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OVERSEAS PRIVATE INVESTMENT CORPORATION

22 CFR Part 706

[No. FOIA-2016]

RIN 3420-AA02

Freedom of Information

AGENCY: Overseas Private Investment Corporation

ACTION: Notice of Proposed Rulemaking

SUMMARY: This rule proposes 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 proposed rule incorporates the FOIA revisions contained in the FOIA Improvement Act of 2016, makes administrative changes to reflect OPIC's costs, and conforms more closely to the language recommended by the Department of Justice, Office of Information Policy.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket Number FOIA-2016, by one of the following methods:

- E-mail: foia@opic.gov. Include docket number FOIA-2016 in the subject line of the message.
- Mail: Nichole Skoyles, Administrative Counsel, Overseas Private Investment Corporation, 1100 New York Avenue, N.W., Washington, D.C. 20527. Include docket number FOIA-2016 on both the envelope and the letter.

FOR FURTHER INFORMATION CONTACT: Nichole Skoyles, 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 FOIA Improvement Act of 2016. OPIC is already complying with these changes and this proposed revision serves as OPIC's formal codification of the applicable law and its practice.

OPIC has also updated its regulations to incorporate much of the suggested language provided by the Department of Justice, Office of Information Policy. Adopting this language allows OPIC to adopt many of the recommended best practices in FOIA administration. This update also assists requesters as much of OPIC's regulations are now similar to those of other agencies.

In general, comments received, including attachments and other supporting materials, are part of the public record and are available to the public. Do not submit any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

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 proposed rule, as promulgated, will not have a significant economic impact on a substantial number of small entities. The proposed 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 processes 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 proposed 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 proposed 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 proposed 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 proposes to revise 22 CFR part 706 as follows:

PART 706 – INFORMATION DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT

Sec.

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Authority: 5 U.S.C. § 552, Public Law No. 114-185

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”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with OPIC’s Privacy Act regulations at 22 CFR 707 as well as under this subpart.

§ 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 ordinarily consider only those records within its possession and control as of the date of OPIC's search. If any other date is used, OPIC will inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

§ 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.

Records that the FOIA requires agencies to make available for public inspection in an electronic format may be accessed through OPIC's FOIA website at www.opic.gov/foia. Records identified as of interest to the public and appropriate for public disclosure are also available, along with an index. These include annual reports and financial statements, program handbooks, press releases, application forms, claims information, and annual FOIA reports. OPIC will review and update its website of posted records on an ongoing basis. Persons seeking information are encouraged to visit OPIC's website to see what information is already available before submitting a request; OPIC's FOIA Office and FOIA Public Liaison are available to assist individuals in locating records.

§ 706.11 Requesting non-public records.

(a) *General information.* (1) *How to submit.* To make a request for records 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. Before submitting their requests, requesters may contact OPIC's FOIA Office or FOIA Public Liaison to discuss the records they seek and to receive assistance in describing the records. 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 otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA Office or FOIA Public Liaison. If a request does not reasonably describe the records sought, OPIC's response to the request may be delayed.

(c) *Format.* Requests may state a preferred format for released records including electronic formats. The records will be provided in the preferred format if the record is readily reproducible in that format. If you do not state a preference, you will receive any released records in the format most convenient to OPIC.

(d) *Requester information.* Requests must include the requester's name and contact information, such as phone number, email address, or mailing address, to assist OPIC in communicating with them and providing the released records.,.

(e) *Fees.* You should 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 of Non-Public Records.

§ 706.20 In general.

OPIC will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requests, commercial use requests, non-commercial scientific or educational institutions or news media requests, and all other requests. OPIC will inform requesters as to which category their request has been placed into. Different fees are assessed depending on the category. Requesters may seek a fee waiver. OPIC will consider requests for fee waiver in

accordance with the requirements in Section 706.24. To resolve any fee issues that arise under this section, OPIC may contact a requester for additional information. OPIC will ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. OPIC ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

§ 706.21 Types of fees

(a) Direct costs are those expenses that OPIC 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. 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 Section 706.33(c) of this subpart, 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.

§ 706.22 Request categories

(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. OPIC's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(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 made in connection with his or her role at the educational institution. OPIC may request verification from the requester that the request is in furtherance of scholarly research.

(1) *Example 1.* A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

(2) *Example 2.* A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationery.

(3) *Example 3.* A student who makes a request in furtherance of their coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(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 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 a representative of the news media. 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.

(e) All other requests include any requests that do not qualify under one of the above categories.

§ 706.23 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 section 706.24 of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, OPIC should not add any additional costs to charges calculated under this section. (1) *Search*.

(i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees will be charged to all other requests, subject to the restrictions of paragraph (b) of this section. Fees for time spent searching is properly charged even if no responsive records are located or if all responsive records are determined to be entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees will be as follows: Professional--\$13.75; and administrative--\$7.50.

(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. Before incurring such costs, OPIC will notify the requester and the requester must agree to pay.

(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 \$0.10 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 must also 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 Section 706.22.

(2) Fees charged when OPIC exceeds time limits.

(i) When OPIC fails to comply with the time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (b)(1) of this section, may not charge duplication fees, except as described in (b)(2)(ii)-(iv).

(ii) If OPIC has determined that unusual circumstances as defined by the FOIA apply and OPIC provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional ten days.

(iii) If OPIC has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, OPIC may charge all applicable fees incurred in processing the request if the following steps are taken:

(A) OPIC has provided timely written notice of unusual circumstances to the requester in accordance with the FOIA; and

(B) OPIC has discussed with the requester via written mail, e-mail, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5 U.S.C. 552(a)(6)(B)(ii).

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) 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.

(5) If, after deducting free entitlements, the total fee calculated under this section is \$25.00 or less, no fee will be charged.

(c) *Notice of anticipated fees in excess of \$25.00.* (1) When OPIC determines or estimates that the fees to be assessed in accordance with this section will exceed \$25.00, OPIC will notify the

requester of the actual or estimated amount of the fees, including a breakdown of fees for search, review, and duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, OPIC will advise the requester accordingly. If the request is for noncommercial use, the notice will specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge, and if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) If OPIC notifies the requester that the actual or estimated fees are in excess of \$25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. OPIC is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but OPIC estimates that the total fee will exceed that amount, the processing of the request will be tolled when OPIC notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. OPIC will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, OPIC's time to respond will resume from where it was at the date of the notification.

(4) OPIC's FOIA Office or FOIA Public Liaison is available to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(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 may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, OPIC will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(g) *Advance payments.* (1) For requests other than those described in paragraphs (g)(2) and (g)(3) of this section 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.

(2) 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.

(3) 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.

(4) 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.

(h) *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 program.

§ 706.24 Requirements for waiver or reduction of fees.

(a) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the interest of the requester.

(b) OPIC will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (b)(1)-(3) are satisfied. (1) Disclosure of the requested information would shed light on the operations or activities of the government. 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) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(i) 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.

(ii) 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.

(3) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, OPIC will consider the following factors:

(i) OPIC shall identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or

profit interest. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) If there is a commercial interest, OPIC will determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (b)(1) and (2) are satisfied and any commercial interest is not the primary interest furthered by the request. OPIC will ordinarily presume that when a news media requester has satisfied factors b(1) and (2) above, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(c) 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.

(d) 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.

Subpart D - Processing of Requests for Non-Public Records.

§ 706.30 Responsibility for responding to requests.

(a) *Authority to grant or deny requests.* The OPIC President and CEO or designee is authorized to grant or to deny any requests for records.

(b) *Consultation, referral, and coordination.* When reviewing records responsive to a request, OPIC will determine whether another agency of the Federal Government is better able to

determine whether the record is exempt from disclosure under the FOIA. As to any such record, OPIC will proceed in one of the following ways:

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

(2) *Referral.*

(i) When OPIC believes that a different agency is best able to determine whether to disclose the record, OPIC will typically refer the 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. However, if OPIC and the originating agency jointly agree that OPIC is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever OPIC refers any part of the responsibility for responding to a request to another agency, it will document the referral, maintain a copy of the record that it refers, and notify the requester of the referral, informing the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the 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 in responding to a request for records on a living third party, OPIC 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 OPIC 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, OPIC should coordinate with the originating agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by OPIC.

(c) *Classified information.* On receipt of any request involving a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, OPIC must refer the responsibility for responding to the request to the agency that classified the information, or that should consider the information for classification. Whenever OPIC's record contains information that has been derivatively classified (for example, when it contains information classified by another agency), OPIC must refer the 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.* All consultations and referrals will be handled according to the date that the first agency received the perfected FOIA request.

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

§ 706.31 Timing of responses to requests.

(a) *In general.* OPIC ordinarily will process requests according to their order of receipt within their appropriate track under subpart (b) 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 subparagraph (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 (f) of this section. Non-expedited requests will be placed into a "simple" or "complex" track based on the estimated amount of work or time needed to process the request. OPIC will consider the number of records requested, the number of pages involved in processing the request, and the need for consultations or referrals. OPIC will advise the requester into which track the request falls and, when appropriate, will offer requesters the opportunity to narrow or modify the request so that it can be placed in a different track.

(c) *Tolling of response time.* OPIC may toll its response time once to seek clarification of a request in accordance with Section 706.11(b) or as needed to resolve fee issues in accordance with Sections 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 OPIC estimates processing of the request will be completed. 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 the original or modified request. OPIC will make its FOIA Office and its FOIA Public Liaison available for this purpose and will notify the requester of the availability of the Office of Government Services (OGIS) dispute resolution services.

(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 (f)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. 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. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an "urgency to inform" the public on the topic. OPIC may waive the formal certification requirement in its administrative 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 Section 706.34 of this subpart shall be acted on expeditiously.

§ 706.32 Responses to requests.

(a) *In general.* To the extent practicable, OPIC will communicate electronically with requesters who have access to the internet.

(b) *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. The letter will include a brief description of the records sought to allow requesters to more easily keep track of requests.

(c) *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 Section 706.22 of this part and of the availability of the FOIA Public Liaison to offer assistance. OPIC will disclose the requested records to the requester promptly upon payment of any applicable fees.

(d) *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.

(e) *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 706.34(a) of this subpart, and a description of the appeal requirements;
- (6) A statement notifying the requester of the assistance available from OPIC's FOIA Public Liaison and dispute resolution services offered by OGIS; and
- (7) Notice of any fees charged under Section 706.23 of this part.

(f) *Markings on released documents.* Records disclosed in part must be marked clearly to 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. If technically feasible, the location of the information deleted will be indicated on the record.

(g) *Notice of record exclusions.* (1) In the event that OPIC identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the agency will confer with the Department of Justice, Office of Information Policy, to obtain approval to apply the exclusion.

(2) OPIC will maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

§ 706.33 Confidential commercial information.

(a) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the agency 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. Information which is required to apply for OPIC support is not considered to be voluntarily submitted.

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information to the Federal government, 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. 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 protected from disclosure under Exemption 4; or

(ii) OPIC has reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(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 or portions of records containing the information. 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 inform the submitters of the proposed disclosure, instead of sending individual notifications.

(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, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially 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; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, OPIC will give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) OPIC will specify a reasonable time period within which the submitter must respond to the notice referenced above.

(2) If a submitter has any objections to disclosure, it should provide OPIC with a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. 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 order to rely on Exemption 4 as a basis for nondisclosure, 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.

(3) 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. OPIC is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(4) 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 decides to disclose information over the objection of a submitter, OPIC will 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; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 706.34 Administrative appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations 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 Section 706.06(c) of

this subpart. The requester must make the appeal in writing and it must be postmarked, or in the case of electronic submissions, transmitted, within ninety calendar days after the date of the response. The appeal should clearly identify OPIC's determination that is being appealed and 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 and 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 Section 706.23 regarding payment of fees are satisfied.

(d) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If OPIC agrees to participate in the mediation services provided by OGIS, it will actively engage as a partner to the process in an attempt to resolve the dispute.

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

Nichole Skoyles,

Administrative Counsel, Department of Legal Affairs

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