



OVERSEAS PRIVATE INVESTMENT CORPORATION

22 CFR Part 706

[No. FOIA-2013]

RIN 3420-ZA00

Freedom of Information

AGENCY: Overseas Private Investment Corporation.

ACTION: Final Rule.

SUMMARY: This final rule implements revisions to the Overseas Private Investment Corporation's ("OPIC") Freedom of Information Act (FOIA) regulations by making substantive and administrative changes. These revisions are intended to supersede OPIC's current FOIA regulations, located at this part. The final rule incorporates the FOIA revisions contained in the Openness Promotes Effectiveness in our National Government Act of 2007 ("OPEN Government Act"), makes administrative changes to reflect OPIC's cost, and organizes the regulations to more closely match those of other agencies for ease of reference. The rule also reflects the disclosure principles established by President Barack Obama and Attorney General Eric Holder in their FOIA Policy Memoranda issued on January 12, 2009 and March 19, 2009, respectively.

DATES: This rule is effective February 14, 2014.

FOR FURTHER INFORMATION CONTACT: Nichole Cadiente, Administrative Counsel, (202)336-8400, or foia@opic.gov.

SUPPLEMENTARY INFORMATION: The revision of Part 706 incorporates changes to the language and structure of the regulations and adds new provisions to implement the

OPEN Government Act. OPIC is already complying with these changes and this final rule serves as OPIC's formal codification of the applicable law and its practice.

The most significant change in this final rule is the treatment of business submitters. This section will define confidential commercial information more concisely and provide a default expiration date for confidentiality labels. This will enable OPIC to more efficiently process requests for commercial information, which comprise the majority of OPIC's FOIA requests. Among other substantive changes: the search date is now the responsive record cutoff date, the information OPIC posts online has been clarified, there is more detail on how to request records about an individual, and illustrative examples have been added.

OPIC published a proposed rule on December 4, 2013 at 78 FR 72843 and invited interested parties to submit comments. OPIC received two sets of comments and a forwarded set of best practices and has made several changes to its rule based on these suggestions.

OPIC adopted the following suggestions. First, OPIC made some editorial changes. An erroneous reference in § 706.11(e) was changed from Section 706.10(c) to § 706.24. Also the term "non-public records" was changed to "records" as it was suggested that requesters might consider "non-public records" to be records excluded from the FOIA.

Second, OPIC added a subsection for "all other requesters" to the listing of requester categories in Section 706.21 to make the listing comprehensive.

Third, OPIC added definitions of "requester categories" and "fee waivers" to §§ 706.21 and 706.24, respectively. These two fee relevant determinations are often

confused by requesters and OPIC agrees that the public would benefit from explicit definitions.

Fourth, OPIC added the following sentence to the end of § 706.22(f): “OPIC will not aggregate multiple requests that involve multiple matters.” This language is already included in the other subsection dealing with request aggregation, § 706.30(e).

Fifth, OPIC has modified the example in § 706.30(f)(3) to remove the word “professional.” The sentence now reads: “For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that he or she is a person whose primary activity or occupation is information dissemination.” OPIC did so to address a concern that requesters might interpret the expedited processing provision relating to “a person primarily engaged in information dissemination” as applying only to persons who are paid for disseminating information. The new wording makes it clearer that the standard can be met regardless of whether the requester is paid.

Sixth, OPIC has reduced its per page charge for photocopies from \$0.15 to \$0.10.

OPIC considered, but did not adopt the following suggestions. First, OPIC did not adopt a suggestion to add a definitions section. OPIC’s 2000 FOIA regulations contained a definitions section which was intentionally removed. Most definitions in the regulations are specific to a topic, therefore placing the definitions near the terms as they are used is more efficient for the reader.

Second, OPIC did not add suggested language specifying that the Privacy Act deals with first-party requests and the FOIA deals with third party requests. The suggested language does not reflect OPIC’s practice. OPIC automatically processes first party requests under both the Privacy Act and the FOIA, regardless of which statute it is

submitted under, and informs the requester of that dual processing in the acknowledgement letter.

Third, in § 706.11(a)(3), OPIC did not change the term, “Where a request for records pertains to a third party” to, “Where a request for records pertains to a living third party.” This section provides information on how to obtain a fuller response on records for both a living and deceased third party, therefore the limitation to only a living party would be inaccurate.

Fourth, OPIC did not delete § 706.30(e). The commenter felt that this section, dealing with the effect of aggregated requests upon the timing of OPIC’s responses, was duplicative of § 706.22(f), which deals with the effect of aggregation upon fees charged. Including a section that discusses the effects of aggregating requests in the fees section as well as the timing section ensures the public is aware of both effects.

Fifth, OPIC declined to include a provision obliging it to provide requesters with a contact within the referral agency when making referrals. Since other agencies often do not provide such information to OPIC, OPIC is not in a position to ensure that a requester will receive it.

Sixth, OPIC declined to change its appeal deadline to thirty calendar days or more. OPIC’s 2000 regulations contained, and this final rule maintains, a twenty working day deadline for appeals. OPIC notes that twenty working days is roughly equal to thirty calendar days and that it is already meeting what several comments pointed to as an agency norm. The twenty working day deadline uses a date system consistent with most of the other deadlines in the FOIA. An agency’s response deadline, as well as the extension for unusual circumstances, is measured in working days. In fact, the agency

response deadline is the same length, twenty working days, during which agencies are expected to search for, review, and process a FOIA request. Although some comments expressed concern about the federal mail delay, OPIC's regulations use the postmark date, not the received by date. OPIC also notes that for at least the past five years it has not received any complaints from requesters about the deadline. In the one incident where OPIC received a request for an extension due to mail handling issues at the requester's office, OPIC granted the extension. Although OPIC's decision to measure appeal deadlines in working days rather than calendar days differs from many agencies, it is consistent with the way that response deadlines are measured within the regulations and provides a deadline that is effectively equivalent to the typical thirty calendar day deadline.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the head of OPIC has certified that this final rule will not have a significant economic impact on a substantial number of small entities. The final rule implements the FOIA, a statute concerning the release of federal records, and does not economically impact Federal Government relations with the private sector. Further, under the FOIA, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters. Based on OPIC's experience, these fees are nominal.

Executive Order 12866

OPIC is exempted from the requirements of this Executive Order per the Office of Management and Budget's October 12, 1993 memorandum. Accordingly, OMB did not

review this final rule. However this rule was generally composed with the principles stated in section 1(b) of the Executive Order in mind.

Unfunded Mandates Reform Act of 1995 (2 U.S.C. 202-05)

This final rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.).

This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This regulation will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United State based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 22 CFR Part 706

Administrative practice and procedure, Freedom of Information, Privacy.

For the reasons stated in the preamble the Overseas Private Investment Corporation revises 22 CFR Part 706 as follows:

PART 706 – INFORMATION DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

Subpart A – General

Sec.

- 706.1 Description.
- 706.2 Policy.
- 706.3 Scope.
- 706.4 Preservation and transfer of records.
- 706.5 Other rights and services.

Subpart B – Obtaining OPIC Records

- 706.10 Publically available records.
- 706.11 Requesting records.

Subpart C – Fees for Requests

- 706.20 Types of fees.
- 706.21 Requester categories.
- 706.22 Fees charged.
- 706.23 Advance payments.
- 706.24 Requirements for waiver or reduction of fees.

Subpart D – Processing of Requests

- 706.30 Timing of responses to requests.
- 706.31 Responses to requests.
- 706.32 Confidential commercial information.
- 706.33 Administrative appeals.

Authority: 5 U.S.C. 552.

Subpart A – General

§ 706.1 Description.

This part contains the rules that the Overseas Private Investment Corporation (“OPIC”) follows in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552 as amended. These rules should be read together with the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget at 52 FR 10012 (Mar. 27, 1987) (“OMB Guidelines”).

§ 706.2 Policy.

It is OPIC's policy to make its records available to the public to the greatest extent possible, in keeping with the spirit of the FOIA. This policy includes providing reasonably segregable information from records that also contain information that may be withheld under the FOIA. However, implementation of this policy also reflects OPIC's view that the soundness and viability of many of its programs depend in large measure upon full and reliable commercial, financial, technical and business information received from applicants for OPIC assistance and that the willingness of those applicants to provide such information depends on OPIC's ability to hold it in confidence. Consequently, except as provided by law and in this part, information provided to OPIC in confidence will not be disclosed without the submitter's consent.

§ 706.3 Scope.

This part applies to all agency records in OPIC's possession and control. This part does not compel OPIC to create records or to ask outside parties to provide documents in order to satisfy a FOIA request. OPIC may, however, in its discretion and in consultation with a FOIA requester, create a new record as a partial or complete response to a FOIA request. In responding to requests for information, OPIC will consider only those records within its possession and control as of the date of OPIC's search.

§ 706.4 Preservation and transfer of records.

(a) Preservation of records. OPIC preserves all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 14 of the National Archives and Records Administration. Records that

are identified as responsive to a request will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

(b) Transfer of records to the National Archives. Under the Records Disposal Act, 44 U.S.C. Chapter 33, OPIC is required to transfer legal custody and control of records with permanent historical value to the National Archives. OPIC's Finance Project and Insurance Contract Case files generally do not qualify as records with permanent historical value. OPIC will not transfer these files except when the National Archives determines that an individual project or case is especially significant or unique. If the National Archives receives a FOIA request for records that have been transferred it will respond to the request in accordance with its own FOIA regulations.

§ 706.5 Other rights and services.

Nothing in this subpart shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Subpart B – Obtaining OPIC Records

§ 706.10 Publically available records.

Many OPIC records are readily available to the public by electronic access, including annual reports and financial statements, program handbooks, press releases, application forms, claims information, and annual FOIA reports. Records required to be proactively published under the FOIA are also online. Persons seeking information are encouraged to visit OPIC's Internet site at: www.opic.gov to see what information is already available before submitting a request.

§ 706.11 Requesting records.

(a) General information. (1) How to submit. To make a request for records not covered under Section 706.10, a requester must submit a written request to OPIC's FOIA Office either by mail to Overseas Private Investment Corporation, 1100 New York Avenue NW, Washington, DC 20527 or electronic mail to FOIA@opic.gov. The envelope or subject line should read "Freedom of Information Request" to ensure proper routing. The request is considered received by OPIC upon actual receipt by OPIC's FOIA Office.

(2) Records about oneself. A requester who is making a request for records about himself or herself must verify his or her identity by providing a notarized statement or a statement under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization, stating that the requester is the person he or she claims to be.

(3) Records about a third party. Where a request for records pertains to a third party, a requester may receive greater access by submitting a notarized authorization signed by that individual, a declaration by that individual made in compliance with the requirements set forth in 28 U.S.C. 1746 authorizing disclosure of the records to the requester, proof of guardianship, or proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). OPIC may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) Description of records sought. Requesters must describe the records sought in sufficient detail to enable OPIC personnel to locate them with a reasonable amount of

effort. To the extent possible, requesters should include specific information that may assist OPIC in identifying the requested records, such as the project name, contract number, date or date range, country, title, name, author, recipient, subject matter of the record, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records sought. If a requester fails to reasonably describe the records sought, OPIC will inform the requester what additional information is needed or why the request is deficient. Any time you spend clarifying your request in response to OPIC's inquiry is excluded from the 20 working-day period (or any extension of this period) that OPIC has to respond to your request. Requesters who are attempting to reformulate or modify such a request may discuss their request with a FOIA Officer or a FOIA Public Liaison. When a requester fails to provide sufficient detail after having been asked to clarify a request OPIC shall notify the requester that the request has not been properly made and that no further action will be taken.

(c) Format. You may state the format (paper copies, electronic scans, etc.) in which you would like OPIC to provide the requested records. If you do not state a preference, you will receive any released records in the format most convenient to OPIC.

(d) Requester information. You must include your name, mailing address, and telephone number. You may also provide your electronic mail address, which will allow OPIC to contact you quickly to discuss your request and respond to your request electronically.

(e) Fees. You must state your willingness to pay fees under these regulations or, alternately, your willingness to pay up to a specified limit. If you believe that you qualify for a partial or total fee waiver under § 706.24 you should request a waiver and provide

justification as required by § 706.24. If your request does not contain a statement of your willingness to pay fees or a request for a fee waiver, OPIC will consider your request an agreement to pay up to \$25.00 in fees.

Subpart C – Fees for Requests.

§ 706.20 Types of fees.

(a) Direct costs are those expenses that an agency expends in searching for and duplicating (and, in the case of commercial-use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (i.e., the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment. OPIC shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(b) Duplication is reproducing a copy of a record or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others.

(c) Review is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any

formal objection to disclosure made by a confidential commercial information submitter under § 706.32(c), but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(d) Search is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records; and the reasonable efforts expended to locate and retrieve information from electronic records. Search costs are properly charged even if no records are located.

§ 706.21 Requester categories.

Requester category means one of five categories that agencies place requesters in for the purpose of determining whether a requester will be charged fees for search, review and duplication. This is separate from a fee waiver, which waives any fees charged. Fee waivers are covered in § 706.24.

(a) A Commercial Use request is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation.

(b) An Educational Use request is one made on behalf of an educational institution, defined as any school that operates a program of scholarly research. A requester in this category must show that the request is authorized by, and is made under the auspices of, a qualifying institution and that the records are not sought for a commercial use, but rather are sought to further scholarly research. Records requested for the intention of fulfilling credit requirements are not considered to be sought for an educational institution's use.

(c) A Noncommercial Scientific Institution Use request is a request made on behalf of a noncommercial scientific institution, defined as an institution that is not operated on a “commercial” basis, as defined in paragraph (a) of this section, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and not for a commercial use.

(d) A News Media Request is a request made by a representative of the news media in that capacity. A representative of the news media is defined as any person or entity that actively 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. 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 include television or radio stations that broadcast news to the public at large and publishers of periodicals that disseminate news and make their products available through a variety of means to the general public. A request for records that supports the news-dissemination function of the requester shall not be considered to be for a commercial use. “Freelance” journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as working for that entity. A publishing contract would provide the clearest evidence that publication is expected; however, OPIC shall also consider a requester's past publication record in making this determination. OPIC’s decision to grant a requester media status will be made on a case-by-case basis based upon the requester's intended use.

(e) All Other Requesters is any request made for a use not covered by paragraphs (a) through (d) of this section.

§ 706.22 Fees charged.

(a) In responding to FOIA requests, OPIC will charge the following fees unless a waiver or reduction of fees has been granted under § 706.24.

(1) Search. (i) Search fees shall be charged for all requests subject to the restrictions of paragraph (b) of this section.

(ii) For each hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be as follows: Professional--\$41.50; and administrative--\$33.50.

(iii) Requesters will be charged the direct costs associated with conducting any search that requires the creation of a new program to locate the requested records.

(iv) For requests that require the retrieval of records stored at a Federal records center operated by the National Archives and Records Administration (NARA), additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) Duplication. Duplication fees will be charged to all requesters, subject to the restrictions of paragraph (b) of this section. OPIC will honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible in the form or format requested. Where photocopies are supplied, OPIC will provide one copy per request at a cost of \$0.15 per page. For copies of records produced on tapes, disks, or

other electronic media, OPIC will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For other forms of duplication OPIC will charge the direct costs.

(3) Review. Review fees will be charged to requesters who make commercial-use requests. Review fees will be assessed in connection with the initial review of the record, i.e., the review conducted by OPIC to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if the appellate authority determines that a particular exemption no longer applies, any costs associated with the re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (a)(1)(ii) of this section.

(b) Restrictions on charging fees. (1) No search fees will be charged for educational use requests, noncommercial scientific use requests, or news media requests as defined in § 706.21. When OPIC fails to comply with the time limits in which to respond to a request, and if no unusual or exceptional circumstances apply to the processing of the request, OPIC may not charge search fees, or, in the instances of requests from requesters defined in § 706.21(b) through (d), may not charge duplication fees.

(2) Except for requesters seeking records for a commercial use, OPIC will provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(3) When the total fee calculated under this section is \$25.00 or less for any request, no fee will be charged.

(c) Notice of anticipated fees in excess of authorization. When OPIC determines or estimates that the fees to be assessed in accordance with this section will exceed the amount authorized, OPIC will notify the requester of the actual or estimated amount of the fees, including a breakdown of fees for search, review, and duplication. Processing will be halted until the requester commits in writing to pay the actual or estimated total fee. This time will not count against OPIC's twenty day processing time or any extension of that time. Such a commitment must be made by the requester in writing, must indicate a given dollar amount, and must be received by OPIC within thirty calendar days from the date of notification of the fee estimate. If a commitment is not received within this period, the request shall be closed. A FOIA Officer or FOIA Public Liaison is available to assist any requester in reformulating a request in an effort to reduce fees.

(d) Charges for other services. Although not required to provide special services, if OPIC chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(e) Charging interest. OPIC may charge interest on any unpaid bill starting on the thirty-first day following the billing date. Interest charges will be assessed at the rate provided

in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by OPIC. OPIC will follow the provisions of the Debt Collection Act of 1982 (Public Law 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(f) Aggregating requests. If OPIC reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, OPIC may aggregate those requests and charge accordingly. OPIC will not aggregate multiple requests that involve unrelated matters.

(g) Other statutes specifically providing for fees. The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, OPIC will inform the requester of the contact information for that source.

(h) Remittances. All payments under this part must be in the form of a check or a bank draft denominated in U.S. currency. Checks should be made payable to the order of United States Treasury and mailed to the OPIC FOIA Office.

§ 706.23 Advance payments.

(a) For requests other than those described in paragraphs (i)(2) and (i)(3) of § 706.22, OPIC will not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(b) When OPIC determines or estimates that a total fee to be charged under this section will exceed \$250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. OPIC may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(c) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within thirty calendar days of the billing date, OPIC may require that the requester pay the full amount due, plus any applicable interest on that prior request. OPIC may also require that the requester make an advance payment of the full amount of any anticipated fee before OPIC begins to process a new request or continues to process a pending request or any pending appeal. Where OPIC has a reasonable basis to believe that a requester has misrepresented his or her identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(d) In cases in which OPIC requires advance payment, OPIC's response time will be tolled and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within thirty calendar days after the date of OPIC's fee letter, OPIC may administratively close the request.

§ 706.24 Requirements for waiver or reduction of fees.

(a) Records responsive to a request shall be furnished without charge or at a reduced rate below that established under § 706.22, where OPIC determines, based on all available information, that the requester has demonstrated that:

(1) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(2) Disclosure of the information is not primarily in the commercial interest of the requester.

(b) In deciding whether disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of operations or activities of the government, OPIC will consider the following factors:

(1) The subject of the request must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.

(2) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not contribute to such understanding where nothing new would be added to the public's understanding.

(3) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as his or her ability and intention to effectively convey information to the public shall be considered. It shall ordinarily be presumed that a representative of the news media satisfies this consideration.

(4) The public's understanding of the subject in question must be enhanced by the disclosure to a significant extent. However, OPIC shall not make value judgments about whether the information at issue is “important” enough to be made public.

(c) To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, OPIC will consider the following factors:

(1) OPIC shall identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(2) A waiver or reduction of fees is justified where the public interest is greater than any identified commercial interest in disclosure.

(d) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(e) Requests for a waiver or reduction of fees should be made when the request is first submitted to OPIC and should address the criteria referenced above. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester will be required to pay any costs incurred up to the date the fee waiver request was received.

(f) The burden of presenting sufficient evidence or information to justify the requested fee waiver or reduction falls on the requester.

Subpart D – Processing of Requests.

§ 706.30 Timing of responses to requests.

(a) In general. OPIC ordinarily will respond to requests within twenty business days unless the request involves unusual circumstances as described in subparagraph (d) of this section. The response time will commence on the date that the request is received by the FOIA Office, but in any event not later than ten working days after the request is first received by OPIC. Any time tolled under paragraph (c) of this section does not count against OPIC's response time.

(b) Multitrack processing. OPIC has a track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (e) of this section. All non-expedited requests are processed on the regular track in the order they are received.

(c) Tolling of response time. OPIC may toll its response time once to seek clarification of a request in accordance with § 706.11(b) or as needed to resolve fee issues in accordance with §§ 706.22(c) and 706.23(d). The response time will resume upon OPIC's receipt of the requester's clarification or upon resolution of the fee issue.

(d) Unusual circumstances. Whenever the statutory time limits for processing cannot be met because of "unusual circumstances" as defined in the FOIA, and OPIC extends the time limits on that basis, OPIC will notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. This notice will be sent before the expiration of the twenty day period to respond. Where the extension exceeds ten working days, the requester will be provided an opportunity to modify the request or agree to an alternative time period

for processing. OPIC will make its designated FOIA contact and its FOIA Public Liaison available for this purpose.

(e) Aggregating requests. For the purposes of satisfying unusual circumstances under the FOIA, OPIC may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. OPIC will not aggregate multiple requests that involve unrelated matters.

(f) Expedited processing. (1) Requests and appeals will be processed on an expedited basis whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal government activity, if made by a person who is primarily engaged in disseminating information;

(2) A request for expedited processing may be made at any time.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that he or she is a person whose primary activity or occupation is information dissemination. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request--one that extends beyond the public's right to know about government

activity generally. A requester cannot satisfy the “urgency to inform” requirement solely by demonstrating that numerous articles have been published on a given subject. OPIC may waive the formal certification requirement at its discretion.

(4) OPIC shall notify the requester within ten calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be given priority, placed in the processing track for expedited requests, and shall be processed as soon as practicable. If OPIC denies expedited processing, any appeal of that decision which complies with the procedures set forth in § 706.33 shall be acted on expeditiously.

§ 706.31 Responses to requests.

(a) Acknowledgments of requests. If a request will take longer than ten days to process, OPIC will send the requester an acknowledgment letter that assigns the request an individualized tracking number.

(b) Grants of requests. OPIC will notify the requester in writing if it makes a determination to grant a request in full or in part. The notice will inform the requester of any fees charged under § 706.22. OPIC will disclose the requested records to the requester promptly upon payment of any applicable fees.

(c) Adverse determinations of requests. OPIC will notify the requester in writing if it makes an adverse determination denying a request in any respect. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does

not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(d) Content of denial letter. The denial letter will be signed by the person responsible for the denial, and will include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemptions applied;

(3) An estimate of the volume of any records or information withheld, for example, by providing the number of pages or some other reasonable form of estimation. This estimation is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A brief description of the types of information withheld and the reasons for doing so. A description and explanation are not required if providing it would harm an interest protected by an applicable exemption;

(5) A statement that the denial may be appealed under Section 706.33(a) of this subpart, and a description of the requirements set forth therein; and

(6) Notice of any fees charged under § 706.22.

(e) Markings on released documents. Where technically feasible, OPIC will mark withholdings made on released documents at the place where the withholding has been made and will include the exemption applied. Markings on released documents must be clearly visible to the requester.

(f) Referrals to other government agencies. If you request a record in OPIC's possession that was created or classified by another Federal agency, OPIC will promptly refer your request to that agency for direct response to you unless OPIC can determine by examining the record or by informal consultation with the originating agency that the record may be released in whole or part. OPIC will notify you of any such referral.

§ 706.32 Confidential commercial information.

(a) Definitions. (1) Confidential commercial information means commercial or financial information obtained from a submitter that may be protected from disclosure under Exemption 4 of the FOIA. Exemption 4 protects:

(i) Trade secrets; or

(ii) Commercial or financial information that is privileged or confidential where either: disclosure of the information would cause substantial competitive harm to the submitter, or the information is voluntarily submitted and would not customarily be publicly released by the submitter.

(2) Submitter means any person or entity who provides confidential commercial information to OPIC, directly or indirectly.

(b) Designation of confidential commercial information. All submitters may designate, by appropriate markings, any portions of their submissions that they consider to be protected from disclosure under the FOIA. The markings may be made at the time of submission or at a later time. These markings will be considered by OPIC in responding to a FOIA request but such markings (or the absence of such markings) will not be dispositive as to whether the marked information is ultimately released. Unless otherwise requested and approved these markings will be considered no longer applicable ten years after submission or five years after the close of the associated project, whichever is later.

(c) When notice to submitters is required. (1) Except as provided in paragraph (d) of this section, OPIC's FOIA Office will use reasonable efforts to notify a submitter in writing whenever:

(i) The requested information has been designated in good faith by the submitter as confidential commercial information; or

(ii) OPIC has reason to believe that the requested information may be protected from disclosure under Exemption 4.

(2) This notification will describe the nature and scope of the request, advise the submitter of its right to submit written objections in response to the request, and provide a reasonable time for response. The notice will either describe the commercial information requested or include copies of the requested records. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish it.

(d) Exceptions to submitter notice requirements. The notice requirements of this section shall not apply if:

(1) OPIC determines that the information is exempt under the FOIA;

(2) The information lawfully has been published or has been officially made available to the public; or

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987.

(e) Opportunity to object to disclosure. (1) The submitter may, at any time prior to the disclosure date described in paragraph (c)(2) of this section, submit to OPIC's FOIA Office detailed written objections to the disclosure of the requested information, specifying the grounds upon which it contends that the information should not be disclosed. In setting forth such grounds, the submitter should explain the basis of its belief that the nondisclosure of any item of information requested is mandated or permitted by law. In the case of information that the submitter believes to be exempt from disclosure under subsection (b)(4) of the FOIA, the submitter shall explain why the information is considered a trade secret or commercial or financial information that is privileged or confidential and either: How disclosure of the information would cause substantial competitive harm to the submitter, or why the information should be considered voluntarily submitted and why it is information that would not customarily be publicly released by the submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(2) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received after the date of any disclosure decision will not be considered. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(3) The period for providing OPIC with objections to disclosure of information may be extended by OPIC upon receipt of a written request for an extension from the submitter. Such written request shall set forth the date upon which any objections are expected to be completed and shall provide reasonable justification for the extension. In its discretion, OPIC may permit more than one extension.

(f) Analysis of objections. OPIC will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) Notice of intent to disclose. If OPIC rejects the submitter's objections, in whole or in part, OPIC will promptly notify the submitter of its determination at least five working days prior to release of the information. The notification will include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed, or a copy thereof; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) Notice of FOIA lawsuit. Whenever a requester files a FOIA lawsuit seeking to compel the disclosure of confidential commercial information, OPIC will promptly notify the submitter.

(i) Requester notification. OPIC will notify a requester whenever it provides the submitter with notice and an opportunity to object to disclosure and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 706.33 Administrative appeals.

(a) Requirements for making an appeal. A requester may appeal any adverse determinations denying his or her request to OPIC's Vice President and General Counsel at FOIA@opic.gov or 1100 New York Avenue, NW, Washington, DC 20527. Examples of adverse determinations are provided in § 706.31(c). The requester must make the appeal in writing and it must be postmarked, or in the case of electronic submissions, transmitted, within twenty working days following the date on which the requester receives OPIC's denial. Appeals that have not been postmarked or transmitted within the twenty days will be considered untimely and will be administratively closed with notice to the requester. The appeal letter should include the assigned request number. The requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, "Freedom of Information Act Appeal."

(b) Adjudication of appeals. OPIC's Vice President and General Counsel or his/her designee will render a written decision within twenty working days after the date of OPIC's receipt of the appeal, unless an extension of up to ten working days is deemed

necessary due to unusual circumstances. The requester will be notified in writing of any extension.

(c) Decisions on appeals. A decision that upholds the initial determination will contain a written statement that identifies the reasons for the affirmance, including any FOIA exemptions applied, and will provide the requester with notification of the statutory right to file a lawsuit or the ability to request mediation from the Office of Government Information Services. If an initial determination is remanded or modified on appeal the requester will be notified in writing. OPIC's FOIA Office will then process the request in accordance with that appeal determination and respond directly to the requester. If an appeal is granted in whole or in part, the information will be made available promptly, provided the requirements of § 706.22 regarding payment of fees are satisfied.

(d) When appeal is required. Before seeking court review, a requester generally must first submit a timely administrative appeal.

Nichole Cadiente,

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