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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

15 CFR Part 2004

[Docket Number USTR-2016-0015]

RIN 0350-AA08

Freedom of Information Act Policies and Procedures

AGENCY: Office of the United States Trade Representative.

ACTION: Final rule.

SUMMARY: This rule amends the Office of the United States Trade Representative's (USTR) regulations under the Freedom of Information Act (FOIA). The final rule is a comprehensive update of the prior USTR implementing rule and describes in plain language how to make a FOIA request to USTR and how the FOIA Office processes requests for records. The FOIA rule appears in subpart B to part 2004.

DATES: The final rule will become effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Janice Kaye, Monique Ricker or Melissa Keppel, Office of General Counsel, United States Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW, Washington DC 20509, jkaye@ustr.eop.gov; mricker@ustr.eop.gov; mkeppel@ustr.eop.gov, or the USTR FOIA Public Liaison at FOIA@ustr.eop.gov or 202-395-3419.

SUPPLEMENTARY INFORMATION:

I. Background

On September 23, 2016, USTR published a proposed rule to revise its existing regulations under the FOIA. See 81 FR 65586. The 60-day comment period ended on November 22, 2016. USTR received two submissions, one public comment and feedback from the U.S. Department of Justice (DoJ). The USTR rule is modeled after a template provided by DoJ. We have carefully considered both submissions and, in response, we have made several modifications to the rule, described in more detail in part II. The rule is effective upon publication to meet the requirement that we update our FOIA implementing regulation by December 30, 2016, found in section 3 of the FOIA Improvement Act of 2016. See Pub. L. 114-185, 130 Stat. 544 (June 30, 2016). For convenience, the entire text of the final rule is set out below.

II. Section-by-Section Analysis

Section 2004.1: In response to suggestions from DoJ, we have retained only the first sentence in subsection (c) to avoid inconsistencies with the foreseeable harm standard in the FOIA statute, 5 U.S.C. 552(a)(8).

Section 2004.2: In response to suggestions from DoJ, we added "in an electronic format" after "for public inspection and copying" for consistency with the language of the FOIA statute.

Section 2004.3: In subsection (a)(3), we combined paragraphs (i) and (ii) and eliminated the requirement for notarization to verify identity and renumbered paragraph (iii) as paragraph (ii). In subsection (b) in response to suggestions from DoJ, we eliminated paragraph (3) and clarified our suggestions for submitting a carefully tailored FOIA request so USTR can identify the records sought and expeditiously process the request.

Section 2004.5: In response to suggestions from DoJ, we made clarifying changes in subsection (a) and eliminated the language about discretionary releases in subsection (b) to avoid any inconsistencies with the statutory foreseeable harm standard, 5 U.S.C. 552(a)(8).

Section 2004.6: In response to suggestions from DoJ, we added a reminder in subsection (a) that the response time to a FOIA request is measured in working days, not calendar days. In subsection (c) we deleted “such as” since unusual circumstances are defined by statute, 5 U.S.C. 552(a)(6)(B). We also added that when we need additional processing time, we will notify a requester of the services of our FOIA Public Liaison and the Office of Government Information Services of the National Archives and Records Administration (OGIS). We added a definition of the term “OGIS” to subpart A of part 2004.

Section 2004.7: In response to suggestions from DoJ, we added references to the services of our FOIA Public Liaison and OGIS in subsections (c) and (d). In subsection (b), we indicated that we might ask for clarification of a FOIA request. The public comment, which suggested that we include information about the subject of the request in our response, already is included in subsection (b).

Section 2004.9: We made several clarifying changes to the section on fees. In response to a 2016 decision (Sack v. U.S. Department of Defense, 823 F.3d 687 (D.C. Cir. 2016)), we revised the definition of “education institution” in subsection (b)(4) to include students and made conforming changes to Example 3. With respect to search fees ((paragraph (c)(1)(ii)), to provide certainty we replaced a variable fee for a set amount - \$76/hour – that is a blended hourly rate for all personnel in the FOIA Office, plus 16 percent of that rate to cover benefits. In response to the public comment, we reduced the per page cost we will charge for duplicating records from 15 to 10 cents. We believe subsection (e) on aggregating requests is accurate as proposed and have made no changes. In subsection (f), we believe the \$25 threshold is appropriate. When we notify a requester that fees will exceed \$25, we will provide a breakdown of the fees and advise if we can readily estimate only a portion of the fee. In subsection (f)(3), we have deleted language that would have placed reformulated requests at the back of the processing queue. In response to a 2015 decision (Cause of Action v. Federal Trade Commission, 799 F.3d 1108 (D.C. Cir. 2015)), we clarified in subsection (h)(ii), that disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject and not the public-at-large.

III. Regulatory Flexibility Act

USTR has considered the impact of the final rule and determined that it is not likely to have a significant economic impact on a substantial number of small business entities because it is applicable only to USTR’s internal operations and legal obligations. See 5 U.S.C. 601 et seq.

IV. Paperwork Reduction Act

The final rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

List of Subjects in 15 CFR Part 2004

Administrative practice and procedure, Courts, Disclosure, Exemptions, Freedom of information, Government employees, Privacy, Records, Subpoenas, Testimony.

For the reasons stated in the preamble, the Office of the United States Trade Representative is amending chapter XX of title 15 of the Code of Federal Regulations as follows:

PART 2004--DISCLOSURE OF RECORDS AND INFORMATION

Subpart B--Freedom of Information Act Policies and Procedures

1. Add the subpart B authority citation to read as follows:

AUTHORITY: 5 U.S.C. 552; 19 U.S.C. 2171(e)(3); Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 FR 10012, Mar. 27, 1987.

2. Add §§ 2004.1 through 2004.9 to subpart B to read as follows:

Sec.

2004.1 Purpose and scope.

2004.2 Proactive disclosures.

2004.3 How do I make a request for records under the FOIA?

2004.4 How will we handle confidential commercial information?

2004.5 Who is responsible for responding to your FOIA request?

2004.6 When will we respond to your FOIA request?

2004.7 What will our response to your FOIA request include?

2004.8 What can I do if I am dissatisfied with USTR's response to my FOIA request?

2004.9 Fees.

§ 2004.1 Purpose and scope.

(a) This subpart contains the rules we follow when processing requests for records under the FOIA, a Federal law that provides a right of access to certain records and information Federal agencies maintain and control. You should read this subpart in conjunction with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines). Additionally, our FOIA Reference Guide, which is available on our website at <http://www.ustr.gov>, contains information about the specific procedures for making FOIA requests and descriptions of the types of records we maintain.

(b) To maximize the amount of information we can provide to you, we may process requests you make for records about yourself under both this subpart and subpart C to part 2004, our rules implementing the Privacy Act.

(c) We administer the FOIA with a presumption of openness.

§ 2004.2 Proactive disclosures.

You can access records that the FOIA requires us to make available for public inspection and copying in an electronic format through our website: <http://www.ustr.gov>. You also can find press releases, links to Federal Register notices and comments, fact sheets, speeches and remarks, reports, information about current initiatives, and historical information about U.S. trade issues. If you need assistance to locate a particular record, you can contact the Office of Public and Media Affairs at MEDIA@ustr.eop.gov or the FOIA Office at FOIA@ustr.eop.gov.

§ 2004.3 How do I make a request for records under the FOIA?

(a) General information—(1) Where do I send my written request? To make a request for records, you should write directly to the FOIA Office. Heightened security delays mail delivery.

To avoid mail delivery delays, we strongly suggest that you email your request to FOIA@ustr.eop.gov. Our mailing address is: FOIA Office, Office of the United States Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW., Washington, DC 20509. To ensure that the FOIA Office receives your request without delay, you should include the notation “FOIA Request” in the subject line of your email or on the front of your envelope and also at the beginning of your request.

(2) Security concerns. To protect our computer systems, we will not open attachments to emailed requests – you must include your request within the body of the email. We will not process email attachments.

(3) Verifying your identity. (i) If you are making a request for records about yourself or about another individual, you may receive greater access by verifying your identity if the records are about you, or the other individual’s identity if the records are about them. To verify identity, you must provide an unsworn declaration under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury. To fulfill this requirement, you must include the following statement just before the signature on your request letter:

“I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].”

(ii) If the other individual is deceased, you should submit proof of death such as a copy of a death certificate or an obituary. As an exercise of administrative discretion, we may require that you provide additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) How do I describe the records I want? (1) You must describe the records you seek in sufficient detail to enable USTR personnel to locate them with a reasonable amount of effort. To

satisfy this requirement, you should be as detailed as possible when describing the records you seek. To the extent possible, you should include specific information that may help us identify the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. For example, we generally will ask you to clarify a request for all records related to a particular trade negotiation or agreement or a request for all communications between USTR and a particular third party. We suggest that you include a date limitation, particular topics, and if asking for correspondence, the subject matter and the relevant parties with contact information such as their email addresses.

(2) If a request does not provide sufficient specific descriptive information for the FOIA Office reasonably to ascertain exactly which records you are requesting and to locate them, our response may be delayed. Please note that in response to a FOIA request, we are not required to create records, conduct research for you, analyze data, answer written questions, or parse your narrative to try and determine the specific records you are seeking. You can contact the FOIA Office before you submit your request for assistance in describing the records you are seeking. If we determine that your request does not reasonably describe the records sought, we will explain why we cannot process your request and ask for additional information. For example, we might ask you to clarify your request if you ask for all documents in a certain date range but do not include a specific subject matter, topic or personnel. We can help you reformulate or modify your request.

(c) Form or format of responsive records. You can specify the preferred form or format (including electronic formats) for the records you seek. We will try to accommodate your request if the record is readily reproducible in that form or format.

(d) Contact information. You must provide contact information, such as your phone number, email address, and mailing address, so we will be able to communicate with you about your request and provide released records. If we cannot contact you, or you do not respond within thirty calendar days to our requests for clarification, we will close your request.

§ 2004.4 How will we handle confidential commercial information?

(a) Definitions. For purposes of this section:

(1) Confidential commercial information means commercial or financial information that we obtain from a submitter that may be protected from disclosure under exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) Submitter means any person or entity, including a corporation or a State or foreign government, but not including another Federal Government entity, which provides information, either directly or indirectly to the Federal Government.

(b) How does a submitter designate confidential commercial information? At the time of submission, the submitter of confidential commercial information must use good faith efforts to designate by appropriate markings any portion of its submission that it considers to be protected from disclosure under exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). These designations expire ten years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) When will we notify a submitter? (1) We promptly will notify the submitter of confidential commercial information in writing whenever we receive a FOIA request or appeal for records containing such information if we determine that we may have to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under exemption 4 of the FOIA, 5 U.S.C. 552(b)(4); or

(ii) We have reason to believe that the requested information may be protected from disclosure exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), but have not yet determined whether the information is protected from disclosure under that exemption or any other applicable FOIA exemption.

(2) Our notice either will describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, we may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure without publicly disclosing the records, instead of sending individual notifications.

(3) We promptly will notify the submitter whenever a requester files a lawsuit seeking to compel the disclosure of the submitter's confidential commercial information.

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

(1) We determine that the information is exempt under the FOIA, and therefore will not be disclosed;

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

(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, Predisclosure notification procedures for confidential commercial information; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, we will give the submitter written notice of any final decision to disclose the information and a reasonable time period within which to object to disclosure under paragraph (e) of this section.

(e) How can a submitter object to disclosure? (1) If a submitter has any objections to disclosure, it should provide to us within the period listed in the notice a detailed written statement that specifies all grounds for withholding the particular information under any FOIA exemption. In order to rely on exemption 4 as a basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(2) A submitter who does not respond within the time period specified in the notice will be considered to have no objection to disclosure of the information. We will not consider any information we receive after the date of any disclosure decision. Any information provided by the submitter under this section may itself be subject to disclosure under the FOIA.

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

(g) Notice of intent to disclose. We will notify the submitter whenever we decide to disclose information over the submitter's objection. Our written notice will include:

(1) A statement of the reasons why we did not sustain each of the submitter's disclosure objections;

(2) A description of the information to be disclosed or copies of the records as we intend to release them; and

(3) A specified disclosure date, which will be a reasonable time after the notice.

(h) When will we notify a requester? We will notify the requester whenever we provide the submitter with notice and an opportunity to object to disclosure; whenever we notify the submitter of our intent to disclose the requested information; and whenever the submitter files a lawsuit to prevent the disclosure of the information.

§ 2004.5 Who is responsible for responding to your FOIA request?

(a) In general. The FOIA Office is authorized to grant or to deny any requests for agency records that USTR maintains. In determining which records are responsive to a request, we ordinarily will include only the agency records in our possession as of the date that we begin our search. We will notify you if we use any other date.

(b) Consultation, referral and coordination. If we believe that another Federal agency is better able to determine whether a record we locate in response to your request is exempt from disclosure under the FOIA, then we will proceed in one of the following ways:

(1) Consultation. When records originated with USTR but contain within them information of significance to another Federal agency or office, we typically consult with that other entity prior to making a release determination.

(2) Referral. If we believe that a different Federal agency is best able to determine whether to disclose the record, we typically refer responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record is presumed to be the best agency to make the disclosure determination. Whenever we refer any part of the responsibility for responding to a request to another agency, we will notify you of the referral, including the name of the agency and that agency's FOIA contact information.

(3) Coordination. The standard referral procedure is not appropriate where disclosure of the identity of the Federal agency to which the referral would be made could harm an interest

protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if a non-law enforcement agency responding to a request for records on a living third party 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, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if an agency 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, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, we will coordinate with the originating agency to seek its views on disclosure of the record. We then will notify you of the release determination for the record that is the subject of the coordination.

(c) Classified information. On receipt of any request involving classified information, we will determine whether the information is currently and properly classified. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another Federal agency, we will refer responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever an agency's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), we will refer responsibility for responding to that portion of the request to the agency that classified the underlying information.

(d) Timing of responses to consultations and referrals. We will handle all consultations and referrals we receive according to the date that the first agency received the perfected FOIA request.

(e) Agreements regarding consultations and referrals. We may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 2004.6 When will we respond to your FOIA request?

(a) In general. We ordinarily will respond to a request within twenty working days based on the order in which we receive the request. We may toll the twenty-day period if we need additional information from you in order to process the request or need to clarify fee assessment issues.

(b) Multitrack processing. We use a multitrack processing system that distinguishes between simple and more complex requests based on the estimated amount of work or time we need to process the request. Among the factors we consider are the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. We will tell you if we place your request into other than the simple track, and if appropriate, we will offer you an opportunity to narrow or modify your request so that it can be placed in a different processing track.

(c) Unusual circumstances—(1) What is an unusual circumstance? We will notify you if we extend the twenty-day period for processing your request. The notice will include the unusual circumstances - the need to search for and collect the requested records from separate offices or facilities, a request that involves a voluminous amount of separate and distinct records, or the need for consultation, and the date by which we estimate we will complete processing your

request. If the extension exceeds ten days, we will give you the opportunity to modify your request or arrange an alternative time period for processing the original or modified request. If you need assistance, you can contact our FOIA Public Liaison at FOIA@ustr.eop.gov, or OGIS at OGIS@nara.gov.

(2) Aggregating requests. We may aggregate requests if it reasonably appears that multiple requests submitted either by a single requester or by a group of requesters acting in concert, involve related matters and constitute a single request that otherwise would involve unusual circumstances. For example, we may aggregate multiple requests for similar information filed within a short period of time.

(d) Expedited processing—(1) How do I request expedited processing? When you submit your request or appeal, you can ask us to expedite processing. If you seek expedited processing, you must submit a statement, certified to be true and correct, explaining in detail the basis for your expedited processing request.

(2) When will we grant expedited processing? We will process requests and appeals on an expedited basis if we determine that:

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

(ii) With respect to a request made by a person primarily engaged in disseminating information, there is an urgency to inform the public about the specific government activity that is the subject of the request or appeal that extends beyond the public's right to know about government activity generally;

(iii) An individual will suffer the loss of substantial due process rights; or

(iv) the subject is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity that affect public confidence.

(3) When will we respond to your request for expedited processing? We will notify you within ten calendar days of the receipt of a request for expedited processing of our decision whether to grant or deny expedited processing. If we grant your request, we will give your request or appeal priority, place it in the processing track for expedited requests, and process it as soon as practicable. If we deny your request, we will process any appeal of that decision expeditiously.

§ 2004.7 What will our response to your FOIA request include?

(a) In general. We will notify you in writing of our determination regarding your request. To the extent practicable, we will communicate with you electronically.

(b) Acknowledgement of requests. We will acknowledge your request in writing, including a brief description of the records you are seeking, and assign an individualized tracking number. If we think that we will be unable to make a determination on your request within twenty days, we will send an acknowledgment within ten days and we may ask you to clarify your request or arrange for a longer period for processing.

(c) Granting requests. If we decide to grant your request in full or in part, our response will include the records we are disclosing unless we have assessed fees under § 2004.9. If your request involves a voluminous amount of material or searches in multiple locations, we may provide interim responses, releasing the records on a rolling basis. If we assessed fees, we will disclose the records promptly upon payment. If you need assistance, you can contact our FOIA Public Liaison at FOIA@ustr.eop.gov, or OGIS at OGIS@nara.gov.

(d) Adverse determinations of requests—(1) What is an adverse determination? 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.

(2) Our response. If we make an adverse determination denying your request in any respect, our response will include:

(i) The name and title or position of the person responsible for the determination;

(ii) A brief statement of the reasons for the denial, including any FOIA exemption(s) we applied;

(iii) An estimate of the volume of any records or information we withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate 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;

(iv) Information about our FOIA Public Liaison and the mediation services provided by OGIS; and

(iv) Your right to appeal our decision under § 2004.8.

(3) Markings on released documents. If technically feasible, we will clearly mark records that we are disclosing in part to indicate the location and show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption.

§ 2004.8 What can I do if I am dissatisfied with USTR's response to my FOIA request?

(a) How do I make an appeal?—(1) What can I appeal? You can appeal any adverse determination in writing to our FOIA Appeals Committee within ninety calendar days after the date of our response. Examples of adverse determinations are provided in § 2004.7(d). You should specify the records that are the subject of your appeal and explain why the Committee should sustain the appeal.

(2) Where do I send my appeal? To avoid mail delivery delays caused by heightened security, we strongly suggest that you email any appeal to FOIA@ustr.eop.gov. Our mailing address is: FOIA Office, Office of the United States Trade Representative, Anacostia Naval Annex, Building 410/Door 123, 250 Murray Lane SW, Washington DC 20509. To make sure that the FOIA Office receives your appeal without delay, you should include the notation "Freedom of Information Act Appeal" and the individualized tracking number in the subject line of your email or on the front of your envelope and also at the beginning of your appeal.

(b) Who will decide your appeal? (1) The FOIA Appeals Committee or designee will act on all appeals under this section.

(2) We ordinarily will not adjudicate an appeal if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the FOIA Appeals Committee must take appropriate action to ensure compliance with applicable classification rules.

(c) Decisions on appeals. The FOIA Appeals Committee will notify you of its appeal decision in writing within twenty days from the date it receives the appeal. A decision that upholds the FOIA Office's determination in whole or in part will identify the reasons for the affirmance, including any FOIA exemptions applied, and notify you of your statutory right to

seek judicial review. The notice also will inform you of the mediation services offered by OGIS as a non-exclusive alternative to litigation. If the FOIA Appeals Committee remands or modifies the original response, the FOIA Office will further process the request in accordance with the appeal determination and will respond directly to you.

(d) When appeal is required. Before seeking review by a court of an adverse determination, you generally first must submit a timely administrative appeal under this section.

§ 2004.9 Fees.

(a) In general. We will assess a fee to process your FOIA request in accordance with the provisions of this section and the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: commercial use requesters, non-commercial scientific or educational institutions or news media requesters, and all other requesters. Different fees are assessed depending on the category. You can seek a fee waiver, which we will consider in accordance with the requirements in paragraph (h) of this section. We will contact you to resolve any fee issues that arise under this section. We will conduct searches, review and duplication in the most efficient and least expensive manner. We ordinarily will collect all applicable fees before sending copies of records to you. You must pay fees by check or money order made payable to the Treasury of the United States.

(b) Definitions. For purposes of this section:

(1) 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. Our decision to place you in the commercial use category will be made on a case-by-case basis based on your intended use of the information. We will notify you of your placement in this category.

(2) Direct costs are the expenses we incur in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to your 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, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space and of heating or lighting a facility.

(3) Duplication is reproducing a copy of a record, or 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.

(4) Educational institution is any school that operates a program of scholarly research. You must show that your FOIA request is made in connection with your role at the educational institution. We may seek verification that you are seeking the records to further scholarly research and not for a commercial use. To fall within this fee category, your request must serve the scholarly research goals of the institution rather than an individual research goal. We will advise you of your placement in this category.

Example 1. We would presume that a request from a professor of economics for records relating to the economic effects of a trade agreement, written on letterhead of the university's department of economics, is a request from an educational institution.

Example 2. We would not presume that a request from the same professor of economics seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing is a request from an educational institution, regardless of whether it was written on institutional stationery.

Example 3. We would presume that a request from a student in furtherance of their coursework or other school-sponsored activities evidenced by a course syllabus or other reasonable documentation indicating the research purpose for the request would qualify as part of this fee category.

(5) Noncommercial scientific institution is an institution 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 and not on a commercial basis, as defined in paragraph (b)(1) of this section. To fall within this fee category, you must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records you seek are to further scientific research and not for a commercial use. We will advise you of your placement in this category.

(6) Representative of the news media is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 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, including news organizations that disseminate solely on the Internet. We will not consider a request for records supporting a news-dissemination function to be for a commercial use. We will consider freelance journalists who demonstrate a solid basis for expecting publication through a news media entity as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however,

we also may consider your past publication record in making this determination. We will advise you of your placement in this category.

(7) Review is the examination of a record located in response to a request in order to determine if 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 redacting the record and marking the appropriate exemptions. Review costs are properly charged even if we ultimately do not disclose a record. Review time also includes time spent both obtaining and considering any formal objection to disclosure a confidential commercial information submitter makes under § 2004.4, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) 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 we expend to locate and retrieve information from electronic records.

(c) Charging fees. In responding to FOIA requests, we will charge the following fees unless we granted a waiver or reduction of fees under paragraph (h) of this section, or the total fee to be charged is less than \$25. If we do not meet the time limits for responding to your request, and if no unusual circumstance described in § 2004.6(c) applies, we will not assess fees.

(1) Search. (i) We will not assess any search fees for processing requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media. For all other requesters, we will charge for time spent searching even if we do not locate any responsive records or if we determine that the records are entirely exempt from disclosure.

We will provide two hours of free search time except for requesters seeking records for a commercial use.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, we will charge \$76/hour, which is a blended hourly rate for all personnel in the FOIA Office, plus 16 percent of that rate to cover benefits.

(iii) We will charge the direct costs if it is necessary to create a new computer program to locate the requested records. We will notify you of the costs associated with creating such a program, and you must agree to pay the associated costs before we build the program.

(iv) If your request requires the retrieval of records stored at a Federal records center, we will charge additional costs in accordance with the Transactional Billing Rate Schedule established by the National Archives and Records Administration.

(2) Duplication. We will charge duplication fees to all requesters. We will honor your preference for receiving a record in a particular form or format if we can readily reproduce it in the form or format requested. If we provide photocopies, we will make one copy per request at the cost of \$.10 per page. For copies of records produced on tapes, disks or other media, we will charge the direct costs of producing the copy, including operator time. Where we must scan paper documents in order to comply with your preference to receive the records in an electronic format, we will charge you the direct costs associated with scanning those materials. For other forms of duplication, we will charge the direct costs. We will provide the first 100 pages of duplication (or the cost equivalent for other media) without charge except for requesters seeking records for a commercial use.

(3) Review. We will charge review fees to requesters who make commercial use requests. We will assess review fees in connection with the initial review of the record, i.e., the review we conduct to determine if an exemption applies to a particular record or portion of a record. We will not charge for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed no longer to apply, any costs associated with re-review of the records in order to consider the use of other exemptions may be assessed as review fees. We will charge review fees at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) Other charges—(1) Special services. We will charge you the direct cost of providing any special services you request, such as sending records by express mail, certifying that records are true copies, or providing multiple copies of the same document.

(2) Interest. We may assess interest charges on any unpaid fees starting on the 31st day following the day on which we sent the bill to you at the rate prescribed in Interest and Penalty on Claims, 31 U.S.C. 3717.

(e) Aggregating requests. We may aggregate separate FOIA requests for the purpose of assessing fees when we reasonably believe that a requester or a group of requesters acting in concert, is dividing a request into a series of requests for the purpose of avoiding or minimizing fees. For example, we may aggregate multiple requests for similar information filed within a short period of time.

(f) If we anticipate fees will exceed \$25. Unless you have indicated in advance a willingness to pay fees as high as anticipated, we will notify you if we estimate that charges will exceed \$25 including a breakdown of the fees for search, review or duplication and whether applicable

entitlements to duplication and search at no charge have been provided. We will advise you if we can readily estimate only a portion of the fee.

(1) We will not process your request until you either commit in writing to pay the actual or estimated total fee, or designate some amount of fees you are willing to pay. If you are a noncommercial use requester and we have not yet provided your statutory entitlements (i.e., two hours of search time and 100 free pages), you can tell us to stop when we exhaust the statutory entitlements. We will start the twenty-day response clock when we receive your written reply.

(2) If you agree to pay some designated amount of fees, but we estimate that the total fee will exceed that amount, we will toll processing when we notify you of the estimated fees in excess of the amount you had indicated a willingness to pay. When we receive your written commitment to pay the actual or estimated total fee, or designate an additional amount of fees you are willing to pay, we will restart the processing clock.

(3) If you decide to reformulate your request to reduce costs, you can contact USTR's FOIA Public Liaison at FOIA@ustr.eop.gov for assistance.

(4) We will close your request if you do not respond in writing within thirty calendar days after the date we notify you of the fee estimate.

(g) Advance payments. (1) If we determine or estimate that the total fee will exceed \$250, we may require you to make an advance payment up to the amount of the entire anticipated fee before we begin to process your request.

(2) If you previously failed to pay a properly charged FOIA fee to any Federal agency within thirty calendar days of the billing date, we may require proof that you paid the full amount due, plus any applicable interest on that prior request, and that you make an advance payment to us of the full amount of any anticipated fee before we begin to process a new request or continue

to process a pending request or any pending appeal. If we have a reasonable basis to believe that you have misrepresented your identity in order to avoid paying outstanding fees, we may require you to provide proof of identity.

(3) If we require advance payment, we will not consider your request received and will not do any additional work until we receive the required payment. We will close your request if you do not pay the advance payment within thirty calendar days after the date of our fee determination.

(h) Requirements for waiver or reduction of fees. (1) You can seek a fee waiver or reduction by explaining in writing how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in your commercial interest. In determining whether to waive or reduce a fee we will consider whether disclosure of the requested information would:

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

(ii) Likely contribute significantly to public understanding of those operations or activities. Disclosure of the requested records must be meaningfully informative about government 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 be meaningfully informative if nothing new would be added to the public's understanding. The disclosure must contribute to the understanding of a reasonably broad audience interested in the subject. We will consider your

expertise in the subject area as well as your ability and intention to effectively convey information to the public.

(iii) Primarily advance your commercial interests. For example, we ordinarily presume that the public's interest is greater than the requester's commercial interest when we receive a request from a representative of the news media. We will not presume that disclosure to data brokers or others who merely compile and market government information for direct economic return primarily serves the public interest.

(2) We will grant a partial waiver when only some of the records to be released satisfy the requirements in this section.

(3) You should include your fee waiver or reduction request when you first submit your FOIA request to us. You can submit a fee waiver or reduction request at a later time so long as the underlying record request is pending or on administrative appeal. If you already committed to pay fees and subsequently request a waiver of those fees that we deny, you must pay any costs incurred up to the date the fee waiver request was received.

Janice Kaye
Chief Counsel for Administrative Law
Office of the U.S. Trade Representative.
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