referral procedures outlined above can be followed. In those cases, the other agency will respond directly to the requester according to the standard referral process.

(3) Otherwise, the FCC should coordinate with the agency that originated the records to determine how the records should be handled under the FOIA.

(4) During the time the agency originally in receipt of the request is coordinating, the FCC shall respond to status inquiries made by the requester.

(5) The agency that originated the documents and whose views are being sought is responsible, upon request, for promptly providing updated status information to the agency originally in receipt of the request. That agency shall work proactively with the receiving agency to ensure that the processing of the request is conducted efficiently and that the requester is not disadvantaged as a result of the coordination process. Moreover, to preserve the privacy and law enforcement interests at stake, the originating agency should promptly provide its views on the records so that they can be readily incorporated into the receiving agency's response letter.

(6) The release determination for the records that are the subject of the coordination should be conveyed to the requester by the FCC.

F. Consultations:

(1) It is appropriate to consult with another agency or entity which holds an interest (sometimes referred to as "equities") in the documents that are the subject of a FOIA request. This most commonly arises when the Commission locates records in response to a request that originated with the Commission, but which contain within them information of interest to another agency or another component. In those situations, the Commission should consult with that other agency, or equity holder, to obtain its views prior to disclosure of the records.

(2) Consultations, rather than referrals, are also appropriate when the FCC locates records in its files that originated with an entity that is not itself subject to the FOIA. The FCC may consult with that outside entity as part of its process of making a disclosure determination.

G. Procedures for Making a Consultation:

When consulting with another agency to obtain its views on disclosure, the following steps should be taken.

(1) Utilize the most time-efficient mechanism in conducting the consultation. For example, in certain situations a phone call or e-mail to the agency whose views are being sought may be all that is required.

(2) For consultations requiring a more extensive review by the other agency, provide copies of the documents at issue, a copy of the request letter, and any other information that may assist the other agency in its analysis.

(3) Conduct consultations simultaneously, rather than sequentially, whenever possible, to ensure greater efficiency. When doing so, advise the receiving agencies of the other agencies that are also reviewing the documents.

(4) When providing updates to requesters on the status of their requests, include information concerning ongoing consultations. Ordinarily, with the same exceptions noted above in the section on coordinating responses, the identity of the entity which is being consulted can be provided to the requester.

H. Procedures Upon Receipt of a Consultation:

Whenever the FCC receives a consultation request from another agency, it should be mindful of the need to respond as promptly as practicable to the consultation to facilitate the other agency's ability to finalize its response to the request. To ensure greater accountability for the handling of consultations, the Department of Justice created a requirement that agencies include data in their Annual FOIA Reports each year regarding any consultations that they receive. Agencies must report in Section XII of their Annual FOIA Reports the number of consultations received, the number processed, and the number of consultations remaining

pending at the end of the fiscal year, including the dates the ten oldest pending consults were received and the number of days those ten oldest consultations have been pending.

Upon receipt of a consultation, agencies should take the following steps.

(1) Assign the consultation a tracking number to facilitate its handling and inclusion in the FCC Annual FOIA Report.

(2) Promptly provide the FCC's views on the disclosability of the contents of the records to the agency seeking the consultation. Utilize the most time-efficient method in doing so.

(3) Continuously assess the need and frequency of the consultations so that the FCC can identify ways to streamline or eliminate the need for certain consultations.

7. FEES: Federal agencies are obliged to safeguard the public fisc and should not provide search, review, and duplication services at reduced or no cost except under circumstances provided for by the FOIA.

A. Search and Review Fees

(1) An hourly fee shall be charged for recovery of full, allowable direct costs of searching for and reviewing records requested under 47 C.F.R. § 0.460(e) or § 0.461, unless such fees are restricted, reduced, or waived pursuant to 47 C.F.R. § 0.470. No fees will be assessed if the fees would be equal to or less than $15. See 47 C.F.R. § 0.470(f). Agencies are prohibited from assessing search fees (or duplication fees if the requester is an educational or noncommercial scientific institution or a representative of the news media) if the Commission fails to meet the 20 business day (or 30 business days if extended in unusual or exceptional circumstances) response time limit.

(2) Search fees may be assessed for time spent searching, even if the Commission does not locate any records or if the records are determined to be exempt from disclosure.

(3) The Commission shall charge only for the initial review. The Commission shall not charge for subsequent review at the appeal level for 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 subsequent review, under these circumstances, are properly assessable.

(4) If the estimated fees are less than $15.00, no fees will be assessed. 47 C.F.R. § 0.470(f).

(5) If the estimated fees are likely to exceed the greater of $25 or the amount which the requested indicated he/she is prepared to pay, whichever is greater, then the B/O shall notify the requester of the estimated amount of fees. Such notice shall offer the requester the opportunity to confer with Commission personnel with the objective of revising or clarifying the request. See 47 C.F.R. § 0.467(e).

(6) When a request exceeds $250 and the requester has no history of payment, then the B/O may require the requester to make an advance payment of the full amount before processing the request.

(7) If estimated fees exceed $250 and the requester has a history of prompt payment, then the B/O shall notify the requester by written response and obtain satisfactory assurance of full payment.

(8) When 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), PERM shall require the requester to pay the full amount owed plus any applicable interest as provided in section 0.468 and make an advance payment of the full amount of the estimated fee before processing the new or pending request.

(9) In the cases of subparagraphs (5)-(7) above, the administrative time limits prescribed will begin only after the Commission has obtained satisfactory assurance of full payment or received the fee payment. See 47 C.F.R. § 0.469.

B. Fees are assessed as follows:

(1) Commercial use requesters: When the Commission receives a request for documents for commercial use, the B/O will assess charges that recover the full direct cost of searching for, reviewing, including excising or preparing for release, and duplicating the records sought.

(2) Educational and non-commercial scientific institution requesters and requesters who are representatives of the news media: The Commission shall provide documents to requesters in these categories for the cost of reproduction only, pursuant to 47 C.F.R. § 0.465, 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 disseminating information.

(3) All other requesters: The requester is entitled to the first 100 pages and the first two hours of search time free of charge. The requester cannot be billed for review time.

8. EXEMPTIONS:

A. The FOIA provides specific areas in which records are exempt from mandatory disclosure. When the public interest is served by release of the records, release

may be justified despite the applicability of the exemption. However, the Commission may be prohibited from disclosing some types of records (e.g., classified documents). A large number of administrative law and court decisions are available for direction in this area. See, *e.g.*, the Department of Justice Freedom of Information Act Guide & Privacy Act Overview (most recent edition), found at http://www.justice.gov/oip/foia_guide09.htm or in Westlaw under the FOIA-GUIDE library.

B. The exemptions and their citations are:

(1) Classified documents concerning national defense and foreign policy – (A) "specifically authorized under criteria established by Executive Order to be kept secret in the interest of national defense or foreign policy" and (B) "are in fact properly classified pursuant to such Executive Order" (5 U.S.C. § 552(b)(1));[1]

(2) Internal personnel rules and practices – matters "related solely to the internal personnel rules" (5 U.S.C. § 552(b)(2)).;

(3) Information exempt under other laws – information "specifically exempted from disclosure by statute [other than the Privacy Act, 5 U.S.C. § 552b], provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld" (5 U.S.C. § 552(b)(3));

(4) Confidential business information – "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. § 552(b)(4));

(5) Internal communications – "inter-agency or intra-agency memorandums or letters which would not be available by law to party other than an agency in litigation with the agency" (5 U.S.C. § 552(b)(5));

(6) Protection of privacy – "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. § 552(b)(6));

(7) Investigatory files – "records or information compiled for law enforcement purposes, not only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency of authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by

[1] Although the Commission does not have original classification authority, it may be directed to derivatively classify records.

a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual" (5 U.S.C. § 552(b)(7));

9. EXCLUSIONS:

The Freedom of Information Reform Act of 1986 provided a new mechanism for protecting sensitive law enforcement records under certain circumstances. In particular, the statute created three record exclusions which authorized agencies, under specified circumstances, to treat records as not subject to the requirements of the FOIA. See 5 U.S.C. § 552(c)(1)-(3). These are rarely invoked and involve criminal law enforcement or foreign intelligence situations. You should consult OGC before attempting to invoke these exclusions and should notify PERM of the initiation of consultation with OGC in this matter.

10. APPLICATION FOR REVIEW

A. General. There are two types of application for review:

(1) When B/O denies the initial request for information in whole or in part, the requester may appeal to the Commission for review of that decision.

(2) When the B/O's initial decision grants access to records provided to the FCC on a privileged or confidential basis, the source of the original materials may file an application for review requesting that the record be withheld from disclosure.

B. Appeals by Requesters:

(1) The letter denying a FOIA request will be signed by the denying official and will notify the requester of the right to appeal to the Commission. The requester should be notified that he/she has 30 calendar days from the date of the written ruling to file a written application for review which must be mailed or delivered to the OGC.

(2) OGC will consult with the B/O that issued the initial FOIA decision and may request that the B/O issue a supplemental response. OGC may attempt to resolve appeals by requesters or third parties.

(3) The Commission will attempt to act on the appeal within 20 business days after its filing or as soon thereafter as possible. Applications for review are submitted to the full Commission for a vote. Decisions on applications for review shall include the names of the Chairman and Commissioners. The appellant should be informed about the FOIA

mediation services offered by Office of Government Information Services (OGIS).

C. Appeals by Third Parties:

(1) If the FOIA request pertains to materials for which confidentiality has been requested, or material listed in 47 C.F.R. § 0.457(d), the person submitting the information will be provided with a copy of the incoming FOIA request, 47 C.F.R. § 0.461(d)(3).

(2) If the FCC grants the request for the inspection of such records, the source of the material is provided a copy of the decision and notified that no records will be released for 10 business days after the date of the written ruling to allow the third party to file for an appeal of the decision. The written request for review will be delivered or mailed to OGC detailing the basis for requesting the protection.

(3) The Commission will attempt to resolve the appeal within 20 business days or as soon thereafter as is possible.

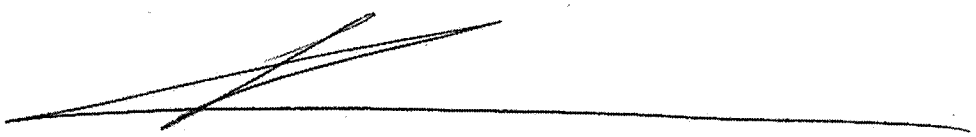
D. Courts and Outside Review:

(1) A party may appeal the Commission's decision to withhold records to the appropriate United States District Court pursuant to the jurisdictional provisions of 5 U.S.C. § 552(a)(4)(B).

(2) If the statutory deadline for acting upon an initial FOIA request or an appeal is not met by the Commission, the requesting party may immediately seek judicial relief. Therefore, all efforts should be made to meet the FOIA's statutory deadlines or obtain consent by the requester to an extension of time.

(3) Decisions to disclose records may also be appealed under provisions of the Administrative Procedure Act or the Privacy Act.

(4) FOIA requesters may also take advantage of mediation services offered by the Office of Government Information Services as a non-exclusive alternative to litigation.



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