



9111-14

R.P. 12-08
ADM-9-03 OT:RR:RD:TC
H225216 ARU

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Parts 103, 161, and 175

CBP Dec. 15-16

RIN 1651-AB05

Freedom of Information Act Procedures

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Customs and Border Protection (“CBP”) Freedom of Information Act (“FOIA”) regulations. Due to the transfer of CBP from the Department of the Treasury to the Department of Homeland Security (“DHS”), and the subsequent promulgation of DHS FOIA regulations which provide that the DHS FOIA regulations generally apply to all DHS components, most of the CBP FOIA regulations have been functionally superseded. This document sets forth that, with the exception of a regulation pertaining to the treatment of confidential commercial information, CBP will apply the DHS FOIA and Privacy Act regulations for purposes of administering the FOIA. This final rule removes outdated regulations, aligns CBP’s regulatory procedures for processing FOIA requests with those of DHS, thereby creating a consistent standard among the DHS components, and brings CBP within compliance of the FOIA guidelines developed by OMB.

DATES: Effective: [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Shari Suzuki, Chief, FOIA Appeals, Policy & Litigation Branch, Office of International Trade, (202) 325-0121.

SUPPLEMENTARY INFORMATION:

Background

The Freedom of Information Act (“FOIA”) (5 U.S.C. 552) provides for the disclosure of agency records and information to the public unless the records and information are exempted from disclosure. U.S. Customs and Border Protection (“CBP”) regulations specifically covering the production and disclosure of records under the FOIA are set forth in part 103 of title 19 of the Code of Federal Regulations (19 CFR part 103) and consist of sections 103.1 – 103.13 (19 CFR 103.1 – 103.13).

Prior to March 1, 2003, the United States Customs Service (“Customs”) was a component of the Department of the Treasury. On November 25, 2002, the President signed the Homeland Security Act of 2002, 6 U.S.C. 101 et seq., Pub. Law 107–296, (the “HSA”), establishing the Department of Homeland Security (“DHS”). Pursuant to section 403(1) of the HSA, Customs was transferred from Treasury to DHS effective March 1, 2003, and renamed as the Bureau of Customs and Border Protection (now U.S. Customs and Border Protection or CBP).

DHS published FOIA and Privacy Act regulations in the **Federal Register** (68 FR 4056) as an interim rule on January 27, 2003. The DHS regulations specifically covering

FOIA-related matters are set forth in subpart A of part 5 of title 6 of the Code of Federal Regulations (6 CFR part 5, subpart A) and consist of sections 5.1 – 5.12 (6 CFR 5.1 – 5.12).

Section 5.1(a)(2) (6 CFR 5.1(a)(2)) states that, except to the extent a DHS component adopts separate guidance under the FOIA, the provisions of the DHS FOIA regulations apply to each component of the Department. However, under these regulations DHS components may issue their own guidance pursuant to approval by DHS. As discussed in more detail below, CBP published in the **Federal Register** (71 FR 54197) a final rule on September 14, 2006, relating to the treatment of confidential commercial information. See also interim final rule issued on August 11, 2003 at 68 FR 47453. No other provisions of the CBP FOIA regulations have been amended since CBP became a part of DHS.

For additional resources, please see the CBP FOIA page online at <http://www.cbp.gov/site-policy-notice/foia>.

Need for Correction

Due to the promulgation of DHS FOIA regulations which provide that the DHS FOIA regulations generally apply to all DHS components except to the extent that a DHS component adopts separate guidance, most of the CBP FOIA regulations have been functionally superseded. The current CBP regulation, section 103.0, directs the public to the Treasury FOIA regulations found at 31 CFR part 1 and instructs that for any inconsistency between 19 CFR part 103 and the Treasury FOIA regulations, the Treasury FOIA regulations control. The existing CBP regulations are now obsolete and retaining

inconsistent regulations causes confusion for those seeking to file a FOIA request. As a result, CBP is amending sections 103.0 through 103.3, removing and reserving sections 103.4 through 103.13 of Subpart A of Part 103, and directing readers to the DHS FOIA regulations. This will align CBP's regulatory procedures for processing FOIA requests and appeals with DHS procedures.

The DHS FOIA regulations reflect many Congressional amendments to the FOIA, for which conforming changes had not been made in the CBP FOIA regulations. The DHS FOIA regulations also reflect OMB's guidelines established in the Uniform Freedom of Information Act Fee Schedule and Guidelines publication. In addition, DHS recently proposed additional updates to its FOIA regulations to update and streamline the language of several procedural provisions, and to incorporate changes brought about by the amendments to the FOIA under the OPEN Government Act of 2007, among other changes (80 FR 45101, July 29, 2015).

While in practice, CBP currently follows the FOIA, as amended, and the rules and procedures set forth in the DHS FOIA regulations, CBP hopes to eliminate confusion for the public making FOIA requests, as well as CBP personnel handling FOIA requests by removing conflicting and sometimes outdated CBP FOIA regulations and directing readers to the DHS FOIA regulations, as appropriate.

Discussion of Amendments

This document makes amendments to the scope section of part 103 (19 CFR 103.0), sections 103.1 through 103.3 of subpart A (19 CFR 103.1-103.3), and by removing sections 103.4 through 103.13 of subpart A of 19 CFR part 103 (19 CFR

103.4-103.13). Specifically, this document amends section 103.0 by removing references to the FOIA subject matters that are no longer discussed within Part 103 because they are now addressed in the DHS regulations and amends section 103.1 to account for CBP's move to virtual reading rooms (19 CFR 103.1). In addition, section 103.2 is revised to explain in paragraph (a) that CBP processes FOIA requests pursuant to the DHS FOIA regulations set forth in 6 CFR part 5, subpart A (19 CFR 103.2(a)), unless CBP provides a particular exception. Paragraph (b) of section 103.2 sets forth the exception that CBP will not apply the DHS FOIA regulation pertaining to the treatment of business information contained in 6 CFR 5.8 (19 CFR 103.2(b)). Rather, as explained below, CBP will continue to apply its current regulation in section 103.35 (19 CFR 103.35) which governs the treatment of confidential commercial information. A corresponding amendment is made to section 103.35 (19 CFR 103.35). Lastly, section 103.3 is revised to explain how CBP processes Privacy Act requests pursuant to the DHS Privacy Act regulations set forth in 6 CFR part 5, subpart B (6 CFR 5).

Exceptions to DHS Regulations

On September 14, 2006, CBP published a final rule in the **Federal Register** (71 FR 54197) governing the disclosure procedures that CBP follows when commercial information is provided to CBP by a business submitter. The rule finalized an interim rule in section 103.35 (19 CFR 103.35) to subpart C, published in the **Federal Register** on August 11, 2003 (68 FR 47453), in order to clearly set forth CBP's policy governing the disclosure of confidential commercial information that is provided to CBP by a business submitter.

As opposed to section 103.35 in title 19 CFR, the DHS FOIA regulation controlling the treatment of business information in 6 CFR 5.8 contains an affirmative requirement that a business submitter must identify information as privileged or confidential in order to be withheld from disclosure. In this regard, 6 CFR 5.8 specifically states that a submitter of business information must use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of their submission that they consider to be exempt from disclosure under the FOIA.

Section 5.8 of title 6 CFR also states that, before business information is released, notice will be provided to submitters whenever a FOIA request is made that seeks the business information that has been designated in good faith as confidential or when the agency has a reason to believe that the information may be protected from disclosure. When notice is provided by the agency, the submitter is required to submit a detailed written statement specifying the grounds for withholding any portion of the information and show why the information is a trade secret or commercial or financial information that is privileged or confidential.

CBP has determined that 19 CFR 103.35 remains an effective regulation. In addition, CBP believes that this regulation should be retained in order to assure the public that CBP's established policy governing the treatment of confidential commercial information subject to FOIA requests will not change as a result of the amendments in this document. See 68 FR 47753 (August 11, 2003). For example, CBP will not require business submitters to designate information as protected from disclosure as privileged or confidential in order for CBP to withhold the information in response to a FOIA request.

Therefore, CBP will continue to apply 19 CFR 103.35 in order to process confidential information under the FOIA. This action is fully consistent with DHS's recent proposed rule on FOIA, which explicitly proposed to incorporate the provisions of 19 CFR 103.35 into DHS's title 6 FOIA regulation. See 80 FR at 45103.

Other Changes

CBP has also determined that paragraph (b) of section 103.13 (19 CFR 103.13(b)), which provides that identifying data will not be eliminated from petitions by domestic interested parties, is more appropriately placed within 19 CFR part 175. Part 175 sets forth the regulations for petitions by domestic interested parties. As existing 19 CFR 103.13(b) is specific to petitions by domestic interested parties, this relocation will provide the public involved with such petitions with all relevant regulations in one location. Accordingly, this document moves the provision currently found in paragraph (b) of section 103.13 (19 CFR 103.13(b)) to the end of section 175.21(b) (19 CFR 175.21(b)).

This document also amends sections 103.31a, 103.32, 103.34, 161.15, and 175.21 (19 CFR 103.31a, 103.32, 103.34, 161.15, and 175.21) in order to remove references in these sections to the CBP FOIA regulations that are being removed and to update the references accordingly. In sections 103.31a and 103.32 (19 CFR 103.31a and 103.32), references to CBP FOIA regulations are removed and replaced with references to the DHS FOIA provisions at 6 CFR 5.3. In addition, the introductory paragraph to section 103.31a (19 CFR 103.31a) is revised to replace a reference to section 103.12(d), which is removed by this document, with text from current section 103.12(d) (19 CFR 103.12)

providing that trade secrets and commercial or financial information are per se exempt from disclosure.

In sections 103.34, 161.15, and 175.21 (19 CFR 104.34, 161.15, and 175.21), the reference to CBP FOIA regulations are replaced with references to the FOIA statute at 5 U.S.C. 552. In addition, section 161.15 (19 CFR 161.15) is revised to replace a reference to section 103.12(g)(4) (19 CFR 103.12), which is removed by this document, with a reference to 5 U.S.C. 552(b)(7)(D) and text from current section 103.12(g)(4). Section 161.15 (19 CFR 161.15) is also being revised to replace a reference to 103.12(i) (19 CFR 103.12), which is removed by this document, with text from current section 103.12(i) which tracks the language found in 5 U.S.C. 552(a)(7)(C)(2). Lastly, this document makes non-substantive amendments to these regulations to reflect the nomenclature changes effected by the reorganization of the U.S. Customs Service under DHS in 2003 and to remove the word consignee from section 175.21 to be consistent with the statutory amendments to 19 U.S.C. 1484(a)(2)(B).

Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a “significant regulatory

action,” under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has not reviewed this regulation.

Following the creation of DHS in 2003, DHS promulgated the Freedom of Information Act and Privacy Act Procedures interim final rule set forth in 6 CFR part 5. For consistent and appropriate administration, CBP generally began applying the DHS FOIA procedures after their publication. However, the CBP FOIA procedures remained in the Code of Federal Regulations, sometimes causing confusion about their use among the public and agency personnel. Unlike the CBP FOIA regulations outlined in 19 CFR 103 subpart A, the DHS FOIA procedures are up-to-date and conform to FOIA guidelines established by OMB. This rule will serve to remove obsolete provisions of CBP’s FOIA regulations and will establish uniform FOIA administration procedures among DHS and its component, CBP, in the Code of Federal Regulations. This rule will not affect CBP’s current application of FOIA procedures as CBP already adheres to DHS FOIA regulations. Instead, the rule will provide greater clarity of CBP’s application of FOIA procedures. Therefore, this rule will not have an economic impact on CBP or the public.

Inapplicability of Notice and Delayed Effective Date

Pursuant to 5 U.S.C. 553(b)(B), CBP has determined that it would be unnecessary and contrary to the public interest to delay publication of this rule in final form pending an opportunity for public comment because the existing regulations are obsolete and maintaining inconsistent regulations causes confusion for the public. In addition, pursuant to 5 U.S.C. 553(d)(3), CBP has determined that there is good cause for this final rule to become effective immediately upon publication. CBP currently follows the DHS

FOIA regulations as a matter of law and policy. The amendments contained in this document merely align CBP's regulatory procedures for processing FOIA requests and appeals with DHS procedures and bring CBP in compliance with OMB's guidelines established in the Uniform Freedom of Information Act Fee Schedule and Guidelines publication.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). The Regulatory Flexibility Act applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA) or any other law (5 U.S.C. 553(a)(2)). Because this rule is not subject to such notice and comment rulemaking requirements, the provisions of the Regulatory Flexibility Act do not apply. However, as discussed above in the "Executive Orders 13563 and 12866" section, this rule will not have an economic impact on the public because it merely clarifies CBP's current adherence to DHS FOIA procedures rather than existing, outdated CBP FOIA regulations.

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to section 403(1) of the Homeland Security Act of 2002. Accordingly, this final rule to amend such regulations may be signed by the Secretary of Homeland Security (or his delegate).

List of Subjects

19 CFR Part 103

Administrative practice and procedure, Computer technology, Confidential business information, Customs duties and inspection, Freedom of information, Privacy, Reporting and recordkeeping requirements.

19 CFR Part 161

Customs duties and inspection, Exports, Imports, Law enforcement.

19 CFR Part 175

Administrative practice and procedure, Customs duties and inspection, Reporting and recordkeeping requirements.

AMENDMENTS TO THE CBP REGULATIONS

For the reasons discussed in the preamble, parts 103, 161, and 175 of title 19 of the Code of Federal Regulations (19 CFR parts 103, 161, and 175) are amended as set forth below.

PART 103 – AVAILABILITY OF INFORMATION

1. The general authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301; 552, 552a; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * *

2. Section 103.0 is revised to read as follows:

§ 103.0 Scope.

This part governs the production/disclosure of agency-maintained documents/information requested pursuant to the Freedom of Information Act (FOIA), as amended (5 U.S.C. 552), the Privacy Act of 1974, as amended (5 U.S.C. 552a), and/or under other statutory or regulatory provisions and/or as requested through administrative and/or legal processes. In this respect, this part contains regulations on production or disclosure in federal, state, local, and foreign proceedings and includes specific information pertaining to the procedures to be followed when producing or disclosing documents or information under various circumstances. In addition, this part contains regulations on other information subject to restricted access. As information obtained by CBP is derived from myriad sources, persons seeking information should consult with the appropriate field officer before invoking the formal procedures set forth in this part.

Except for 19 CFR 103.35, the regulations in this part supplement the regulations of the Department of Homeland Security regarding public access to records found at 6 CFR part

5. For purposes of this part, the CBP Office of the Chief Counsel is considered to be a part of CBP.

Subpart A – Production of Documents/Disclosure of Information Under the FOIA

3. Section 103.1 is revised to read as follows:

§ 103.1 Public Reading Room

CBP maintains a virtual public reading room at <http://foiarr.cbp.gov/> where the material required to be made available under 5 U.S.C. 552(a) and this part may be inspected and copied.

4. Section 103.2 is revised to read as follows:

§ 103.2 Department of Homeland Security Freedom of Information Act Procedures.

(a) Department of Homeland Security FOIA Regulations. In order to process requests for documents/information and appeals under the Freedom of Information Act (FOIA), as amended (5 U.S.C. 552), except as provided in paragraph (b) of this section, CBP applies the Department of Homeland Security FOIA regulations in 6 CFR part 5, subpart A.

(b) Exception. Notwithstanding section 5.8 of Title 6, CBP retains its own policy on the treatment of confidential commercial information provided in § 103.35.

5. Section 103.3 is revised to read as follows:

§ 103.3 Department of Homeland Security Privacy Act Procedures.

Department of Homeland Security Privacy Act Regulations. In order to process access requests for documents/information and appeals under the Privacy Act of 1974, as

amended (5 U.S.C. 552a), CBP applies the Department of Homeland Security Privacy Act regulations in 6 CFR part 5, subpart B.

§§ 103.4 through 103.13 [Removed and Reserved]

6. Remove and reserve §§ 103.4 through 103.13.
7. In § 103.31a, revise the introductory text to read as follows:

§ 103.31a Advance electronic information for air, truck, and rail cargo; Importer Security Filing Information for vessel cargo.

The following types of advance electronic information are per se exempt from disclosure as either trade secrets or privileged or confidential commercial or financial information, unless CBP receives a specific request for such records pursuant to 6 CFR §5.3, and the owner of the information expressly agrees in writing to its release:

* * * * *

§ 103.32 [Amended]

8. In § 103.32:
 - a. In the parenthetical clause in the first sentence, add the words “or CBP Decisions” after the words “Treasury Decisions”;
 - b. Remove the word “Customs” each place it appears and add in its place the term “CBP”;
 - c. Remove the word “shall” each place it appears and add in its place the word “must”; and
 - d. Remove the reference in the last sentence to “§103.5” and add in its place “6 CFR 5.3”.
9. In § 103.34:

a. The section heading is revised;

b. Paragraph (a) is amended by:

i. Removing the word “Customs” each place it appears and adding in its place the term “CBP”;

ii. Removing the phrase “the U.S. Customs Service” and adding in its place the term “CBP”; and

c. Paragraph (b) is revised.

The revisions read as follows:

§ 103.34 Sanctions for improper actions by CBP officers or employees.

* * * * *

(b) Under 5 U.S.C. 552(a)(4)(F), the Special Counsel, Merit Systems Protection Board, has authority, upon the issuance of a written finding by a court that a CBP officer or employee who was primarily responsible for withholding a record may have acted arbitrarily or capriciously, to initiate a proceeding to determine whether disciplinary action is warranted against that officer or employee. Such proceedings are governed by Merit Systems Protection Board regulations found at Part 1201 of Title 5 of the Code of Federal Regulations.

10. In § 103.35, the first sentence of paragraph (a) is revised to read as follows:

§ 103.35 Confidential commercial information; exempt.

(a) * * * Notwithstanding 6 CFR 5.8, for purposes of this section, “commercial information” is defined as trade secret, commercial, or financial information obtained from a person. * * *

* * * * *

PART 161 – GENERAL ENFORCEMENT PROVISIONS

11. The general authority citation for part 161 continues to read and a specific authority citation for section 161.15 is added to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1600, 1619, 1624.

* * * * *

Section 161.15 also issued under 5 U.S.C. 552.

12. Section 161.15 is revised to read as follows:

§ 161.15 Confidentiality for informant.

The name and address of the informant must be kept confidential. No files or information will be revealed which might aid in the unauthorized identification of an informant. Pursuant to 5 U.S.C. 552(b)(7)(D), specific informant records that are exempt from disclosure are those that could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source. Informant records maintained by CBP under an informant’s name or personal identifier that are requested by a third party according to the informant’s name or personal identifier are not subject to the disclosure requirements of 5 U.S.C. 552(a), unless the informant’s status as an informant has been officially confirmed.

PART 175 – PETITIONS BY DOMESTIC INTERESTED PARTIES

13. The general authority citation for part 175 continues, and a specific authority citation for section 175.21 is added, to read as follows:

Authority: R.S. 251, as amended, secs. 516, 624, 46 Stat. 735, as amended, 759; 19 U.S.C. 66, 1516, 1624, unless otherwise noted.

* * * * *

Section 175.21 also issued under 5 U.S.C. 552.

14. In § 175.21, paragraph (b) is revised to read as follows:

§ 175.21 Notice of filing of petition, inspection of petition, and inspection of documents and papers.

* * * * *

(b) Inspection of petition; inspection of documents and papers. The petition filed by a domestic interested party will be made available for inspection by interested parties in accordance with the provisions of 5 U.S.C. 552(a). However, neither a petitioner nor other interested parties will in any case be permitted to inspect documents or papers of the importer of record which are exempted from disclosure by 5 U.S.C. 552(b)(4). Identifying data is not to be deleted from petitions filed by American manufacturers, producers, and wholesalers pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516).

Dated: November 9, 2015

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

[FR Doc. 2015-29183 Filed: 11/16/2015 8:45 am; Publication Date: 11/17/2015]